

UNFORTUNATE ENDS

Legal Corner

We all hope that a real estate contract terminates with a successful closing and performance by all parties concerned. After all, that is how you earn your living. Unfortunately, however, contracts can end in a variety of non-successful, non-paying, ways.

A contract may terminate early according to its own terms. Home inspection rejection and failure to reach an accord on home inspection items are good examples of a non-breaching, non-paying, contract termination. The standard REIN contract provides for a number of other different termination scenarios. For example, should financing not be obtained through no fault of the purchaser then the contract may be terminated pursuant to paragraph 5(b). This termination expressly requires the parties to execute a release agreement. Likewise, the home inspection contingency addendum requires a release agreement to be tendered if the buyer rejects the results of the home inspection.

In some cases the contract contains language obligating the parties to execute a release. But is a signed release agreement necessary to terminate a contract? The short answer is no. There is no general legal requirement that a “release agreement” be executed to terminate a contract, and the REIN contract does not impose a requirement for one to be executed as a pre-condition to termination. An executed release is useful and prudent, however, because it resolves any question concerning the termination of the contract and it releases all parties – including agents – of further liability.

The standard release also expressly authorizes the release of the earnest money deposit. VREB regulations and the REIN contract require that the earnest money deposit not be released “until (i) all parties to the transaction have agreed in writing as to [its] disposition, or (ii) a court of competent jurisdiction orders disbursement of the deposit, or (iii) escrow agent can pay the deposit to the party who is entitled to receive it in accordance with a clear and express it explicit terms of this agreement.” Our Association release form serves as the required written agreement regarding disposition.

What do you do if there is a recalcitrant party who refuses to sign a release when

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one should be signed? Obviously, you should consult with your broker and attorney under those circumstances, but generally the advice will be to confirm in writing that you believe the contract is being treated as terminated and unenforceable, and that you [really the client] are moving forward to either sell the property or purchase other property as the case may be. Please note in this regard the thirty-day option under paragraph 7 of the REIN contract. Depending on the exact circumstances, prudence might dictate that you include a savings clause in any subsequent contract, which is a clause that makes your client's performance in the subsequent contract conditional upon there being no duty to perform under the prior, unreleased, contract.

Finally, your broker has the ability to release the deposit notwithstanding a party's refusal to obtain a release under the "clear and explicit" language of the VREB regulations and the contract. Under this provision, however, your broker must give written notice and entertain objections. Upon such an objection, your broker may not release the deposit under any circumstances other than a court order. Quite often, unreasonable refusals to sign a release are predicated on a client's misapprehension of the law, the facts, or the customary practices of the real estate profession, and in those events the dispute resolution provisions of paragraph 17 of the REIN contract are quite helpful in resolving or correcting those misapprehensions.