

# THREE STRATEGIES FOR DEALING WITH BALKING PURCHASERS

By Edward Farrell



In today's residential real estate market, balking purchasers are a major challenge for developers. Many purchasers are seeking to renegotiate purchase agreements, and others are attempting to extricate themselves from validly binding contractual obligations by filing lawsuits or formal complaints with the

Office of the Attorney General. Purchasers are disputing the terms of new transactions as well as those that were "in contract" before the economy declined.

Some purchasers seek relief based on irrelevant factors such as the state of the economy, while others thoroughly scour the unit, purchase agreement and offering plan in an attempt to discover a single detail that deviates from the original plans. Many purchasers are even willing to simply walk away from their down payment in order to avoid closing.

Developers have several tools to counter these increasingly common and harmful tactics and achieve their primary objectives of avoiding costly disputes, capitalizing on their investment and compelling balking purchasers to comply with the agreements they signed. The following three strategies may have a positive impact, and can be used both before signing new purchase agreements and during renegotiations of existing purchase agreements.

## 1. Request a Higher Down Payment

A down payment equal to 10% of the purchase price has been an industry standard in residential real estate transactions for many years. The rationale for this percentage is twofold: to require a substantial investment that will deter a purchaser from simply walking away from the purchase agreement and to adequately compensate the seller if the purchaser willfully defaults. Neither is the case in today's real estate market

because many purchasers have been willing to forfeit their down payments and 10% of the purchase price does not provide adequate compensation to a developer. Therefore, developers should consider requesting a 15% down payment. This will result in more purchase agreements proceeding to closing since purchasers may be unwilling to forfeit this higher amount.

Courts have held that a seller may retain a down payment that exceeds 10% of the purchase price absent evidence of overreaching, fraud, illegality or mutual mistakes. This increased down payment may be structured in installments with 10% payable at signing and an additional 5% due six months later.

Even if a purchase agreement has been signed, it is not too late to capitalize on this strategy. When a purchaser seeks to renegotiate, any concessions made should be contingent on the purchaser's increasing the down payment. For example, if a purchaser requests an extension of the closing date, a developer can require that the purchaser pay an additional 5% of the purchase price in exchange for the extension.

## 2. Require Purchasers to Pay All Legal Fees

In light of the steep increase in frivolous but expensive lawsuits and dispute resolution applications filed with the Attorney General by purchasers attempting to terminate purchase agreements, it is more important than ever for developers to insulate themselves from unanticipated legal fees. All offering plans and purchase agreements should provide that a purchaser is required to pay all legal fees and costs incurred by a developer in defending any litigation or dispute. If purchasers are obligated to pay these costs, they may be less likely to file lawsuits or other legal procedures, especially in cases where they are unlikely to prevail.

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This provision can also be added to a purchase agreement during a renegotiation. Since a renegotiation is often initiated by the purchaser, a developer can take advantage of the purchaser's weak legal position by making the requested changes only if the purchaser agrees to include additional safeguards like this one.

### **3. Seek Specific Performance**

Most purchase agreements limit a seller to the remedy of retaining the down payment if a purchaser willfully defaults. It would be prudent to also include the right to seek specific performance for a purchaser default. Many purchasers who are simply walking away from their contractual obligations have the financial ability to complete the transaction but are simply choosing not to. With the remedy of specific

performance available, a developer could potentially compel a purchaser to complete the transaction in spite of the purchaser's unwillingness. This remedy will also reduce the number of requests to renegotiate a purchase agreement since the threat of walking away from the transaction will be removed.

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#### ***Edward Farrell, Partner***

*Edward is a Partner of Tarter Krinsky & Drogin LLP. He focuses his practice on real estate and mortgage finance, representing large institutional lenders in mortgage loan transactions as well as purchasers and sellers of commercial and residential real estate. Edward is also experienced at drafting and negotiating commercial leases and handling mortgage foreclosure litigation cases. You can reach him at [efarrell@tarterkrinsky.com](mailto:efarrell@tarterkrinsky.com) or 212.216.8090.*