Real Estate Earnest Money Contract Issues

Purpose: the purpose of this paper is to highlight common issues that arise from the standard earnest money contracts and to offer some suggestions on how best to address these issues and educate our customers. Throughout this paper you will find sections that I've pulled from the standard TREC 1-4 Family Contract as well as some provisions from the standard TAR Contract. Each of these provisions appear at the beginning of each section as green font as an effort to distinguish the promulgated language of the forms from my notes and commentary.

A. Who gets to pick the title company that will issue the owner policy of title insurance?

The seller is contractually obligated to deliver good title; therefore, they are typically the one to pay for the title policy. Since the seller pays for the policy the seller will argue that they should be able to choose the title company. However, the buyer will argue that they are the beneficiary of the title policy, and have the right to determine who will provide the title policy. Both arguments are valid arguments and have historically been freely negotiated between the parties.

Some real estate practitioners are under the mistaken belief that the Real Estate Settlement and Procedures Act ("RESPA") prohibits a seller from requiring a buyer to close at a certain title company. However, prohibition under RESPA only applies if 1) the purchaser is obtaining a federally backed loan, and 2) the buyer is required to pay for the policy.

An additional argument is that the buyer is paying for the loan policy and should have the opportunity to choose the company.

The following was offered by the Texas Association of Realtors:

"It depends. If the seller pays for both the owner policy and the lender policy of title insurance, then the seller can pick the title company without violating the Real Estate Settlement and Procedures Act. However, if the buyer pays for the owner policy, then the seller cannot condition the sale of the property on the buyer purchasing the owner policy from a particular title company. Rather, the buyer would get to pick the title company.

In situations where the seller pays for the owner policy and the buyer pays for the lender policy, RESPA application is less clear. At least one court has held that, where the seller paid for the owner policy and the buyer paid for the lender policy, the seller did not violate RESPA by insisting on a particular title company for the owner policy. The court explained that the seller did not require as a condition of sale that the buyer use that same title company to issue the lender policy.

However, the Consumer Financial Protection Bureau, the government agency that enforces RESPA, has yet to take an official position on the law's application in this scenario. Therefore, if a seller wants to avoid a possible violation of RESPA, the seller should not insist on a particular title company for the transaction unless the seller is paying for both the owner policy and the lender policy of title insurance."

B. Earnest Money. Section 5.

EARNEST MONEY: Upon execution of this contract by all parties, Buyer shall deposit $_____ as earnest money with _____, as escrow agent, at _____ (address). Buyer shall deposit additional earnest money of $_____ with escrow agent within _____ days after the effective date of this contract. If Buyer fails to deposit the earnest money as required by this contract, Buyer will be in default.

- **If earnest money is required you should receipt it immediately upon receipt and deposit the same as soon as possible.**
- **If the earnest money check bounces then you should give the performing party the opportunity to deliver good funds within a short time period (24-48 hours). If they fail to deliver good funds then you should notify the other party of their failure to deliver the earnest money.**
- **If additional funds are required after a defined period then the escrow agent should note the same and communicate with the parties if funds are not delivered within the time period defined in the contract.**

C. Option Fee. Section 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 2 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). 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.**

- **Do not hold the option fee check for the parties. It is the responsibility of the real estate agents to make sure the option fee check is delivered to the seller.**

D. Delivery of Commitment and Supporting Documents. Section 6.B.

COMMITMENT: Within 20 days after the Title Company receives a copy of this contract, Seller shall furnish to Buyer a commitment for title insurance (Commitment) and, at Buyer's expense, legible copies of restrictive covenants and documents evidencing exceptions in the Commitment (Exception Documents) other than the standard printed exceptions. Seller authorizes the Title Company to deliver the Commitment and Exception Documents to Buyer at Buyer's address shown in Paragraph 21. If the Commitment and Exception Documents are not delivered to Buyer within the specified time, the time for delivery will be automatically extended up to 15 days or the Closing Date, whichever is earlier. If, due to factors beyond Seller’s control, the Commitment and Exception Documents are not delivered within the time required, Buyer may terminate this contract and the earnest money will be refunded to Buyer.

