

Escalation Clauses



What is an Escalation Clause?

- Provision where buyer offers to pay more for a property than another prospective buyer(s) without knowing the price offered by the other buyer(s)
- Example: "The purchase price shall be \$1,000 higher than any other offer"
- Also sometimes referred to as a "relative bid" or "sharp bid"



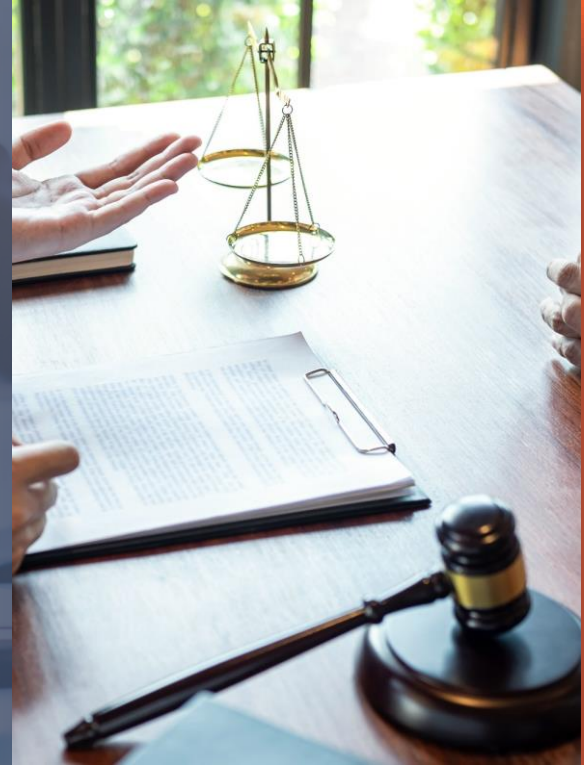
When are Escalation Clauses Used and Why?

- Used when a buyer is looking to make their offer stand out in a multiple offer or competitive market environment
- Allows buyer to make the highest offer, but only by the minimal amount necessary to beat out other offers



Are Escalation Clauses Legal?

- Generally yes, when drafted properly. Escalation clauses can be used to create a binding contract
- Buyer and seller client should be advised to seek legal advice for questions



Including a “Cap” or Maximum Price

- Buyer may offer “XXXX dollars more” than any other offer but “not to exceed” a certain maximum price
- Pro: Limits the buyer's exposure when another buyer makes an outrageously high offer
- Con: Reveals the maximum price at which the buyer is willing to buy (Seller may counter at that maximum price or use it as leverage to get higher offers)
- Bottom Line: Buyer must decide if they want to include a cap, and should seek legal advice about potential consequences

Including a “Floor” or Minimum Price

- Buyer may offer “XXXX dollars or \$1,000 higher than any other offer received, whichever is greater”
- Pro: If no other offers, the seller can accept the buyer’s offer and create a binding contract
- Con: Buyer’s floor price could be higher than the next highest offer, including the escalation amount, causing buyer to pay more than they would otherwise
- Bottom Line: Buyer must decide if they want to include a floor, and should seek legal advice about potential consequences



Requiring Verification of Next Highest Offer

- Buyer should include a requirement that seller provide proof of the highest offer received, with a right to contact the other buyer or their agent to confirm the offer is in fact real
- While agents are often uncomfortable handing over other offers, without the use of a confidentiality agreement, offers themselves are not confidential and may be shared with other agents or prospective buyers

What if Multiple Offers Include an Escalation Clause?

- Unlikely Seller can just accept one of the offers with an escalation clause to create a contract – it may be impossible to determine purchase price
- Seller would be well-advised to issue multiple counter offers



Risk Management Concerns

- Buyers should always be advised to speak with their own legal counsel prior to making an offer with an escalation clause
- Brokers may
 - adopt a policy discouraging the use of escalation clauses
 - adopt a policy that agents may not draft escalation clauses, requiring the buyer to use their own attorney to draft such clauses

Additional Resources

Quick Guide

<https://www.car.org/-/media/CAR/Documents/Transaction-Center/PDF/QUICK-GUIDES/Quick-Guide---Escalation-Clauses.pdf?la=en&hash=4AE878F7D2B9416B9EBB84785F82447048D98D56>

Legal Q&A

<https://www.car.org/riskmanagement/qa/contract-forms-folder/escalationcauses>