

Earnest Money Disputes

Q: My Seller has terminated a contract and delivered a Release of Earnest Money ("ROEM") to the Buyer, which proposed that the earnest money was to be released to the Seller, and the Buyer refuses to sign it. My Seller does not understand why the title company will not release the earnest money to him if the contract clearly indicates that the Seller is entitled to it. I know that no title company will release the earnest money without a ROEM signed by both parties, but I don't know exactly why - can you explain?

A: As an escrow agent and a neutral third party in the transaction, we cannot act upon a unilateral request by either Seller or Buyer to release the earnest money. Neither the TREC earnest money contract nor the state laws of Texas give a title company the authority to become a mini-courtroom and listen to each party's side of the story and determine who is entitled to receive the earnest money under the terms of the contract. To the contrary, an escrow agent who attempts to make such a factual and legal determination could be subject to a "breach of fiduciary duty" lawsuit by the party who lost the earnest money, based on their argument that the escrow agent overstepped their role in the transaction.

Q. Now the Buyer has delivered a Release of Earnest Money to my Seller as well, but it states that Buyer should receive back his earnest money. Of course my Seller refuses to sign this version and everyone is arguing with one another and leaving me and the other agent stuck in the middle. What should I do?

A: Extract yourself from the dispute as quickly as possible! A Realtor has no duty to get involved in a disagreement over the earnest money, other than assisting with the preparation of the Release of Earnest Money and circulating it to the correct parties, and possibly giving testimony about what occurred during the contract period if the dispute proceeds into the courtroom. Direct your Seller to read Paragraph 18 of the contract, which refers to the release of earnest money, and advise them to consult with an attorney to determine what their legal remedies are in regard to the dispute over the earnest money.

Q: What if we remain at a standstill - is there any way my client can force the other party to sign a ROEM?

A: The residential contract states that if a Buyer or Seller **wrongfully** fails or refuses to sign the ROEM within seven days of receiving it, that party could be liable to the other party for the amount of the earnest money, PLUS three times the amount of the earnest money, PLUS reasonable attorneys' fees. Perhaps pointing out that language in the contract might motivate the other party to sign the ROEM.

Q: So where do we go from here to determine who gets the earnest money?

A: Your client must file suit against the other party in small claims court in the JP Court precinct where the property is located. Notice must be given to a party via certified mail ten days prior to filing a lawsuit in small claims court. After the case is set for trial (usually within six months), the Justice of the Peace will hear the facts and make a determination of who should receive the earnest money under the terms of the contract.

Q: If my Seller files suit and wins, will the title company release the earnest money to him then?

A: If your Seller wins, the judge should issue an Order directing the title company to release the earnest money to your Seller, and we would obey that Order and release the earnest money as it directs.

Q: I don't think that my Seller will really want to go through the time and expense of suing the Buyer. Is there any alternative?

A: Under Paragraph 18(C) of the earnest money contract, a title company shall, upon request by the party seeking the earnest money (provided that Paragraph 21 of the contract, listing addresses to send notices to each party, was properly completed when the contract was executed), forward a written demand to the party who is not responding or refusing to sign the ROEM, and if such party does not respond within 15 days of receiving such demand, the title company **MAY** release the earnest money to the requesting party and be fully indemnified by all parties in doing so. Whether this procedure will be utilized is completely up to the title company holding the earnest money, however, and any response at all from the other party will probably be enough to keep the earnest money tied up at the title company. The only other obvious alternative, if neither party wants to go through the expense of going to Court, is to agree on some kind of compromise to split the money between them. Neither side will probably be completely satisfied with the compromise, but it beats nobody receiving any of the earnest money.

Q: If the parties never go to court, and a demand letter is not successful, what will happen to the earnest money then?

A: After three years of holding it, the title company must treat the earnest money as "unclaimed property" and escheat the money to the State of Texas.