

Non-Contingent Offers

Risk for Buyers and Sellers



Balancing Risks in Hot Markets

- In a competitive market, Buyers need to balance the desire for making an offer attractive with the risk of waiving contingencies
- Contingencies are safeguards to buyer's deposit if cancellation is desired



Key Buyer Contingencies

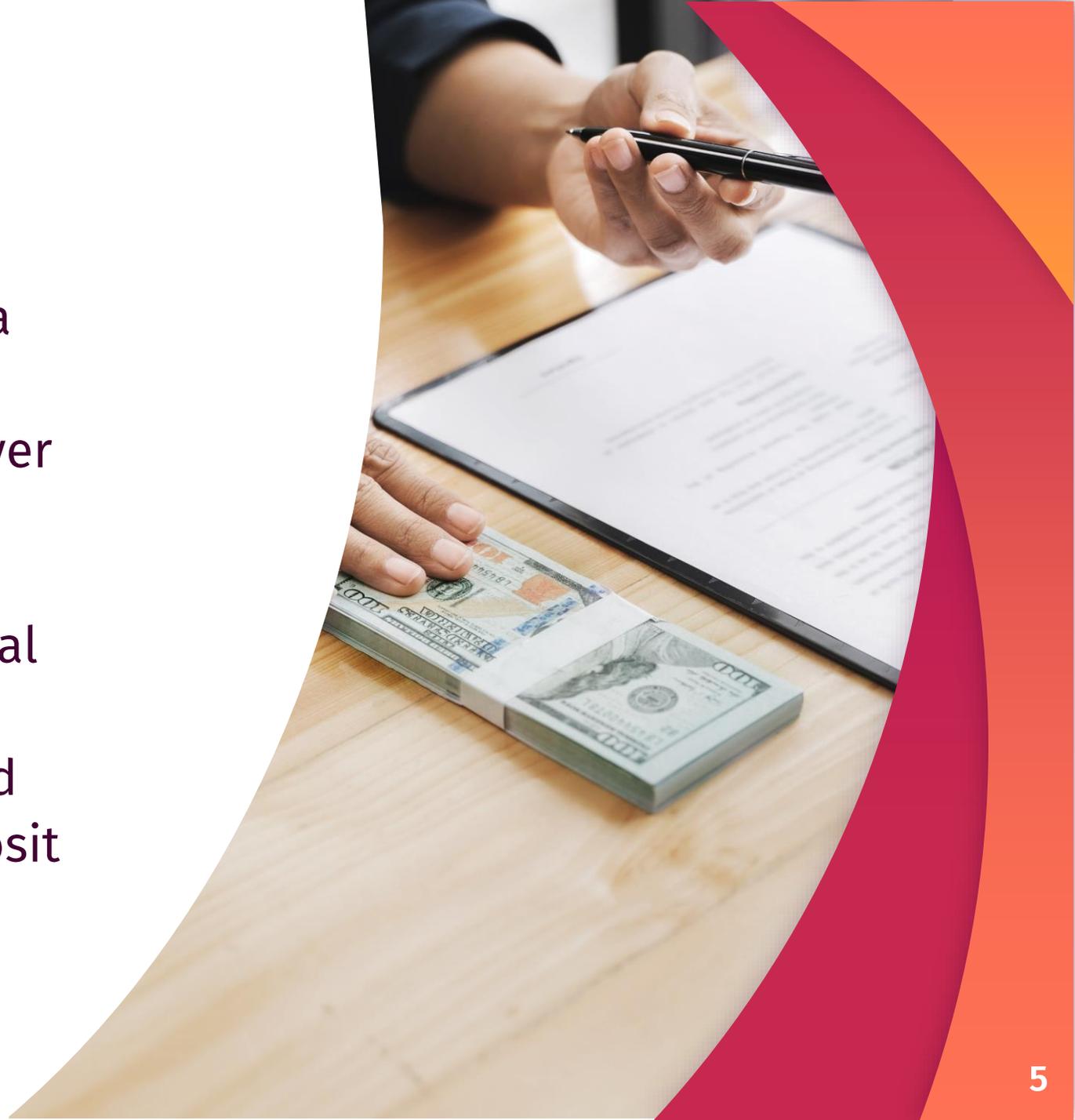
- Loan
 - Will the Buyer need a loan for all or even part of the purchase?
 - Does Buyer have sufficient cash available if the lender does not loan the full amount?
- Appraisal
 - Even if there is no loan, will the Buyer still want the property if it appraises significantly below the purchase price?
- Inspection
 - Will the Buyer still want the property if an expensive or safety-related defect is discovered?

Inspection Contingency Considerations

- The inspection process commonly reveals defects
- Is Buyer prepared to accept a significant or costly defect?
- What options does Buyer have without the inspection contingency where defects are significant?
 - Buyer may ask the Seller to correct an issue, hoping for agreement by Seller
 - Buyer may decide to cancel the agreement, but with no contingency, Buyer's deposit is at risk to cover Seller's actual or liquidated damages
- Buyer should consider the impact of significant defects that may be too costly for Buyer to correct and could impact a future sale in a cooler market

Liquidated Damages

- The liquidated damages clause is a pre-agreement to the amount of damages Seller is entitled to if Buyer defaults
- If Buyer does not have a contractual excuse to cancel, Seller will be entitled to liquidated damages and retain that portion of Buyer's deposit



