

Are you kidding me?

By James L. Goldsmith, Esquire

It has come to our attention from points across the state, that members are modifying the *DEFAULT, TERMINATION AND RETURN OF DEPOSITS* (Paragraph 26 of the Agreement of Sale) to provide for a return of buyer's deposit within one day (yes one day) rather than the 180 days (by default) when there is a dispute. My reaction is pretty well summed up in the title to this article.

Allowing brokers to dispose of deposit monies in dispute is a relatively new (approximately 8 years) practice made available as a result of changes to the Rules and Regulations of the Real Estate Commission. Prior to this rule change, brokers were required to keep the disputed deposits in an escrow account pending a final order of court or agreement providing for distribution of the disputed funds signed by buyer and seller. All too frequently, deposits were ignored and brokers held "disputed" funds for eons. This was so even if it was clear to the broker who was entitled to the disputed deposit.

The Rules' change added a means by which brokers could rid themselves of these deposits. If the parties entered into a written agreement before a dispute arose, the broker could disburse the funds according to that agreement in the event a dispute later arose. (Reread the last sentence, if necessary.) PAR's Standard Forms Committee drafted such an agreement that you now find in Paragraph 26(C) of the standard agreement. It's the paragraph that says ". . . if there is a dispute over the entitlement to deposit monies that is not resolved ____ days (180 if not specified) after the Settlement Date . . . the Broker holding the deposit monies will, within 30 days of receipt of Buyer's written request, distribute the monies to the Buyer unless the Broker is in receipt of verifiable written notice that the dispute is the subject of litigation or mediation." This formula enables the broker to rid himself/herself of the deposit monies without having to decide a winner or loser. If the money is returned to the buyer, it does not extinguish the seller's right to sue for it even though there may be a collectability issue once the deposit is out of escrow.

Changing the 180 days to 30 days is one thing, but to reduce that time to a week or a day is bad practice and probably malpractice. It is likely to cause one or both of the brokers to face disciplinary charges if one of the consumers complains. Why?

Allowing a buyer to have a deposit back in a relatively short period of time when there is a dispute over entitlement to those funds imposes an unreasonable burden on a seller to initiate litigation and furnish proof to the broker holding the escrowed funds. How can any listing agent allow such a provision that is so adverse to his/her client?

Next, requiring a return of deposit in such order will make it very difficult for deposit-holding brokers to verify whether litigation or mediation has been initiated. Mistakes are likely to abound. Make a mistake with an escrow deposit and . . . well, need I say more?

The potential damage caused by shortening this time period so drastically argues against even requiring deposits. Any why do we require deposits? It measures the seriousness of the buyer and potentially holds the buyer's feet to the fire when a buyer could otherwise walk for any or no reason.

The Standard Forms Committee carefully studied reducing the time from a year to 180 days, as it did several years ago when the agreement underwent revision. It was studied and deliberate. My advice . . .

**Copyright © James L. Goldsmith, Esquire, 2017
All Rights Reserved**

Jim Goldsmith is an attorney with Caldwell & Kearns and serves as general counsel to PAR. A substantial portion of his practice is dedicated to providing advice and counsel to real estate licensees. He and his firm represent and defend real estate salespersons and brokers in civil lawsuits and licensing claims across the Commonwealth. Jim also defends REALTORS® in disciplinary hearings conducted by the Real Estate Commission. He routinely counsels employers on employee relations issues and is one of the voices of the PAR Legal Hotline. He may be reached at www.caldwellkearns.com.