

DISPUTED EARNEST MONEY

Many brokerages are requiring their clients to place earnest money at title companies in order to forgo the requirement of keeping a real estate trust account. In these cases, the monies are not considered “entrusted,” and the responsibility falls to the title company, which has its own requirements to follow. In these cases, during an earnest money dispute, the brokerage is to inform all parties, in writing, that the title company will handle the dispute according to their procedures; brokerages must also retain proper receipting and ledger card records.

This Guideline will explore the procedures for brokerages when an earnest money dispute occurs with “entrusted” consideration. As a reminder, any and all funds received by the broker are considered “entrusted” **UNLESS**:

- The parties have directed the broker, in writing, to transfer those funds to control of a third party, such as a title, escrow or trust company; **and**
- Neither the broker nor his licensees have any right to exercise control over the safekeeping or disposition of the funds

While the Commission regularly receives complaints concerning earnest money disputes, these disputes are considered a civil matter. Therefore, the Commission is not empowered to decide earnest money disputes or order to release of earnest money. However, Idaho Code 54-2047 provides brokers with three options for settling earnest money disputes involving “entrusted” consideration.

It should be noted that the law does not give weight to any of these options over the others. Furthermore, license law does not require that these options be utilized in any particular order. However, the Commission has presented these options below, in what it considers the most logical succession.

Option 1:

If an earnest money dispute occurs during a transaction, a broker may attempt to resolve the issue via a written agreement, signed by both the buyer and the seller. This agreement may release the broker as the custodian of the disputed earnest money, and provide directions as to the proper disbursement of the consideration.

While this option appears to be the simplest solution for everyone, depending on the level of disagreement between the buyer and the seller, it may not be the most realistic choice for resolution. Often, brokers may find the relationship between the buyer and seller has turned contentious, and either one or both parties are unwilling to concede to an agreement. Should this be the case, the broker should employ an alternative option.

Option 2:

Idaho Code 54-2051(4)(e) requires that all offers to purchase real property contain “A provision for division of earnest money retained by any person as forfeited payment should the transaction not close.” As such, a broker involved in an earnest money dispute may rely on the wording of the purchase and sale agreement as directions for the division of the funds in the event that the transaction fails or terminates.

Should a broker choose this route and disburse the earnest money in accordance with the terms of the purchase and sale agreement, the broker must first notify all parties involved in the transaction, in writing, of the broker’s intention. Furthermore, a broker in this situation should maintain accurate documentation within their files as to how and why the consideration was disbursed.

However, while this option may also appear to be as simple as the previous, brokers 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.

Option 3:

Brokers also have the option of holding the disputed, entrusted funds in their trust account until they are ordered to disburse the funds by a court of competent jurisdiction. Prior to utilizing this option, brokers must notify all parties involved in the transaction, in writing, of the decision. This option should only be utilized if the broker does not believe it is reasonably possible for the funds to be disbursed in accordance with the written instructions of the offer to purchase.

Ultimately, it is a broker’s responsibility to use their best efforts to get the dispute resolved between a buyer and a seller.

Unless a broker has acted in a reckless manner by improperly holding or disbursing earnest money, the Commission will not get involved in this type of problem. Rather, it is up to the buyer and seller to reach agreement concerning the dispute. If the buyer and seller are unable to come to an agreement on their own, they may choose to resolve the dispute through a broker-initiated interpleader action or in civil court. In many cases, if the dispute involves \$5,000.00 or less, it may be handled in Small Claims Court.

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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