

MAILBAG – Earnest Money Deposits

Hello, Michigan Realtors® and welcome back to “From the Mailbag.” I’m Becky Berke, and today we are talking about one of the most frequently asked topics at our Legal Hotline. Earnest money deposits. Let’s get into those questions from the mailbag.

Question 1: Is an earnest money deposit required in order to have a legally binding contract to purchase real property?

Answer 1: No. An earnest money deposit is not required to have a binding purchase agreement. It’s rare to see a purchase agreement without one, but it’s not required.

Question 2: My seller entered into a purchase agreement that contains a clause that says that the earnest money deposit will become non-refundable if the closing does not occur by the date specified in the purchase agreement. The closing date has passed, but the buyer is disputing the release of the money. Since the contract says that the deposit is non-refundable, can the money be released to the seller?

Answer 2: No. If there is a dispute between the buyer and the seller over the EMD (and if the deposit is being held by a real estate broker), the MI Occupational Code says that a broker cannot release those funds to either party either: 1) the parties sign an agreement where they agree, in writing, as to who is entitled to the EMD; or 2) there’s a court order that says who is entitled to the EMD. In our scenario, the fact that one party’s claim to the deposit is clearly wrong does not make a difference. Since there’s a DISPUTE, it can’t be released yet.

Question 3: I am the listing agent. One week after a purchase agreement was signed, the buyer sent an email stating that he was backing out of the deal. The buyer is demanding that the sellers authorize the release of the buyer’s EMD and claims that the sellers cannot sell their home to anyone else until the parties sign a mutual release. Is this true?

Answer 3: No. If the first buyer has terminated the purchase agreement, the sellers are free to relist and sell their home to someone else. The sellers’ dispute with the first buyer over the earnest money does not need to be resolved before the home is sold. Note, however, that if there is any possibility that the first contract is still valid (meaning that the buyer could argue that the sale should still go through) then the seller should speak to legal counsel before entering into a new purchase agreement with a new buyer.

Question 4: Can the parties agree that the broker will not deposit the earnest money check until after a certain event takes place (for example, until after an inspection period has come and gone)?

Answer 4: Yes, but in that case the buyer should wait to deliver the check until AFTER that event takes place. Remember that the MI Occupational Code requires a salesperson to deliver an earnest money check to their broker upon receipt. And the broker, once they receive the check, must deposit it within two banking days of there being a binding purchase agreement in place. That that means is that, if the parties agree that the check won't be deposited until some later date...that's fine, but it also means that the buyer must wait to HAND OVER the check until that later date. Because once a real estate licensee receives the check, their hands are tied by the Occupational Code.

As always, thank you for tuning in to another installment of From the Mailbag. If you have any additional questions on earnest money deposits, please reach out to the email listed below. Take care, and we'll see you next time!