

Legal Webinar Series

Hot Topics from the Legal Hotline

DAVID JONES, RCE, SENIOR ASSOCIATE COUNSEL



Top 10 topics from the Legal Hotline

1. Updating the Seller's Disclosure Notice
2. Contract formation (execution and effective date)
3. Termination Option (fee delivery and notice)
4. Intermediary
5. Earnest Money disputes
6. Backup contracts
7. Rental repairs (who pays?)
8. Paying commission after agent leaves broker
9. Special provisions
10. Lender appraisal addendum (and Third party financing addendum)



If the seller learns of new information about their property after the Seller's Disclosure, does the seller have a duty to provide the new information to the buyer under the current contract?

Yes. Sellers are required by law to disclose any known material information about the property's condition, even if those conditions are revealed after the completion of the *Seller's Disclosure Notice*. This is not found in the TX Property Code, but in case law. Use *Update to Seller's Disclosure Notice* (TXR 14 18).



UPDATE TO SELLER'S DISCLOSURE NOTICE

USE OF THIS FORM BY PERSONS WHO ARE NOT MEMBERS OF THE TEXAS ASSOCIATION OF REALTORS®, INC. IS NOT AUTHORIZED.
©Texas Association of REALTORS®, Inc. 2018

UPDATE TO THE SELLER'S DISCLOSURE NOTICE CONCERNING THE PROPERTY AT _____

Seller is aware of the following new information regarding the condition of the Property. Section(s) _____ are changed to read (*cite specific sections and copy the applicable language in the sections verbatim, making any necessary changes*): _____



Do we have a binding contract? / When is the effective date?

EXECUTED the _____ day of _____, 20____ (Effective Date).
(BROKER: FILL IN THE DATE OF FINAL ACCEPTANCE.)

Page 8 of the *One to Four Family Residential Contract (Resale)* (TXR 1601) instructs Broker to fill in the “Date of Final Acceptance”.

Date of Final Acceptance = the day the last party to accept (sign) the contract communicates their acceptance to the other party.

Other related issues:

- Broker doesn't fill in Effective Date
- Buyer doesn't deposit Earnest Money. Earnest Money is not consideration!

Can the seller terminate because the buyer didn't pay the option fee?

No. The only consequence is that the buyer doesn't have the unrestricted right to terminate under paragraph 23.

Other related issues:

- If buyer doesn't deliver earnest money, then seller can terminate!
- Option fee is paid to seller (listing agent), not the title company.
- 5 pm deadline only applies to the notice to terminate, not payment of the option fee.

23. TERMINATION OPTION: For nominal consideration, the receipt of which is hereby acknowledged by Seller, and Buyer's agreement to pay Seller \$_____ (Option Fee) within 3 days after the Effective Date of this contract, Seller grants Buyer the unrestricted right to terminate this contract by giving notice of termination to Seller within _____ days after the Effective Date of this contract (Option Period). **Notices** under this paragraph must be given by 5:00 p.m. (local time where the Property is located) by the date specified. If no dollar amount is stated as the Option Fee or **if Buyer fails to pay the Option Fee to Seller within the time prescribed, this paragraph will not be a part of this contract and Buyer shall not have the unrestricted right to terminate this contract.** If Buyer gives notice of termination within the time prescribed, the Option Fee will not be refunded; however, any earnest money will be refunded to Buyer. The Option Fee will will not be credited to the Sales Price at closing. **Time is of the essence for this paragraph and strict compliance with the time for performance is required.**

Does a listing broker have to act as an intermediary if an unrepresented buyer is interested in their client's property?

No. The broker may represent the seller only. There is no law requiring a buyer be represented in a transaction. Broker's should make it clear that they only represent the seller. Use *Representation Disclosure*(TXR 1417).

Other related issues:

- Only the broker can be the “intermediary”.
- The broker can appoint sales agents to represent buyer and seller.
- The broker cannot appoint themselves to one side.
- If no appointments are made, the broker cannot give advice and opinions to their client.

Yada, yada, yada...who gets the Earnest Money

In some cases, the terms of the contract determine which party receives the earnest money:

- If buyer terminates under the Option Period or Third-Party Financing, buyer receives earnest money

If no specific term applies, paragraph 15, the Default provision kicks in. The non-defaulting party gets to either:

- Terminate and receive earnest money as liquidated damages,
- Sue for specific performance, and/or
- Seek other relief as provided by law (sue for damages).

Paragraph 18(D) Escrow (One to Four Family contract):

D. DAMAGES: Any party who wrongfully fails or refuses to sign a release acceptable to the escrow agent within 7 days of receipt of the request will be liable to the other party for (i) damages; (ii) the earnest money; (iii) reasonable attorney's fees; and (iv) all costs of suit.