Liquidated Damages Calculation

- For residential 1 to 4 property that Buyer intends to occupy, the deposit (not to exceed 3% of purchase price) is the estimate of damages
- If property sells for more money within 6 months after the breach, Buyer may be able to show estimate of damages was not reasonable

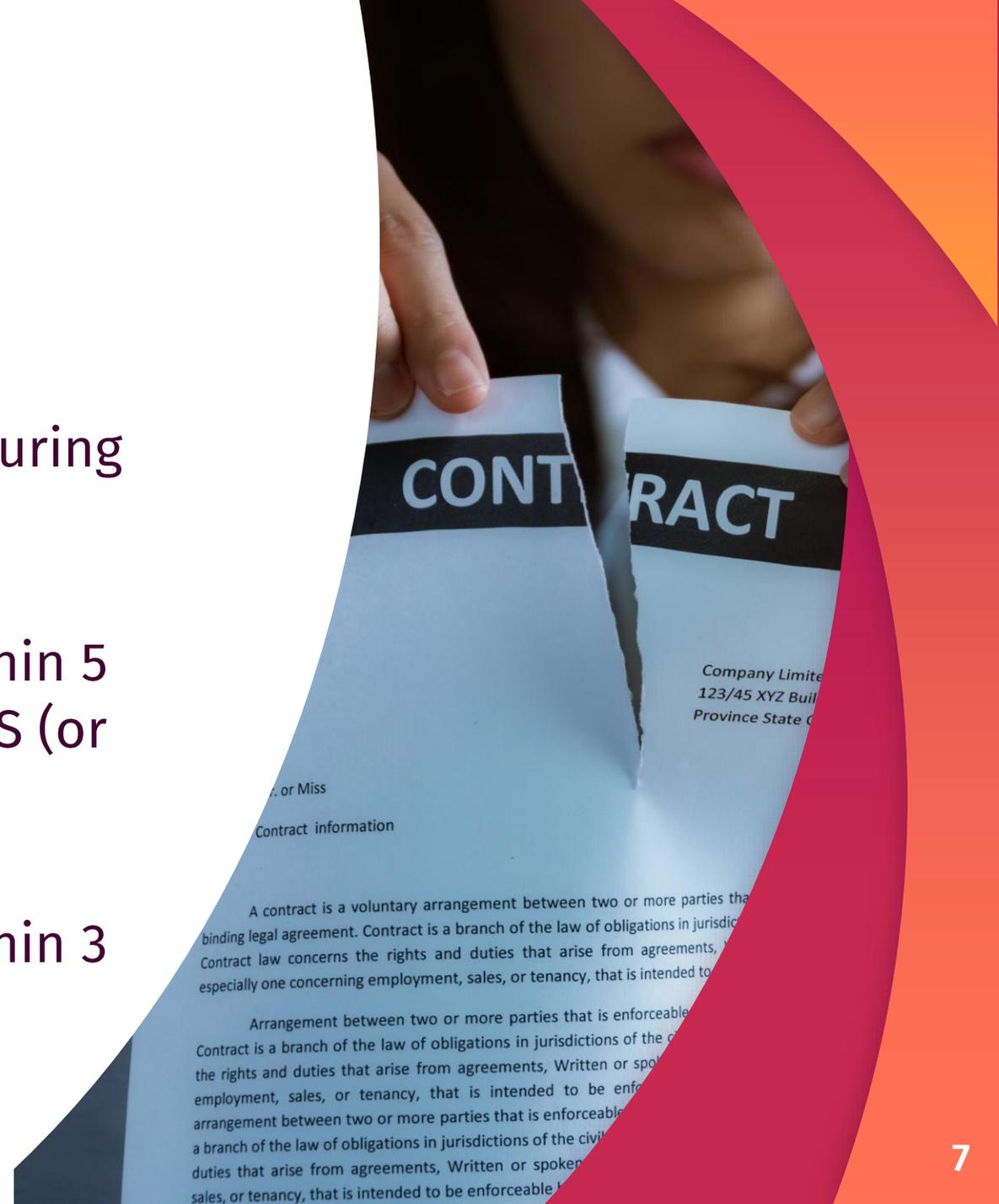
Example

Purchase Price Jan 1, original Buyer:
\$1,000,000 (3% liquidated damages \$30,000)

Purchase Price Apr 1, new buyer:
\$1,500,000, so Buyer may argue Seller had a gain rather than was damaged

TDS: Buyer May Still Have Contractual Right to Cancel

- If Buyer is provided a TDS after offer acceptance or TDS is updated/modified during transaction:
 - Buyer has statutory right to cancel within 5 days after deliver via mail/email of TDS (or updated TDS)
 - Buyer has statutory right to cancel within 3 days after deliver in person of TDS (or updated TDS)



Considerations for Sellers

- Always verify Buyer has sufficient funds for purchase price, if all cash, or down payment if buyer getting a loan. Best to verify before acceptance of offer.
- Significant valuation differences in appraisal may still lead Buyer to cancel and risk a dispute.
- Significant defect discoveries may still lead Buyer to cancel and risk a dispute.
- TDS provided or updated after offer will give Buyer a statutory right to cancel.

Considerations for Sellers

- Deposits are not automatically released to a Seller even if Buyer does not perform
- Disputes are costly in time and money
- Dispute may keep Seller's property off market during resolution of the dispute
- Disgruntled Buyer increases possibility of a legal claim
- Again, disputes are costly in time and money!

Additional Resources

Quick Guide – Non-contingent Offers