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# What to Do if a Buyer Wants Out of a Contract

by Sandy Gadow

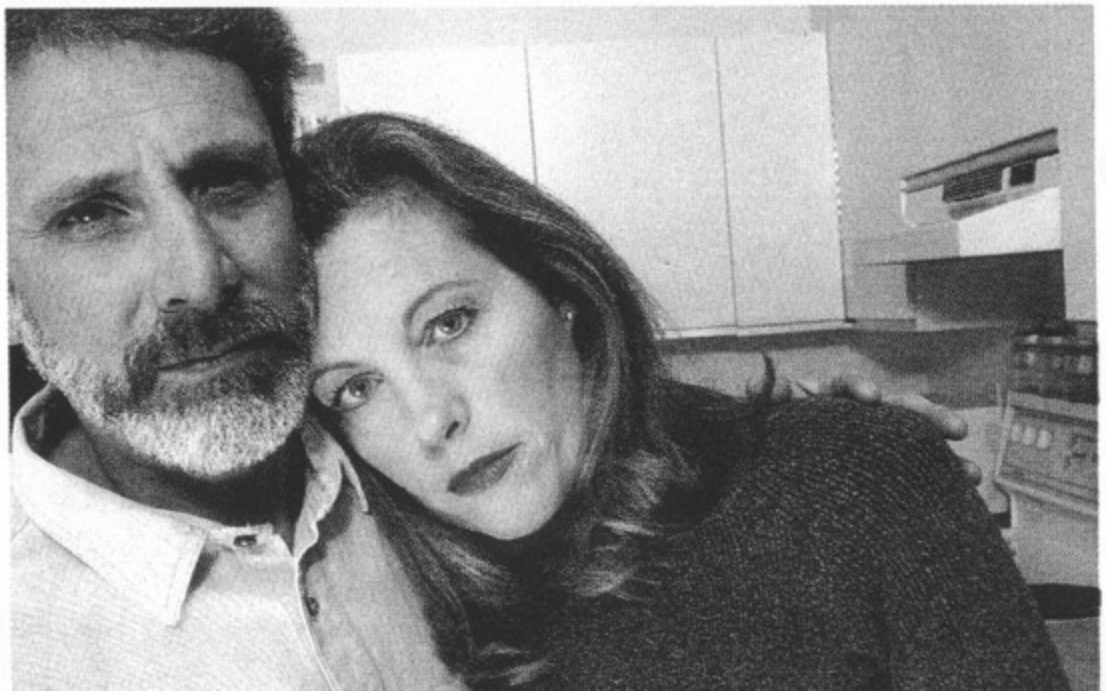
After their offer on a two-story ranch-style home in Westlake Village, Calif., had been accepted, Bob and Deborah Gordon realized that the house, which is only 15 miles from their work, is really located two hours away during rush-hour traffic. Mr. Gordon also began to have second thoughts about being able to keep up with the monthly loan payments. Even though he wanted to back out of the deal, Mr. Gordon felt he had no alternative but to go through with it because it was already in escrow. Although this is late in the closing process to cancel escrow, there are options for buyers in this and similar situations.

The Gordons' purchase agreement included a cancellation clause that outlined what would happen if both parties agreed to cancel escrow. A cancellation clause will typically specify what will happen to the buyer's deposit being held in escrow, and which party will be responsible for paying any title-company, inspection or real-estate agent fees that may have accrued. Mr. Gordon first contacted the seller and explained his desire to call off the deal. Luckily for the Gordons, the seller agreed to cancel escrow, provided that the couple followed the provisions of the contract.

required involving the terms and conditions of this contract, the prevailing party shall be entitled to reasonable attorneys' fees and costs as determined by the court."

• The seller can sue for specific performance. Specific performance means that the court can

remedy is available in which a buyer and seller agree to mediate or submit their legal dispute to arbitration. This can be an effective solution, but each party should understand that there may be no rights to appeal an unfavorable award and no right to a jury trial. If the rights of a buyer or sell-



involved in the transaction so that they each could sign it. Only after the closing officer is sure that a release and cancellation agreement has been signed by all the parties, will he or she disburse the monies being held in escrow.

