Legal Ease

the return of MULTIPLE OFFERS

BUYERS LINE UP FOR HOMES AS A SELLER'S MARKET LOOMS

In the depth of the real estate recession just a couple of years ago who would have predicted that one of the biggest challenges some REALTORS® would face today is how best to deal with multiple offers on properties? Yet, in many parts of Georgia that is exactly where our industry finds itself in the spring of 2013. Well-priced houses in desirable neighborhoods have become highly sought after with multiple buyers lined up to make offers. Why are we seeing such demand for these houses? The answer is simple. Buyers have come to the conclusion that the real estate market has not only hit bottom, but is rebounding. There is finally a sense of urgency on the part of buyers that if they do not act quickly, the incredible deals resulting from low housing prices and low interest rates will not be there for them.

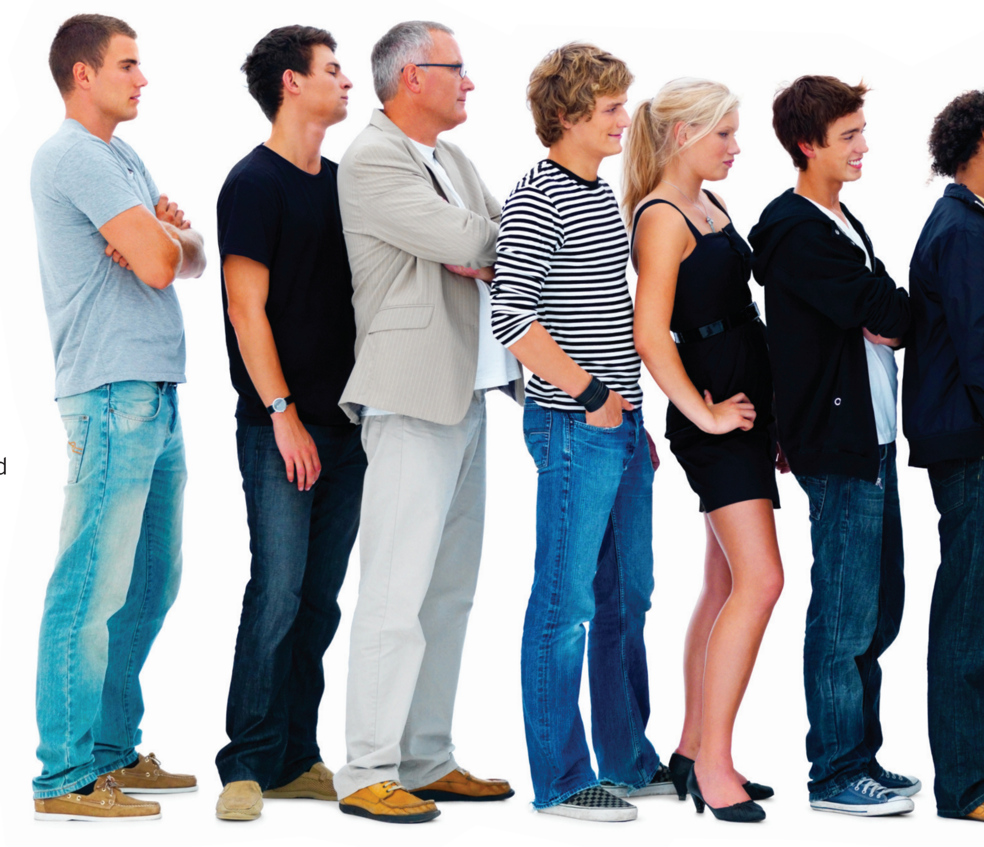
Additionally, with so little new home construction going on in Georgia and many sellers waiting to list their homes until housing prices have rebounded further, there is actually a shortage of quality listings in many desirable neighborhoods. While this trend is by no means uniform in Georgia or in all segments of our housing market, it is a good sign for the long term health of housing.

For REALTORS® who have practiced for less than five years, this new (should I dare say?) seller's market is something they have never seen before. More experienced REALTORS®, while having worked in such markets before, are discovering that some of the tried and true techniques for succeeding in a multiple offer environment are giving way to newer approaches. This article will explore multiple offers from the perspective of both the buyer and the seller and discuss how REALTORS® can help their buyer and seller clients succeed in this new business environment without getting into legal trouble.

