

DISPUTED EARNEST MONEY

One of the most common types of complaints brought to the attention of the Commission concerns disputed earnest money.

When a situation involving disputed earnest money occurs, the broker should first try to obtain a written agreement signed by the buyer and the seller releasing the broker from the custody of such money and instructing the broker as to the proper disbursement of same.

The Commission is aware of the fact that, in most cases involving disputed earnest money, the buyer and seller are not getting along and, in such cases, it is impossible for the broker to obtain a statement signed by both parties as contemplated above which forces the broker to use the next alternative of relying on the provisions of the purchase and sale agreement (forfeiture clauses and/or contingency clauses).

The broker may rely on the wording of a properly executed purchase and sale agreement under which said money was originally taken and which describes the manner in which division of funds shall occur in the event one of the parties fails to fulfill the terms of the contract.

In the event a broker disburses the earnest money in accordance with the terms of the purchase and sale agreement, the broker should, of course, keep accurate documentation in his/her files as to why the money was disbursed. Also, prior to such disbursement, the broker should notify both parties in writing as to the broker's intentions.

If the broker has made his or her best effort to accomplish all of the above, but still cannot determine how the earnest money should be disbursed, the parties involved should be notified that the money is being held in the trust account until the broker is ordered to disburse such funds by a court of competent jurisdiction (as required by section 54-2047, Idaho Code).

It should be kept in mind that the broker may be found civilly liable to the party not receiving the funds if the broker disburses the funds in a manner found to be inconsistent with the terms of the purchase and sale agreement.

Unless the broker has acted in a reckless manner by improperly holding or disbursing the earnest money, the Commission will not get involved in this type of problem. It is up to the buyer and seller to reach agreement concerning the problem or to get the matter resolved in civil court. If the dispute involves \$5,000.00 or less, then, in many cases, it may be handled in Small Claims Court. It is the broker's responsibility to use his or her best efforts to get the dispute resolved between the buyer and the seller.

IDAHO REAL ESTATE LICENSE LAW

54-2047. Disputed Earnest Money.

Any time more than one (1) party to a transaction makes demand on funds or other consideration for which the broker is responsible, such as, but not limited to, earnest money deposits, the broker shall:

- (a) Notify each party, in writing, of the demand of the other party; and
- (b) Keep all parties to the transaction informed of any actions by the broker regarding the disputed funds or other consideration, including retention of the funds by the broker until the dispute is properly resolved.

The broker may reasonably rely on the terms of the purchase and sale agreement or other written documents signed by both parties to determine how to disburse the disputed money and may, at the broker's own discretion, make such disbursement. Discretionary disbursement by the broker based on a reasonable review of the known facts is not a violation of license law, but may subject the broker to civil liability.

If the broker does not believe it is reasonably possible to disburse the disputed funds, the broker may hold the funds until ordered by a court of proper jurisdiction to make a disbursement. The broker shall give all parties written notice of any decision to hold the funds pending a court order for disbursement.