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Episode 19: Should we file a lawsuit?

Call from the Agent: The other party has breached and my client has been damaged — should we file a lawsuit?

The Response: Following the recent episodes discussing remedies for buyers and sellers where the other party breaches a real estate contract, the reasons to file or not file naturally follow. A decision to initiate a lawsuit is unique to each situation and should be made only after calm thought. While there is no substitute for consulting with a skilled and experienced litigation attorney, here are few things to know:

Release: The standard Termination of Contract and Release of Earnest Money currently circulated by the SC Association of Realtors releases the earnest money and the other party. Once it is signed by both parties, neither party can sue. End of story. Therefore, if a party intends to file a lawsuit, that party should not sign the Termination of Contract and Release of Earnest Money.

Path to Recovery: Especially where money damages are sought (as opposed to specific performance), even where the buyer wins the lawsuit and a monetary judgment is entered, the matter of actually collecting on the judgment may (and likely will) be painful and uncertain. Prior to filing a lawsuit, a good litigation attorney will do his or her best to evaluate the chances of actually collecting money for their client. A shocking number of judgments are never collected, so the notion of a lawsuit should be evaluated very carefully with an attorney prior to its commencement. In the world of litigation, there are few certainties.

The Proper Court: Magistrate's Court is far less formal than the Court of Common Pleas (usually called "Circuit Court") and that has its attractions for many. Keep in mind, Magistrate's Court has a jurisdictional limit of \$7,500 – in other words, no matter what, the judgment cannot exceed \$7,500. Further, Magistrate's Court cannot order equitable relief. A party seeking damages in excess of \$7,500 or seeking specific performance must file in Circuit Court. As said, Circuit Court is much more formal than Magistrate's Court (greater formality generally means greater cost) and it takes a lot longer for the case to reach trial.

Attorney:

1. Each party should be represented by an attorney. Your claim or your defense should be presented as skillfully as possible – attorneys do it for a living. Individuals are allowed to represent themselves if they wish to do so, but an entity (LLC, corporation, etc.) cannot represent itself in court and, therefore, must have an attorney.
2. In cases such as this, most attorneys will charge by the hour as opposed to a contingency fee. This can get expensive quickly. In the previous episodes, I pointed out the court can award attorney's fees and costs to the winner, but bear in mind that award is just part of the monetary damages award and may or may not be collected.

Intangibles: A lawsuit can be unpleasant, expensive and can take awhile. When a party breaches, it is typical (and very human) for the other party to be angry, but this is not a reason to file a lawsuit. If a dispute can be worked out, it is usually best to do so.