

CONTRACT TERMINATION

This outline is a general treatment of the subjects covered and is not intended as legal advice or comprehensive answers to all questions, nuances, etc. that may come up in particular transactions.

I. Terminating a Contract:

- A. *Mutual Consent:* The parties to a contract may simply agree to terminate the contract on whatever terms they deem acceptable.
- B. *Default:* Paragraph 30 defines default and speaks generally to either party not carrying out the terms and conditions of the contract. Paragraph 30 also discusses remedies available to each party against the defaulting party.
- C. *Void:* Paragraph 35 of the NVAR standard contract discusses the consequences and procedures for a void contract.

II. Void Contract:

- A. There are numerous provisions in the contract that reference a void contract, some of which require certain actions. Some examples:
 - 1. *Financing Contingency:* Seller is able to give notice, buyer may opt to void the contract within 3 days of Seller's notice. In addition, Purchaser may void the contract by delivering a copy of the written rejection letter to the Seller.
 - 2. *Appraisal Contingency:* Same deadline rules as the financing contingency. Also, if the property does not appraise, Seller may lower the sales price or parties may mutually agree to some number in between. If parties fail to agree or do not respond within three day notice deadline, the contract becomes void. (Note: different procedure for FHA/VA appraisal).
 - 3. *Home Inspection:* In order to void the contract based on the home inspection contingency, Purchaser must deliver to Seller a copy of the entire home inspection report and notice voiding the contract or proactively void during the purchaser's election period.
 - 4. *POA Act:* Purchaser must give "notice of cancellation" in one of four (4) ways.
 - 5. *Repairs:* Five (5) day Notice requirement.

6. *Title*: Title is subject to commonly acceptable easements, covenants and restrictions of record; otherwise purchaser may declare the contract void.
7. *VA Residential Property Disclosure Statement*: If provided after acceptance of contract, Purchaser may terminate contract by giving written notice to seller either by hand delivery or U.S. mail on earlier of: three (3) days after delivery in person; five (5) days after delivery if mail; settlement on property, etc.
8. *FHA Appraisal*: No deadline date for appraisal. Purchaser can send 3 notices – Purchaser proceeds to settlement at the contract sales price, requests seller to lower the sales price to not less than appraised value, or voids the contract. All notices have three (3) day time periods for response. If no response, contract is void. Party may provide notice that the contract shall become void at 9 p.m. three (3) days after delivery unless recipient delivers to the other party notice of acceptance of the last delivered offer.
9. *Short Sale Contingency*: After deadline expires, purchaser may request seller send written approval letter within 3 days or contract becomes void.

B. Paragraph 35: If the Contract becomes void and of no further force and effect, without Default by either party, both parties will immediately execute a release directing that the Deposit be refunded in full to Purchaser according to the terms of paragraph 3 (Deposit).

1. Having the parties execute a release is the contractual next step to a void contract. The release itself does not void the contract.
2. A party's intention regarding a void contract should be clearly stated in a notice to the other party. *See new NVAR form Notice Voiding Contract.*
3. Along with such notice, a release form should be included for execution that also directs the return of the earnest money deposit pursuant to paragraph 35. (Sending a release by itself is not good practice and does not fully represent your client's interests).
4. Paragraph 30 (Default) of the contract states that if a party fails to execute a release when requested to do so in writing and a court finds that such party should have executed the release, the party who refused will pay for the attorney's fees and costs of the other party in the litigation.

III. Default: While there are provisions in the Contract that reference default (e.g., paragraphs 15&16), a default can occur in any number of ways.

- A. If either party believes the other has defaulted, a clear notice stating that should be delivered.
- B. Anticipatory Breach: This occurs when a purchaser has made clear he/she has no intention of closing the transaction. In this event, Seller should confirm purchaser's nonperformance in writing. After such confirmation, it is appropriate for Seller to re-list the property, even without an executed release.
- C. Ultimately, only a judge will determine default.

IV. Earnest Money Deposit:

- A. The EMD will be released in one of three ways. Paragraph 3 of the NVAR Contract provides that the Deposit will be held in escrow until:
 - 1. Credited toward the sales price at settlement;
 - 2. All parties have agreed in writing as to its disposition; or
 - 3. A court of competent jurisdiction orders disbursement and all appeal periods have expired.
- B. Option 1 or 2 above is highly preferable.
- C. Being clear and concise about your client's intentions should hopefully avoid the common challenges that surround the handling of the EMD.

- V. Conclusion: Consult with your clients about their objectives and intentions. Advise them to consult legal counsel if they have legal questions. However, once they decide to terminate the contract, provide a clear, unambiguous notice to the other side of such a decision. The absence of such notice can create ambiguity among the parties, which often leads to disputes and litigation. Moreover, where the contract calls for a specific procedure to void the contract, simply sending a release has no force or effect and can put your client in jeopardy (e.g., purchaser wants to void contract based on home inspection and just sends a release).

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