THE SELLER'S SIDE OF MULTIPLE OFFERS

The Risks of Multiple Offers

Multiple offer transactions are risky for three reasons. First, unlike most real estate transactions, the listing agent can be assured that at least one prospective buyer (*i.e.,* the prospect whose offer is not accepted) is likely going to end up being disappointed and unhappy. Experienced REALTORS® know that disappointed and unhappy buyers are usually at the top of the list of people who end up filing lawsuits or complaints

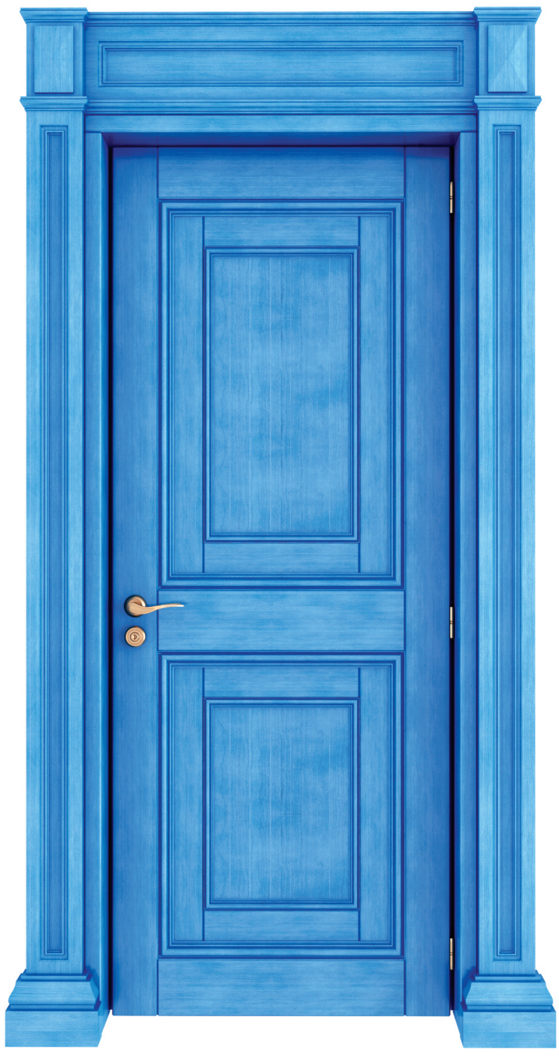


at the Georgia Real Estate Commission (regardless of whether such claims have merit or not). And as such, REALTORS® entering the world of multiple offers should be prepared for the issues that often arise in these transactions and be ready to perform at the top of their games.

Second, multiple offer transactions are risky because all interested buyers may end up losing interest in the property. As such, it is a little like fishing with two separate rods and snagging two fish at the same time. If the seller is not careful in reeling in the fish, both may get away. Some sellers fail to appreciate this risk as thoughts of multiple buyers bidding up the price of their homes dance in their heads. REALTORS® would do well to gently remind their seller clients (preferably in writing) that while things may work out better financially than the seller had hoped because of multiple offers, there is also a risk of losing both buyers depending on the strategy selected by the seller.

How can a seller drive two, and in some cases more, buyers away in a multiple offer transaction? It's easy. Some buyers will not play the game of getting into a bidding war over a piece of real property and upon learning of other offers will choose to walk away instead. In other cases, if a prospective buyer feels like he or she is being held in reserve while the seller negotiates with another buyer, the prospect may also feel slighted and move on to other houses. Finally, even if the high bidder puts the property under contract, for any number of reasons, he or she may walk away from the deal. There are few letdowns more disappointing for sellers than to go from having two or more buyers bidding on the seller's property to none. Therefore, to avoid being blamed for the seller's good fortune turning into misfortune, the key decisions on how best to handle multiple offers should be made by the seller. At the top of the list of decisions the seller should make in a multiple offer situation is whether to: 1) invite all interested buyers to make their highest and best offers; or 2) negotiate with one buyer while trying to keep the others in reserve.

The third risk with multiple offers is the seller mistakenly selling the property to two different buyers. While the likelihood of such an event occurring may seem improbable, it occurs far more frequently than one might think. The most common scenario where this occurs is when the seller has made an outstanding counteroffer to one buyer and a second buyer then comes along and makes a better offer that the seller simply cannot refuse. Sometimes, a seller, anxious to accept the second offer, will do so before withdrawing the counteroffer in the first transaction. As luck would then have it, the open counteroffer always



seems to then be accepted before it can be withdrawn. Sometimes, this risk is compounded by the REALTORS® letting the first buyer know that the seller has accepted another offer before the seller gives formal notice that the counteroffer to the first buyer has been withdrawn. Since the notice by the REALTORS® is ineffective to withdraw a counteroffer (because the notice has not been signed by the seller), it creates an opening for the first buyer to immediately accept the counteroffer before it is withdrawn by the seller and argue that he or she also has an enforceable contract. Having two buyers with contractual rights to purchase the property is rarely an easy or inexpensive legal problem to resolve since it often requires a court to sort out the rights of the respective parties. Moreover, the interests of the seller and the listing broker are often no longer aligned (where they can share the same attorney) since the seller will often blame the listing agent for ending up in such a mess and sometimes threatens to sue the listing broker. Listing agents must remember that their duty to their seller clients under BRRETA is to recommend their clients seek professional advice on matters beyond the expertise of the listing agent. Therefore, this normally requires the listing broker to recommend that the seller seek independent legal counsel to best advise the seller who is under contract to two different buyers.

