

Assignee or Nominee: What is the Difference?

What is an assignee? What is a nominee? An assignee is generally understood to be one who contractually agrees to assume, or take-over, the burdens of the originally responsible party – the assignor. A nominee is generally understood to mean one who is appointed by the originally responsible party but who has not contractually agreed to assume those responsibilities. In a real estate transaction, typically the assignee or nominee becomes the buyer in place of the named buyer in the contract.

Why does it matter? Because a nominee is not legally obligated to complete the duties of the originally responsible party, if the contract permits the buyer to nominate another to take its place, arguably there is not an enforceable contract. First, there may be a lack of mutual consideration since only one side is contractually obligated to perform. Second, the identity of the buyer may not be sufficiently certain which raises questions about whether the contract satisfies the Statute of Frauds. If a listing broker brings in a buyer who writes a full price and term offer in the name of a “buyer or nominee,” the broker may not have earned a commission for procuring a ready, willing and able purchaser because the offer is indefinite and uncertain.

What does the C.A.R. purchase agreement say? The RPA, and all other C.A.R. purchase agreements, allows a buyer to assign the contract to a third party with the written consent of the seller. The seller’s consent shall not be unreasonably withheld. The seller’s consent is required unless the assignee is the buyer’s own trust or a wholly owned entity of the buyer. Whether consent is required or not, the assignor must disclose to the seller the name of the assignee and any consideration the original buyer receives for the assignment; the assignee must qualify with a lender the same as the originally named buyer; and the assignee must already be in existence at the time the original contract is signed. The originally named buyer remains responsible for completing the purchase if the assignee does not perform.

Why would a contract provide for a nominee rather than an assignee? A contract providing for a nominee might be enforceable if both buyer and seller understood that the buyer was going to create an entity after the contract was signed and then, before closing, transfer the contract to that entity. In that case, both buyer and seller could be said to have agreed the buyer would use good faith to set up the entity and the contract would fail if for some reason that was not possible. The seller has no right to disapprove of the entity. The nomination acts sort of like a contingency. That type of mutual agreement could create a valid contract. But is that what most sellers would expect? Another possibility would be if the nominee was acting as a mere agent of and for the named buyer, the way many people think of a revocable trust. Today, since seller consent is not needed to assign to a buyer’s wholly owned entity or trust, and since creating such entities or trusts are not difficult and can be easily done before contract, writing a contract in the name of the “buyer or nominee” is generally not needed, and any advantage of doing so could be outweighed by the risk of creating an unenforceable agreement.

December 2022 Revision to RPA: Nominee is interchangeable with assignee. Most residential parties and real estate practitioners do not understand the implications of writing, “or nominee” into a contract, yet the practice persists. The December 2022 version of the RPA has language to address that bad practice. A nominee will be treated the same as an assignee, and shall follow the same procedures, requirements and terms imposed upon an assignee by the contract. Nominee effectively means the same thing as assignee. If any other meaning is intended, the nominee language should be prepared by legal counsel.