

## ENTROPY, TERMINATION AND RELEASE

Entropy is a principle of thermodynamics that says (really, really, paraphrasing) that in a closed system things always go from a complicated state to an uncomplicated state over time. Naturally, the practice of residential real estate brokerage violates this law of science because it is inevitable that it gets more, rather than less, complicated over time. Just look at all the forms we've accumulated over the years and the length of the contract. This is because residential real estate is not a closed system, rather, it has lawyers in it. Heh.

Today I write because of one such new form. Realtor Judy Frates and I recently discussed termination vs. release at VPAR's recent Contract Writing Seminar as a result of the new REIN termination form. I would like to take a moment to summarize our thoughts on that topic.

At the outset, for the moment, let us dispense with the formal, defined, terms "termination" and "release". Rather, let us just examine how we "end" a REIN contract early, that is, prior to closing.

Most of the time we end a contract with an *agreement* to do so, and this is a very good thing because everyone knows exactly where they stand. In other words, all parties agree in writing that the contract is at end, the deposit may be released, and everyone is to go their separate ways. We naturally (and correctly) use the REIN release form to do so (Practice Tip: the release form has been changed to preserve rights to pursue commissions, so please be careful about this and make sure your client understands the risk or modify the form).

Sometimes the contract ends not because there is an agreement to do so exactly, but because the terms of the contract itself say it is to end. A low appraisal, lack of financing, etc. are examples of situations where the contract is to end by its terms. Here too it is normal and proper to use the release form to end things and dispose of the

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deposit and most such provisions in the contract *require* the parties to sign a release. Likewise, when the parties are unable to reach an agreement on home inspection repairs then the contract is to end, but in that case we might as well say no there is no contract because no meeting of the minds finally occurred. Regardless, a release is proper and appropriate to *confirm* there is no contract and dispose of the deposit.

Suppose though we have one of those situations where the contract gives a party the *unilateral* right to terminate and declare the contract at end. This usually occurs when there is a breach or default, and a good example would be a buyer's failure to apply for financing within 7 days. Under such circumstances the first question to ask is whether your client (in our example, the seller) seeks damages or just wants out. If your seller just wants out then tender and seek a release using the release form. It is perfectly appropriate to note on the *release* form that the seller is *terminating* the contract. What we are seeking by using the release form under these circumstances is an *agreement* about that state of facts and the (lack of) consequences thereafter.

As a result, one can see that current practice need not, and in our opinion should not, change as a result of there being a new form – the termination form – because under nearly all circumstances the parties will want an agreement to end the contract and agents will just continue existing practice to get it.

When then would the termination form be used? The form would be used when there is no agreement, i.e. when there is a dispute, whether the contract is at end. Back to our buyer-didn't-apply-for-financing-in-a-timely-fashion example: your seller does not want to let the buyer off the damages-hook because they lost another deal, i.e. the seller does not want to "release" the buyer. Or it may be that the buyer will not sign a release because the buyer literally disputes whether they applied in a timely fashion (or worse, whether being late is material despite the language of the contract). Under these circumstances, or similar circumstances where a party has a right to terminate but no release will be signed, one would use the termination form to declare the contract terminated (and state the reasons).

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Note that under such circumstances the Code of Ethics obligates you to recommend to your client that he seek legal counsel when the contract is in dispute (and the termination form has a reminder of this). And, frankly, this is one time where even if the client will not seek counsel you or your broker should do so before you send the termination form. If you alone make a determination that no contract exists or a party is in breach and blithely move forward you do so at your own peril. And just considering our previous example that peril is significant: you terminate because the buyer did not apply for financing until the 8<sup>th</sup> day, re-list the seller's house, and accept a new offer. Before that deal closes the buyer files suit and a *lis pendens* (record notice of their claim). You will not be able to close the second deal and your seller will be in breach of one of the two contracts for certain. Most agents will recognize you try to eliminate or temper that outcome by having a "subject to release" clause in the second contract, but ask yourself this: you know you are not going to get a release because it has already been denied, so what is the real point of making it subject to a *release* – what are you going to do when the second contract is supposed to close and you do not have a *release* of the first? Please work through these sorts of problems with your broker and counsel and do not send the termination form until you (or your client) have done so. Lawyers who practice in this area should know how to work a client and agent through these problems. I do so all of the time and this is one time when a good lawyer will help to validate the law of entropy and make things simple.

As always, please feel free to email me at [bdlytle@lytlelaw.com](mailto:bdlytle@lytlelaw.com) if you have any questions about this article or suggestions for future articles. Please help us raise money for CHKD by participating in the first annual **Lytle Law 5k** on May 5 – please visit [www.lytlelaw.com](http://www.lytlelaw.com) for details and registration.