CALIFORNIA ASSOCIATION OF REALTORS®

QUICK GUIDE

Deposit Disputes When There Is No Deposit

Even though a deposit is not required to create a binding real estate contract, most sellers will insist that the buyer make a deposit to "put some skin in the game" to demonstrate the buyer's good faith intention to proceed with the transaction and provide the seller some assurance the buyer will perform.

What happens if the buyer does not make the deposit as promised?

Option 1: Seller can give the buyer a notice to buyer to perform (C.A.R. Form NBP).

Once the NBP is delivered, the Seller can cancel if buyer does not make the deposit within the required 2 days. Even though the buyer arguably is in breach for failing to make the deposit, under paragraph 14 of the RPA the seller is obligated to return the buyer's deposit anyway. Since the deposit was never made, no further action is required and that should be the end of it. Paragraph 14 provides a trade-off. It gives the seller the unilateral contractual right to cancel in exchange for giving up the right to the deposit to avoid a dispute over whether the buyer's breach is material, and therefore justifies a cancellation.

Option 2: Seller can do nothing and wait to find out if buyer closes escrow.

If buyer closes, great. If not, Seller can give buyer a demand to close escrow (C.A.R. Form DCE). If buyer does not close in 3 days, seller can pursue the buyer for damages for the buyer's failure to close.

What happens if there is a signed liquidated damages clause, and buyer does not make the deposit?

A liquidated damages clause only allows a seller to pursue the deposit actually paid by the buyer (capped at 3% of the price for residential property the buyer intends to occupy). Arguably, if no deposit is made, the liquidated damages clause is invalid and of no effect. The seller, after following the DCE process, should be able to pursue the buyer for actual damages resulting from the buyer's wrongful failure to close. If a court agrees, which it might under the general rule that a person (the buyer) cannot take advantage of their own wrong (failure to make the deposit). In that case, the damages amount would not automatically be set at the would-be deposit amount and the seller would have to prove actual damages, such as the difference between the contracted price and the price for which the property eventually sells.

What happens if there is a signed liquidated damages clause, and no contingencies, and the buyer does not make the deposit as agreed but then cancels in writing without a contractual justification?

Since the buyer has already repudiated the contract, the seller should be able to immediately pursue the buyer for damages for failure to close escrow. However, a more cautious approach is for the seller to give the buyer a DCE before cancelling and then bringing legal action for damages.

Because there are no cases interpreting the liquidated damages law under the situations described above, buyer and seller should seek the advice of a qualified California real estate attorney in these circumstances.