

Earnest Money Deposit Disputes

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Numerous agents have trouble with knowing what to do when an escrow does not close and there is a dispute over the earnest money deposit. The scenario is generally like this:

Seller and buyer have entered into a purchase agreement. Buyer then cancels the deal because he cannot obtain financing. Seller wants to keep all of Buyer's earnest money. Buyer demands the return of her earnest money. Buyer's agent wants to know how she can help Buyer get his earnest money back.

The escrow company works for the clients, your buyers and sellers, and not for the brokers. The brokers have no authority to direct the payment of the earnest money. Don't lead your clients to believe that all you have to do is tell the escrow company that there is a default and then they will pay the earnest money to your client. If there is a dispute, the escrow company will not pay anyone. The escrow company can only pay if there is an agreement or they receive a court order telling them how to distribute the funds.

The first issue to determine is whether the Buyer is entitled to the return of her earnest money under the terms of the purchase agreement. The answer usually depends on whether the Buyer's performance under the agreement was contingent on her obtaining financing. Most purchase agreements provide that if the Buyer does not obtain financing, her performance under the agreement is excused and she is entitled to the return of her earnest money (less the costs of any inspections she agreed to pay for that have already been performed). The failure of a contingency is not a breach of the purchase agreement.

The escrow company can't and won't decide who has defaulted. The escrow company will not release the funds if one party refuses to sign a release form. The parties will have to negotiate or sue.

NRS 645A.175 directs how the escrow company's may distribute the money in escrow. This statute states that the only reason a party (the buyer or seller) may refuse to execute a form to distribute the funds in escrow is if a "good faith" dispute exists concerning the money. The client should go to his/her attorney to determine what is a "good faith" dispute.



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NRS 645A.175 gives the parties 30 days to resolve any dispute. After 30 days, the party injured by the failure of the other party to execute the document necessary to distribute the money in escrow, may collect from that party: (a) actual damages of not less than \$100 nor more than 1 percent of the purchase price or the real property, whichever is greater; (b) the money deposited in escrow which was not held to resolve a good faith dispute concerning the sale of the property; and (c) a reasonable attorney's fee.

Now what? Some purchase agreements agree to mediate any dispute between the Seller and Buyer. If that is in the contract, the parties must request mediation and begin the process. If that is not in the agreement, the injured party will need to file a law suit in the appropriate court.

The agent cannot request the mediation or file the law suit. That must be done by the injured party. The agent can tell the party how to get mediation forms from the broker's local association.

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