There could be many reasons why buyers may want to cancel a contract -- personal situations change, neighborhoods may seem less desirable than when the purchase agreement was made, a sales price may now appear to be too high or perhaps a seller isn't willing to repair undisclosed defects. Unless the buyer's reason for canceling is specifically included in a contingency contained in the purchase contract, a seller has the right to force a buyer to honor the contract.

In the Gordons' case, canceling escrow was relatively simple because both parties agreed to it. But what happens when there is no agreement? Does a seller have any remedies to force a buyer to follow through with closing? Likewise, can a buyer force a seller to complete a transaction?

There are three common alternatives when a buyer is in default of a purchase agreement:

• The seller keeps the earnest-money deposit. This option may be part of the original purchase agreement with a buyer. If a buyer is not willing to release the deposit, the seller may have to take the buyer to court. It is important that an attorney's fee clause be included in the purchase agreement, otherwise each side may have to pay its own legal fees should the case land in court. The clause may read: "In the event litigation is

• The seller can sue for damages. This option may be more difficult to prove, as a seller must prove actual damages suffered because of the cancellation of the contract. Most real-estate contracts contain a "liquidated-damages" clause, which outlines a predetermined amount that the seller could recover in the case of a breach of contract by the buyer.

Buyers generally have two options for forcing a seller to sell a property and honor a purchase agreement.

• The buyer can sue for specific performance. If the seller refuses to sell and the sales contract is legally enforceable, a court could order the seller to deliver the deed as agreed.

• The buyer can record a lis pendens. Recording a lis pendens (notice of a pending legal action) effectively prevents the seller from selling the property to another buyer or refinancing it. This ties up the property until a pending legal decision has been reached.

In some cases, a lawsuit for specific performance or payment of monetary damages isn't enough to resolve the problem. An additional order the buyer to live up to his or her part of the contract and force the property purchase. This generally will happen only if there are no other buyers for the property and the payment of money in lieu of actual performance is deemed to be inadequate or impracticable. Many defaulting buyers are willing to forfeit all or most of their deposit money in order to avoid a specific-performance suit.

One of the best ways to limit your liability in case of a purchase-agreement cancellation is to carefully draft the wording in the default or cancellation clause in the contract. You may not anticipate a cancellation at the beginning of the buying process, but it's wise to make sure you're comfortable with the penalties you would incur in case of default.

er are unclear in a dispute, another remedy could be to ask a court to decide what should be done. This solution is often referred to as a "declaratory-judgment lawsuit." This is a binding judgment issued by the court but does not provide for enforcement of the judgment. It defines the legal relationship between a buyer and seller and their rights with respect to the matter before the court.

One of the best ways to limit your liability in case of a purchase-agreement cancellation is to carefully draft the wording in the default or cancellation clause in the contract. You may not anticipate a cancellation at the beginning of the buying process, but it's wise to make sure you're comfortable with the penalties you would incur in case of default. Be sure you understand the terms spelled out in the liquidated-damages clause. For example, the clause may state that liquidated damages cannot exceed 3% of the purchase price, or it may explain the circumstances under which a seller could retain a buyer's full deposit. There may be an arbitration clause, which might say that in the event of a dispute you agree in advance to binding arbitration to settle the dispute. You want to be sure that the wording of any default clause is legally binding and could not be declared void by either party.

If you believe a cancellation of your escrow will be necessary, you should try to cancel before signing the closing documents. Escrow and closing instructions are legally binding contracts and are not revocable like purchase agreements because the closing instructions generally do not have escape or "contingency" clauses. After escrow instructions and closing documents are signed, cancellation becomes a more complicated, and usually more expensive, process.

Negotiating with the defaulting party should always be your first step. Reminding the other party of the legal remedies available often will help encourage a compromise. Should you wish to cancel the escrow or closing, consult with your closing officer or someone who specializes in real-estate matters.