What Do I Need to Disclose to Multiple Buyers?

The question most commonly asked by REALTORS® when a seller is negotiating with one buyer while trying to hold onto one or more other buyers interested in the property is whether the listing agent is required to affirmatively disclose to all buyers that there are multiple buyers interested in the property. As a general rule, the answer to this question is no. BRRETA requires listing brokers to "keep confidential all information received by the broker during the course of the engagement which is made confidential by the express request or instruction from the seller . . ." Therefore, if the seller requests that the listing agent not disclose the existence of multiple buyers or multiple offers, the listing agent must honor this request. However, license law also requires licensees not to make any substantial misrepresentations. How does a listing agent reconcile these competing duties if a selling agent asks whether there are multiple offers or multiple parties interested in the property? One answer is to simply say, "the seller has asked me not to discuss that". Of course, telling another agent that you are not at liberty to discuss whether there are other offers is often a strong clue that there may indeed be interest in the property by multiple parties.

When sellers decide to keep some prospective buyers in the dark regarding other interested buyers, that decision almost never extends to the buyer with whom the seller has decided to negotiate. It usually pays to let the chosen buyer know that others are interested in the property or have made offers to encourage that buyer to be reasonable in any continuing negotiations to avoid the risk of losing the transaction to another buyer.

With prospective buyers who have made offers that are being held in abeyance while the seller is negotiating with another buyer, the REALTOR® should also be well-advised to let the agents of these prospects know the exact date and time that their offers were presented to the seller. This is because some prospects may otherwise mistakenly believe that the seller's delay in responding is because of the failure of the listing agent to timely present the offer.

Offering $1,000 More Than the Next Highest Offer

One new wrinkle in the multiple offer world is how best to handle an offer that states it is $1,000 more than the next highest offer. For several reasons, seller's agents should discourage buyers from making this type of offer. In tying one buyer's offer to what another buyer is willing to pay for the property, it could result in the first buyer paying significantly more or significantly less for the property than what the buyer may otherwise have intended. Let's look at the examples below to better understand this.

EXAMPLE #1: Seller A has listed his property in a very desirable neighborhood for $285,000. There are multiple offers on the property and the seller asks everyone to make their best offer by a particular date and time. Buyer 1 really wants the property and is willing to pay up to $325,000 for the property. However, Buyer 1 would prefer not to pay this amount if he does not have to. Buyer 2 offers $305,000 for the property. Buyer 1 offers to pay $1,000 more than the next highest bidder. If the seller accepts this offer, Buyer 1 will end up paying much less than he was really willing to pay.

Alternatively, the buyer may pay more than intended. Let's look at the example below to better understand this.

EXAMPLE #2: Seller A has listed his property in a very desirable neighborhood for $300,000. There are multiple offers and the seller asks everyone to make their best offer by a particular date and time. Buyer 1 really wants the property and believes that $305,000 would be more than a fair price to pay for it. However, to avoid the remote possibility of being outbid, Buyer 1 states that his offer is $1,000 more than the next highest bidder with a cap of $335,000. Another buyer bids $334,000 for the property. In this case, Buyer 1 is still the high bidder. However, having thought that $305,000 was more than a fair price for the property, Buyer 1 may get buyer's remorse if he now has to pay $335,000.

Another risk of bidding $1,000 more than the next highest bidder with a cap is that an unscrupulous seller, knowing the limit of the buyer's cap could work in cahoots with a "fake" buyer to have him or her put in an offer that is at or near the cap to drive up the price paid by the legitimate buyer.

The second problem with offering more than the next highest offer is that it may not create an enforceable contract even if it is accepted by the seller. This is because the GAR Contract (and almost every other form real estate contract) provides that it represents the entire agreement of the parties and neither party is relying on anything not contained in the Agreement. Since the offer of the next highest bidder is not a part of the GAR Contract, there is a significant risk that a court may find the offer not to be one capable of being accepted by the seller because the other offer is not incorporated by reference into the GAR Contract. Some buyers have tried to work around this by trying to incorporate by reference the next highest offer into the contract. Others have stated that all other offers on the property are incorporated by reference. Whether courts will find these approaches to incorporate by reference other offers into the contract is unclear. Until there is some judicial confirmation that this type of approach is legally enforceable in Georgia, REALTORS® should be cautious in using this type of special stipulation.

