

Contingencies and Cancellation

What is a contingency?

A contingency allows a buyer (or seller) to cancel a purchase agreement based upon the happening of a certain event. By default, all of the CAR purchase agreements contain contingencies for loan, appraisal, title, disclosures and investigations.

Must a contingency be removed in writing?

Yes, under the CAR purchase agreements, all contingencies must be removed in writing and signed off. Until that happens, the buyer (or seller) will retain a right to cancel based upon the open contingency.

Don't the contingencies expire after 17 days?

Yes and no. The contingencies are not waived automatically after 17 days. However, elapse of the 17-day period (or 21-day period for the loan contingency) allows the seller to deliver a Notice to Buyer to Perform (NBP) giving the buyer two days to remove contingencies. If the buyer doesn't, the seller may cancel.

Can the buyer cancel for any reason when there is an open contingency?

No. The cancellation right depends on the contingency. For the loan contingency, the buyer will have the right to cancel if they are unable to qualify for the designated loans. For the appraisal contingency, the buyer may cancel if the property does not appraise at the agreed upon purchase price. The investigation contingency is the broadest contingency. It gives the buyer the right to cancel if they are in good faith dissatisfied with the condition of the property or any matter affecting the condition of the property.

If a buyer properly cancels based upon an open contingency, do they lose their deposit?

No. The buyer would be entitled to retain their deposit. Since the buyer has the right to cancel, it is not a breach of the contract. And since it is not a breach, the seller cannot claim damages. However, an agent should never provide assurances that the buyer will get their deposit back. Ultimately, if a seller is refusing to release the deposit from escrow, the dispute may go to court or arbitration.

If a seller cancels after delivery of a NBP, is the seller entitled to keep the buyer's deposit?

No. The CAR contracts are very clear on this point. A seller who cancels after delivery of a NBP must authorize the release of the deposit back to the buyer. (See paragraphs 14D(1) and (2) of the RPA-CA). The most typical scenario in which the seller might retain the deposit is if the seller cancels for failure of the buyer to close escrow after the buyer has removed all contingencies. But in that situation, the seller should be delivering a Demand to Close Escrow (Form DCE), not a NBP.