

Getting Paid Even if You Don't Close

If you are selling a wholesale or retail property, you want to know that if your buyer doesn't close you get their escrow deposit, after all that's the purpose of the escrow. You deserve the escrow because you now have to carry and re-sell the property all over again, which will likely take another 30 days to close. These carrying costs are coming out of your profit!

Here is the typical scenario – the buyer doesn't say anything through the inspection period and you know the deposit is now yours if he doesn't close. After all, you have carefully used clever and “super legal” clauses in your contract stating “If for any reason, including the buyer's inability to get financing, the buyer is unable to close, he forfeits his deposit.” No question here, and maybe you checked “cash” as the closing option or maybe even pulled the clever trick of using a “0” days inspection period. To cap it all off, you even put the closing date as “On or before.....” so there is no question the buyer had to close on or before a certain date and that there is no chance of a refund of his deposit. Right? **Wrong - unfortunately this is not the case!**

Whether you can find the buyer or not, and whether he agrees that he can't close, you call your friendly closing agent and tell him “Send me my escrow check!” To which he promptly responds “I'll send out the Release to the buyer and let you know when I get it back”. Anger starts to build within you and you start making a case for why you have all the legal angles covered and that you want your money, and immediately. Your attorney agrees and says you have an excellent case in court, but he can't be the judge and if you don't want to litigate, get the buyer to sign the Release.

You don't believe him and you call your buddies to find out the same thing – if the buyer doesn't sign, you don't get your money. Resolved to the solutions of either suing him and pay \$2,500 - \$4,000 for attorney's fees and with no absolutely positive chance of winning, you look at option number two – have your attorney call or send the buyer a letter asking him to “split” the escrow with you, or you will seek legal action. You can't sue your attorney; you are suing the buyer only for the amount of the escrow, so any recovery will be less the legal fees – assuming you win. Almost always, the easiest solution is for you and the buyer to each get half of the escrowed deposit. To me this is a travesty, the seller deserves the deposit and the buyer should be more responsible about getting bad mortgage advice or changing his mind at the last minute.

If this hasn't happened to you yet, it will if you do any amount of business, so be prepared. The frustrating part of this problem is you have to carry the property, re-market it, re-qualify another buyer, contract with him, go through the same escrow issue possibly and never be sure you will get but half of your escrow. I can hear the howls from readers saying that this didn't happen to them and they got their deposit back from their closing agent. I suspect that if you did the closing agent wasn't an attorney because he/she would have realized that his acting as a judge in “awarding” the escrow opened him to great personal liability. If your closing agent issued you the escrow, you better be careful about what other issues he/she might be overlooking that could materially affect you.

I have to admit this exact escrow issue happened to me a couple of times when I least expected it. A simple solution is to have the buyer make the escrow check to you or your company. One local investor has his company named something like “Hartford Escrow Company” when in fact he owns the company

and if the buyer defaults, he already has the money- let the buyer pay for an attorney which seldom happens. That's one solution but it may be impractical when a buyer wants to escrow with his attorney.

I mentioned a second solution that I have used for some time that when I started it, my closing attorney at the time said it was "brilliant". I wanted my escrow money and I took this action to make sure I got it. My experience with retail closing is that the buyer's mortgage broker, and personal friend, says the buyer can qualify for the loan. Often he may not have even pulled his credit, just estimated from his income what the buyer could afford. So as the closing date approaches and the mortgage broker finds out he can't get the buyer financing, he doesn't worry because it isn't his escrow and he knows that I will have to fight to get my escrow.

The first time I had to use this new technique I developed, the buyer's mortgage broker called me to say he couldn't get the buyer financed because he didn't realize the buyer wasn't a citizen and no one would co-sign for him. Oh yea, he said "just send him back his deposit". I said that I had a non-refundable deposit and it was "toast" as far as he should be concerned. He replied that he would not sign a Release and I would have to sue. Naturally, the mortgage broker called the day before the closing but I waited until the day after the "on or before" date on my contract and called the closing attorney and said "Send out the escrow check". His response was "It will be in the mail today", and NONE of the foolishness about having the buyer sign a Release. If the buyer doesn't show with cash or financing at the closing, I own his escrowed funds, NO Release necessary!

For some of you the solution to this escrow dilemma is probably fairly obvious, it wasn't to all the attorneys I have dealt with until I showed them what to do. So before you send your attorney an escrow check from a perspective buyer, ask him what will happen if the buyer defaults and how soon you can get "your" escrow money! If you don't like the answer, you better be prepared beforehand to have to sue or negotiate to get what you can.

Sorry to be so long-winded, but I am passionate about NOT getting my "escrow" deposits stolen back by the buyer who couldn't close.

Dave Dinkel with your Wednesday Minute.

Don't forget to take a look at these important software programs:

www.ExcelRESoftware.com (Failure-proof your real estate investing)

www.RequiredFLDocs.com (Must-have disclosure documents for every Florida investor)

www.FSBOAutopilot.com (For Sale by Owner Professional selling system to sell any home in one weekend)

www.StopMyForeclosureMess.com (32 Ways to Instantly Stop Foreclosure)