The third problem with allowing an offer to be made that is $1,000 more than the next highest offer is how to resolve a conflict where more than one buyer makes this type of offer. If both parties have established an upper limit or cap on their offers, and the cap of one buyer is higher than the cap of the other buyer, this should hopefully not be a problem. If neither buyer includes a cap, the competing offers would automatically increase by $1,000 *ad infinitum*. Presumably, the seller would then give each buyer the opportunity to make his or her best and final offer (not using the approach where they offer $1,000 more than the other).

The Appraisal Issue with Multiple Offers

The other issue that sometimes arises in a transaction with multiple offers is that the property may not appraise for the bidded up price being offered by the winning bidder. As such, the benefit to the seller of having multiple buyers bidding up the price of the property can be lost. One way that sellers can try to minimize this risk is to invite all buyers to make their best offers but to then communicate that only contracts with the following special stipulation included will be considered.

SPECIAL STIPULATION

Buyer acknowledges that multiple prospective buyers have made offers on the Property and that the purchase price of Buyer in an arm's length negotiation may exceed the appraised value of the Property. Notwithstanding any provision to the contrary contained herein, Buyer agrees that (a) the Property not appraising for at least the purchase price shall not be a basis for buyer to seek for a reduction in the purchase price of the Property or terminate this Agreement due to the failure of any financing contingency to which this Agreement is subject; and (b) in the event the Property does not appraise for at least the purchase price herein, Buyer agrees to pay cash for all amounts in excess of any mortgage loan for which Buyer has been approved.

THE BUYER'S SIDE OF MULTIPLE OFFERS

From the buyer's perspective, multiple offers are mostly about the buyer figuring out how to distinguish his or her offer from others. There are five basic ways this can be done.

Make the Listing Agent Like You

Being a difficult buyer or selling agent can cost your buyer the property in a multiple offer situation. All things being equal, most listing agents would prefer to work with buyers and selling agents who are nice people and easy to work with. When everyone likes each other and work well together it also increases the likelihood of the deal getting done and decreases the risk of claims after closing. While being a difficult selling agent or buyer may have been tolerated in a buyer's market, it definitely does not play well in a seller's market.

Be in Regular Communication with the Listing Agent

There's a lot that can be learned from talking regularly with the listing agent including whether the seller has any special needs regarding the transaction and the degree to which other buyers are interested in the property. So, for example, if you learn in a conversation with the listing agent that the seller would like to close by a particular date, you now have critical information that can be used to distinguish your buyer's offer from others. Regularly communicating with the listing agent is also a way to send a message to the seller of the buyer's interest and commitment to the property.

Remind Your Buyer That He Who Hesitates is Lost

Whoever came up with the above proverb must surely have been a selling agent in a seller's market. Buyers who delay in a selling market usually end up losing good properties to other buyers until they finally learn the lesson that they need to act quickly. Buyers sometimes forget that if they really like a property and think it is well-priced, other buyers are usually thinking the same thing. While buyers should not rush to make an offer on a house that only marginally appeals to them, when the house is right, the buyer needs to jump.

Encourage the Buyer to Make a Powerful Offer

Making a powerful offer sends a strong message to the seller that the buyer has the means and the motivation to get the deal done. There are many ways a buyer can do this including:

- Putting down a lot of earnest money;
- Offering top dollar for the property;
- Having a short due diligence period;
- Having a short financing contingency period;
- Keeping the offer simple;

Offering a quick closing, if that is something that would benefit the seller. Of course, since not every buyer is in a position to make a strong offer, those who are in position to do so have an advantage over those who cannot.

If you aren't able to make a powerful offer, but are totally committed to buying the property, consider writing a letter to the seller telling them of your commitment. The reality is that most sellers want their properties to go to nice people who love their properties as much as they do. Love of a property can sometimes trump the highest offer (at least when the price difference is not too great).

Encourage Your Buyer Not to Sweat the Small Stuff

All real estate contracts are about allocating risk between the buyer and the seller. In a competitive market, the buyer typically needs to accept more risk to increase the buyer's likelihood of getting the property as a reward. To accomplish this, the buyer should be gently reminded to let the small issues that always arise in a real estate transaction roll off the buyer's back. In the grand scheme of things, no minor issue is worth the buyer losing a house that he or she really wanted.

CONCLUSION

The types of problems REALTORS® face will change with the type of housing market in which REALTORS® find themselves. Multiple offers is a sign of the times and fortunately, it is a good sign. Next, we will have to see whether my prediction of a housing shortage by 2015 actually comes true.

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