

## Terminating the agreement of sale

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Terminating an agreement of sale falls into one of three categories: 1) termination based on law; 2) termination based on a contractual right; and 3) termination unsupported by law or contract. An example of termination based on law is where the agreement of sale fails to include a statement of the zoning classification if the property is zoned other than to permit single-family dwelling. In the event of such failure the agreement of sale, pursuant to the Real Estate Licensing and Registration Act, is voidable at the option of the buyer. Pennsylvania law also provides the buyer with a right of termination within five days of receipt of a certificate of resale pertaining to a condominium or a unit in a planned community. In both situations, the provisions of Pennsylvania law provide the buyer with a right of termination though, you will also find these rights repeated as terms in the standard agreement of sale. Terminating an agreement because of failure to state the zoning classification if other than single family, or terminating within five days receipt of a certificate of resale are both exercised in the same way that one would terminate an agreement of sale by virtue of a contractual right to do so.

An example of terminating based on a contractual provision is the right of seller to terminate when the buyer's mortgage commitment is not produced timely. Another example is when buyer terminates based on the results of an inspection performed under an inspection contingency.

Most terminations are based on a contractual right to do so and most of those fall into rights granted under the mortgage contingency clause or the inspection contingencies. Because the right of termination granted under these clauses is unilateral (it vests in only one party) they are easily exercised. A buyer who receives a home inspection report and is dissatisfied and wants to terminate the agreement, merely does so in writing. The document that is used to exercise a right of termination granted by the agreement is the Notice of Termination of Agreement of Sale (TER). It is as simple as that (or almost).

Many of you are questioning why I didn't reference PAR's release form, or you are asking isn't a release also necessary? I will get to that, but for the moment let's concentrate on the Notice of Termination which is the perfect form for the job.

If the agreement gives a party the right to terminate the agreement in writing, it's sufficient to write "I terminate" on a napkin and deliver it to the other licensee or party. While it is sufficient, it isn't best because there are questions of authorship and one might be confused as to which right is being exercised. PAR's termination form cures these problems. It is signed and can be witnessed and it asks the terminator to provide the basis for doing so. A release is not the perfect vehicle for exercising a right of termination. Why? If one party has the right to terminate by submitting written notice of termination, why submit a writing that requires two parties to sign? A release is an agreement and for an agreement to be effective its terms have to be approved by both parties. So what if a seller wants to terminate because the buyer has not produced a mortgage commitment timely? Assume that the seller, instead of using the appropriate form TER, selects a release and signs it. It is then forwarded to the buyer who refuses to sign. Why? The buyer thinks that his

mortgage commitment will be approved any minute and wants to wait until the commitment is received and then, per the agreement, send a copy of that commitment to the seller's agent, or seller, at which time the agreement is no longer terminable by the seller! Why would the seller not simply exercise the right of termination by doing what the agreement says, "notify buyer in writing?"

This is not to say that a release is not useful when a party terminates per a contract provision. Termination means that the agreement is ended, but it really doesn't say who gets the deposit and it doesn't tie loose ends that one might wish to accomplish by way of a release. A release clearly states that where the deposit is going and that each party gives up any right they may have against the other. It is an important form because it makes clear to the broker holding the escrow that he/she has the authority to transfer a deposit as per the release.

Time to turn to the other classification of terminating an agreement of sale. This is when one party, or both, wish to terminate an agreement and there is no basis for doing so in the agreement of sale. Examples include a buyer or seller who no longer wishes to consummate the transaction by virtue of any number of reasons (seller illness, buyer remorse, etc.).

Assume one of the parties wants to terminate, but doesn't have the right to do so under the agreement. What is the best way for this to be accomplished? Some buyers who want to back out of an agreement and who are still in their contingency period will have a home inspection as a pretext, and then use its findings to terminate. This wastes time and money, and ultimately puts an inspection report in the seller's hands who then must deal with the findings by modifying a disclosure, making a repair or frequently both.

Terminating without a contractual basis is not done by a Notice of Termination (TER). A Notice of Termination signed by one party is ineffective where there is no contractual provision allowing it. This is a situation where the release is the better form than the Notice of Termination.

A release is what? That's right, a contract and therefore both parties are required to sign. It is a contract that can undo a contract and that's why we would use it in this situation. Assuming both parties agree, a release is executed providing where the deposit is to go. In these situations it is not automatic or not necessarily intuitive where the deposit should go. This is a matter of negotiation that may be required in order to induce one party or the other to agree to terminate. This non-contractual termination is more frequently used when sellers, who have few contractual rights to terminate, wish to do so. I see this more frequently with aged sellers who, after signing an agreement of sale, suffer a worsening of a health condition or who simply have difficulty coping with the stress of an anticipated move.

Everything clear now?