

CP-6 Commission Position On Release of Earnest Money Deposits

(Revised Position 8-6-2008)

Rule E-15 states in part that: “When for any reason the owner fails, refuses, neglects or is unable to consummate the transaction as provided for in the contract, and through no fault or neglect of the purchaser the real estate transaction cannot be completed, . . . the deposit should be returned to the purchaser at once . . .”

The Commission will not pursue disciplinary action against a broker for refusal to disburse disputed funds when the broker is acting in accordance with the language of the appropriate Commission-approved contract to buy and sell. It is clear in the contract to buy and sell real estate that the broker holds the earnest money on behalf of both buyer and seller. If there is no dispute, the broker should disburse to the appropriate party immediately.

Some brokers unnecessarily require a signed release by both parties even when there is no disagreement. Audits have disclosed many instances where brokers have held deposits for extended periods just because one or both parties will not sign a release. While good judgment is always urged, releases are not a requirement of the Real Estate Commission. In addition, where one party has given written authorization for the release of a deposit to another, a written release by the other party is not required.

Exculpatory provisions holding the broker harmless do not belong in an agreement for the release of earnest money and should not be used to relieve the broker from liability unrelated to earnest money.

In the case of a dispute between the parties, the broker is authorized by the contract to buy and sell to obtain mutual written instructions (such as a release) before turning a deposit over to a party. The Commission has approved an optional use “Earnest Money Release” form when such a written release might help facilitate expeditious disbursement.

Unless otherwise indicated in the Commission-approved contract to buy and sell, a broker is not required to take any action regarding the release of the earnest money deposit when there is a controversy. If the following provisions are included in the contract, the broker may exercise three options in the event of an earnest money dispute, if the broker is the holder of the earnest money deposit. One option is that the broker may await any proceeding between the parties. Another option for the broker is to interplead all parties and deposit the earnest money into a court of competent jurisdiction. If included in the contract to buy and sell, the broker is entitled to recover court costs and reasonable attorney and legal fees. However, if this provision is struck from the contract to buy and sell, the broker may not be entitled to recovery those costs. A third option available to the broker is to provide notice to the buyer and seller that unless the broker receives a copy of the Summons and Complaint or Claim (between the buyer and seller) containing a case number of the lawsuit within one hundred twenty (120) days of the broker’s notice to the parties, the broker will be authorized to return the earnest money to the buyer.

If the broker is unable to locate the party due the refund, the broker may be required to transfer the deposit to the Colorado State Treasurer under the provisions of the Colorado “Unclaimed Property Act” C.R.S. 38-13-101. Notice of funds held is published in local newspapers under the “Great Colorado Payback Program” each year. Further information and reporting forms may be obtained from that office.

CP-7 Commission Position On Closing Costs

In the past, the Commission’s position had been that real estate licensees were responsible for all costs of closing. This position has been modified after a re-examination of the Colorado Supreme Court case of Conway-Bogue vs. The Denver Bar Association and after the adoption of Rule E-37.

Commission Rule E-37 states:

“There is no obligation for a licensee to prepare any legal documents as part of a real estate transaction. However, if a licensee or the licensee’s agent prepares any legal document, the licensee or the licensee’s agent may not charge a separate fee for preparation of such documents. A licensee shall not be responsible for fees charged for the preparation of legal documents where they are prepared by an attorney representing the purchaser or seller. Costs of closing not related to preparation of legal documents may be paid by the licensee or by any other person. A broker