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Episode 21: Early Occupancy

Call from the Agent: The buyer has asked for early occupancy – should my seller allow it?

This is a very common question, but the situations are different from one another, so let's run down the things to know and the things to consider. The question almost always arises just before closing when one party or the other is unable to perform the contract on the date of closing (ex. the buyer's lender is delayed, the seller is trying to resolve a title issue, etc.). The advice given to a seller first hinges on which party is causing the delay – most commonly, the delay is outside either party's control, but the delay is nevertheless laid at the feet of one party or the other. If the delay is on the seller's side, that seller will be more likely to grant early occupancy and do so on favorable terms. If the delay is on the buyer's side, a seller is usually less inclined to grant early occupancy and, if it is granted, the terms are more strict.

We are all familiar with the SCAR form now in use, but for the sake of convenience, here is a list of the elements:

- a. Allows for (does not require) an "occupancy fee" to the date of closing and contemplates payment in advance;
- b. Allows for a separate "occupancy fee" if closing is delayed beyond the agreed-upon closing date;
- c. Choice between utilities being in the name of the seller or buyer;
- d. If closing does not occur, buyer promises to vacate;
- e. Buyer cannot alter/improve the property;
- f. Buyer inspects the property before occupancy and waives any later claims of deficiencies other than as may be agreed upon between the parties in advance (ex. if the seller has promised to replace the HVAC and it hasn't yet been done, it should be noted before the buyer occupies in order to avoid potential disagreement later);
- g. Buyer is responsible for insuring his own belongings (not required); and
- h. Attorney's fees are recoverable in some (but not all) situations (more on this below).

In truth, most agents present the SCAR form and the parties either sign it or not, but it is important to know the state form does not have to be used and, where it is used, it can be modified in any way the parties wish.

The most obvious risk in early occupancy is the buyer's failure to close – this can be due to inability, unwillingness or the failure of a contract contingency (ex. loan is denied in the final moments). In very general terms, the failure of a contract contingency excuses the buyer from his purchase obligations, while a simple refusal to close constitutes a breach of contract. Breach or not, a fall-through is an undesirable result for the seller.

In the contractual world, there is no such thing as absolute protection, but through effective contract provisions, the parties covenant to conduct themselves in a certain manner and agree to consequences if they fail to do so. The state form provisions are listed above and, depending upon the relative bargaining position of the parties, a seller may wish to add some contractual contour. If so, the following additional provisions might be considered:

1. Require the earnest money be declared non-refundable.
2. Require a security deposit for the occupancy over and above the "occupancy fee." The occupancy fee might be thought of as rent, while the security deposit can cover damage, refusal to leave, etc. A security deposit provision can easily include a convenient sub-provision stating the security deposit will be credited toward the purchase price at closing.
3. Require a waiver of all contract contingencies by the buyer. IMPORTANT: Where the SCAR form is used without amendment, the contract contingencies are still active during early occupancy.
4. Enhance the attorney's fees provision to include fees and costs incurred in removing the buyer if the closing does not occur and the buyer does not leave. (the attorney's fees provision in the SCAR early occupancy agreement covers damage and/or the collection of an unpaid occupancy fee, but nothing else).

Early occupancy typically goes well because, in my experience, most people are good-hearted and fair-minded, but allowing a non-owner to occupy a property is no small matter and is very often seen as an unacceptable risk. It can be refused and, in many cases, should be refused. The provisions described above can help bridge a buyer's need to occupy and a seller's unwillingness to allow it. If used, it is best to have an attorney handle the drafting.

As a final thought, some sellers will want to know how the buyer can be removed from the property in the event the closing falls through and the buyer does not leave. The proper course would be to have the local police remove the buyer from the property, but as a practical matter, police typically do not wish to become involved and, instead, tell the owner "it's a civil matter." More than likely, the seller will have to serve a Notice to Quit and, if the occupant does not leave, proceed to magistrate's court to seek removal by the sheriff.