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Legal Hotline Q & A

Get the Facts: January 8, 2019

QUESTION:

I have been asked a few times about non-refundable earnest monies. If a seller, who is a builder, is requesting that earnest monies be released and become non-refundable, what precautions can be put in place to help protect the buyer? My agents get worried about writing language concerning such an issue. The main concern being how to protect the buyer in the event the seller does not perform? Any suggestions or thoughts you can share that you have seen from other agents?

ANSWER:

The Hotline lawyer cannot give broker the answer to this question that broker is seeking because it is the opinion of the Hotline lawyer that brokers should not be drafting language in a PSA that converts buyer's EM to some form of a non-refundable deposit or fee. There is language in the statewide forms Pre-Sale Addendum that allows seller/builder to collect a non-refundable payment for certain upgrades requested by buyer but that is the only language in the statewide forms system that makes any buyer deposit nonrefundable. If seller/builder can utilize those provisions of that form, then broker can create "non-refundable" money for seller/builder.

Otherwise, the responsible way for sellers to convert buyer's EM to a non-refundable fund is for seller to require buyer's waiver of all contingencies. If buyer has no contingencies, then buyer has no legal excuse for failing to perform the terms of the agreement and no right to recover the EM if buyer fails to perform the terms of the agreement. Similarly, however, if buyer has a contingency, then buyer's EM IS refundable if buyer triggers that contingency, notwithstanding a "non-refundable" provision to the contrary ... or at least buyer has that argument to make in defense of seller's retention of the EM based on conflicting terms of a purchase agreement drafted by a real estate broker. It is never okay for a real estate broker to draft a purchase agreement including terms that conflict with one another.

If "non-refundable" money is important to seller, then broker should advise seller to consult seller's lawyer for assistance in drafting a non-refundable provision. If seller's lawyer drafts an addendum and instruct seller's broker to include it with any counteroffer signed by seller, then listing broker must follow those instructions. Listing broker should not, however, draft the non-refundable EM provision for seller.

If broker represents buyer in this situation, then broker should advise buyer to seek legal counsel because the brokers discussed in this question are correct ... buyer's EM will likely be lost forever if it is released to seller prior to closing and seller is unable or unwilling to close.

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