If the backup contract never moves into the primary backup buyer refunded the earnest money and option fee?

The earnest money is returned to the backup buyer, but the seller keeps the option fee.

Other related issues:

- *Addendum for "Back-Up" Contract* (TXR 1909)
 - The backup contract is binding when executed
 - Backup buyer must deliver earnest money and option fee 3 days after execution
- A. The contract to which this Addendum is attached (the Back-Up Contract) is binding upon execution by the parties, and the earnest money and any Option Fee must be paid as provided in the Back-Up Contract. The Back-Up Contract is contingent upon the termination of a previous contract (the First Contract) dated _____, 20_____, for the sale of Property. Except as provided by this Addendum, neither party is required to perform under the Back-Up Contract while it is contingent upon the termination of the First Contract.

The tenant asked for the carpet to be replaced because it needs repair. Is the landlord required to replace the carpet?

No. Neither the Texas Property Code nor the *Residential Lease* (TXR 2001) requires the landlord to replace or repair something like this. TXProp. Code 92.052 requires a landlord to make a diligent effort to repair or remedy a condition if the condition “materially affects the physical health or safety of an ordinary tenant...”

Other related issues:

- The *Residential Lease* is written to comply with TXProperty Code.
- Landlord will pay for heating and air conditioning systems, water heaters, or water penetration from structural defects.
- Landlord will not pay for items that are cosmetic in nature, such as worn carpet in this example.

One of my agents left my brokerage with a pending still owe them a commission when the transaction closes?

It depends on the agreement you have with the agent. Under the *Independent Contractor Agreement for Sales Associate* (TXR 2301), fees paid to a sponsored agent after termination is a negotiable term.

Other related issues:

- The previous broker can pay the agent directly. It does not go through the new broker.

B. Entitlement to Fees: Any fee to Associate that remains unpaid on the date of termination will be paid in accordance with:

(1) the attached fee schedule.

(2) _____,
which is incorporated into this agreement.

I want to protect my client; can I write in special p

NO

TREC Rule 537.11(b) prohibits license holders from drafting language defining or affecting the rights, obligations or remedies of the principals of a real estate transaction, including escalation, appraisal or other contingency clauses.

Article 13 of the Code of Ethics states, “Realtors® shall not engage in activities that constitute the unauthorized practice of law and shall recommend that legal counsel be obtained when the interest of any party to the transaction requires it.”

My buyer is submitting an offer above the list price and is providing extra cash to closing if the property doesn't appraise. What form do we use?

Addendum Concerning Right to Terminate Due to (Texas) (94.8)

The financing described in the Third Party Financing Addendum attached to the contract for the sale of the above-referenced Property does not involve FHA or VA financing. *(Check one box only)*

- (1) **WAIVER.** Buyer waives Buyer's right to terminate the contract under Paragraph 2B of the Third Party Financing Addendum if Property Approval is not obtained because the opinion of value in the appraisal does not satisfy lender's underwriting requirements.

If the lender reduces the amount of the loan due to the opinion of value, the cash portion of Sales Price is increased by the amount the loan is reduced due to the appraisal.

- (2) **PARTIAL WAIVER.** Buyer waives Buyer's right to terminate the contract under Paragraph 2B of the Third Party Financing Addendum if:

(i) Property Approval is not obtained because the opinion of value in the appraisal does not satisfy lender's underwriting requirements; and

(ii) the opinion of value is \$_____ or more.

If the lender reduces the amount of the loan due to the opinion of value, the cash portion of Sales Price is increased by the amount the loan is reduced due to the appraisal.

- (3) **ADDITIONAL RIGHT TO TERMINATE.** In addition to Buyer's right to terminate under Paragraph 2B of the Third Party Financing Addendum, Buyer may terminate the contract within _____ days after the Effective Date if:

(i) the appraised value, according to the appraisal obtained by Buyer's lender, is less than \$_____; and

(ii) Buyer delivers a copy of the appraisal to the Seller.

If Buyer terminates under this paragraph, the earnest money will be refunded to Buyer.

Third Party Financing Addendum (TFR 1901), Paragraph

B. PROPERTY APPROVAL: If Buyer's lender determines that the Property does not satisfy lender's underwriting requirements for the loan (including but not limited to appraisal, insurability, and lender required repairs) Buyer, not later than 3 days before the Closing Date, may terminate this contract by giving Seller: (i) notice of termination; and (ii) a copy of a written statement from the lender setting forth the reason(s) for lender's determination. If Buyer terminates under this paragraph, the earnest money will be refunded to Buyer. If Buyer does not terminate under this paragraph, Property Approval is deemed to have been obtained.

Thank You

Legal Hotline
800-873-9155