

Published September 2009

Florida Yacht Brokers Association

Good Faith Deposits and Escrow Accounts

By Danielle J. Butler, Esq.

Due to the current uncertain economic times that we find ourselves in, we have seen more failed than successful yacht transactions. This begs the question of whether a good faith deposit (“deposit”) should be made simultaneously with the offer on a yacht and who is the best person to hold this deposit?

A deposit is generally a sum of money placed in escrow at the time a written offer is made by the buyer to the owner of the yacht. A written offer from the buyer to the owner is made to set forth the terms and conditions via a purchase and sale agreement.

The yachting industry standard is to require a deposit equal to 10% of the total offer. The deposit should be placed with a third-party who is mutually agreed to by the buyer and owner. Typically, deposits are held by either the yacht broker or an attorney, but there are generally five (5) ways for a deposit to be held.

First, by a joint bank account. The parties can agree to form a joint bank account to hold the buyer’s deposit to assure his ability and willingness to complete the transaction.

Second, by an escrow service. Most banks and real estate escrow service will hold the deposit under an escrow agreement. The value of such a service is that the funds and fidelity of the escrow service is insured by a fidelity bond or other security supervised by the State. The principal problem that occurs is that these

facilities are not familiar with maritime transactions and are many time uncomfortable with handling a situation in which they do not have experience. The bank and escrow service will charge for this service. The amount may range from a few hundred dollars to several thousand dollars.

Third, by an attorney’s trust account. All attorneys maintain a trust account. This is an account which the attorney deposits and disperses funds held for their clients. This account is closely monitored by the State and that State’s Bar. In Florida, the State and the Florida Bar has a program where an attorney trust account can be insured up to the total amount of the deposit even if the deposit is above and beyond the FDIC limit of \$250,000. Have your law firm check with its bank to determine if the bank participates in this program. Fowler White Burnett’s banks do participate in this program giving our clients full insurance on the funds that we hold for them in trust.

Forth, by a broker’s trust account. Most brokers maintain trust accounts in which deposit may be placed, held and dispersed as required. Most States do not require that these accounts be insured or that the broker have a fidelity bond. However, California and Florida do require fidelity bonds, but these are usually relatively low limits.

Lastly, with the yacht owner. Although viewed as the most unconventional method for the yachting industry, but typical for the commercial industry, the buyer may make a deposit directly with the owner. The biggest problem arises if the parties have a dispute over the terms or conditions of the sale. The owner may unilaterally refuse to refund the deposit

and the buyer will be required to hire an attorney and file suit.

Regardless of how the deposit is made, the purchase agreement needs to make explicitly clear the terms and conditions on which the sale is predicated and how the deposit is be treated upon default. A bank, attorney, or escrow service will require explicit escrow instructions which are signed by the Buyer and Seller, and will follow those instructions solely.

There are serious dangers for an owner to accept a buyer's offer without a deposit in place. If the buyer breaches the agreement, then the owner is left with attorney's fees, sea trial costs and whatever other expenses he may have occurred to prepare the yacht for the sale to the buyer. When a deal collapses, without a deposit in place, then the owner is out his costs and expenses without a deposit held to defray his costs.

What if an owner indicates that a deposit might scare off the buyer? Well in fact, the reverse is true. A serious buyer should have his funding in place and be ready to put up a deposit to secure the right to purchase the yacht. A deposit separates the "lookers" from the "buyers". A deposit is a level of commitment by the buyer to his offer. It is the buyer's commitment to complete the deal.

On the other hand and as protection for the buyer, if an owner accepts an offer and deposit, then he is legally obligated to sell the yacht to the buyer on those terms, even if the owner receives a better and higher offer. Without an accepted offer and deposit in place, the owner may decide to accept another higher bid.

The general rule should be that nothing happens until there is a deposit in place. Once

that takes place, revisions of the purchase and sale agreement, sea trials, surveys, financing agreements and all other terms may be resolved.

Most purchase and sales agreements make an offer contingent upon a buyer's personal inspection, complete survey, sea trial and inventory. If any one of those items are not satisfactory to the buyer and he notifies the owner within the contractual time period, then the buyer's deposit is fully refunded and the escrow agent must immediately refund the buyer's deposit.

With most failed transactions, the number one reason for litigation is to determine who breached the agreement and what happens to the deposit? If there is a conflict regarding who is at default, then the escrow agent only should make one of the two following move: (1) hold the deposit until the escrow agent receives instructions by the parties via a mutual agreed to letter signed by both parties, or (2) lodge the deposit with the local court. Once the deposit is lodged with the court, then the parties can fight over who the deposit should go to. As a broker, it is important to remember, that if you accept the deposit, then regardless of your role as a broker, you have a legal duty to act as a neutral third party concerning the deposit. Do not be convinced to distribute the deposit based on pressures from your client, as if you do you can be assured to find yourself being sued.

***Danielle J. Butler is a Partner at Fowler White Burnett, P.A. Ms. Butler handles both transaction and litigation matters within the yachting and pleasure boating community.*

*She may be contacted at 786-543-1141 or
dbutler@fowler-white.com.*