

DISPUTED EARNEST MONEY

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

The license law provides three options a broker can use to settle an earnest money dispute when the funds are “entrusted” to the broker. It gives no weight to one over the other. There is no order in which these options must be used.

1. When a situation involving disputed earnest money occurs, the broker may 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 method.

2. 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 must notify both parties in writing as to the broker’s intentions.

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.

3. If the broker cannot, or is unwilling to, make the decision based upon the written agreement, the broker should notify all parties that the entrusted funds will remain in the trust account until the broker is ordered to disburse such funds by a court of competent jurisdiction.

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 either through a broker initiated interpleader action or 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.

Many brokerages are allowing the buyer and seller to place earnest money at title companies and foregoing the keeping of a real estate trust account. In these cases, the monies are not considered “entrusted” and the broker has no responsibility to act upon the dispute. This becomes the responsibility of the title company who has its own laws to follow. In the event a title company is used, the broker is to inform all parties in writing that the title company will handle the dispute according to their procedures, and retain proper receipting and ledger card records.

This guideline is not a new law but is an agency interpretation of existing law.
For more information on this guideline, please contact:
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