- **Copies of exception documents should be delivered to the buyer with the commitment as required under the contract**
- **If you choose to charge the customer for the copies, the fee should be charged to the purchaser as stated in the contract.**

E. Reservations

The following is from the TREC Farm and Ranch Contract Section 2.F.:

RESERVATIONS: Any reservation for oil, gas, or other minerals is described on the attached TREC addendum. Seller reserves the following water, timber, or other interests: _____.

- **Under the TREC 1-4 contract you often find statements regarding mineral reservations added to the "SPECIAL PROVISIONS" section.**
- **If the contract is silent then all minerals owned are to be included. In Texas, all minerals are considered part of the real estate unless they were previously severed from the surface.**
- **Terminology used by the parties is very important.**
  - **Many realtors will include that "All minerals are to convey" when in fact what they intend is that "All minerals currently owned by seller, if any, will convey."**
- **The contract could also be made contingent upon the buyer receiving a certain percentage of the mineral interest.**
  - **If this is the case, the parties should get a mineral opinion and you should make it clear that the title company is not providing one through the issuance of our commitment. Remember that neither the Commitment nor any of our policies of title insurance are a representation of title or show the "status of title." If a consumer or lawyer wants your commitment so that they can "see what minerals they are getting," they should be reminded that the commitment does not fulfill that request. Again, the commitment is not a representation of title. The commitment is a contract showing how we agree to insure the title. The items listed on Sch. B are what is "not covered" by the policy.**
  - **The title company does NOT have to research minerals or provide mineral coverage in a policy. A policy that insures "Fee simple" covers the minerals unless the minerals are excepted from coverage by specific reference to mineral documents of record or by exclusion of minerals from fee simple in Sch. A or general exception to minerals in Sch. B, as now authorized under Procedural Rule P-5.1. The promulgated wording of P-5.1 below is the only "general" mineral exception language that can be used.**

    "All leases, grants, exceptions or reservations of coal, lignite, oil, gas and other minerals, together with all rights, privileges, and immunities relating thereto, appearing in the Public Records whether listed in Schedule B or not. There may be leases, grants, exceptions or reservations of mineral interest that are not listed."

- **The management of each title company should decide whether the title examiner will research and set out specific mineral exceptions in commitments and policies or whether they will not cover minerals at all and institute internal procedures accordingly. This decision will be based on several factors, some being: tradition of mineral coverage in the area (it is handled very differently in different parts of the State of Texas), whether**

the title plant contains all mineral documents at least back to 1900 (most underwriters require a mineral search back to that date), whether title examiners have the experience and ability to determine mineral document application, customer requirements and competitive issues.

- **If you research minerals, on any title where there appears to be a prior complete severance or conveyance of all minerals or if in the current transaction the seller is reserving all minerals, always include the general exception of P-5.1 so that there is no potential for a claim for missed or misread mineral exceptions.**

- **What about surface rights? In Texas, the owner of a mineral interest holds a superior right to enter upon the surface of the property and drill a well, subject to municipal and other regulations.**

    - **The Mineral Addendum addresses this issue and the parties should be encouraged to use the addendum offered by TREC.**
    - **If terms regarding the mineral estate are included in the contract the title company should make sure the party drafting the deed has a copy of such provisions.**
    - **The TREC Addendum for Reservation of Oil, Gas and Other Minerals is attached hereto for reference.**

F. Sales Price Adjustments based on survey.

The following is from the TREC Farm and Ranch Contract Section 3.D.:

The Sales Price ☐ will ☐ will not be adjusted based on the survey required by Paragraph 6C. If the Sales Price is adjusted, **the Sales Price will be calculated on the basis of $_____ per acre.** If the Sales Price is adjusted by more than 10%, either party may terminate this contract by providing written notice to the other party within _____ days after the terminating party receives the survey. If neither party terminates this contract or if the variance is 10% or less, the adjustment will be made to the amount in ☐ 3A ☐ 3B ☐ proportionately to 3A and 3B.

The following is from the TAR Contract:
Adjustment to Sales Price: *(Check (1) or (2) only.)*
☐ (1) The sales price will not be adjusted based on a survey.
☐ (2) The sales price will be adjusted based on the latest survey obtained under Paragraph 6B.
(a) The **sales price is calculated on the basis of $ _____per**:
☐ (i) square foot of ☐ total area ☐ net area.
☐ (ii) acre of ☐ total area ☐ net area.

(b) "Total area" means all land area within the perimeter boundaries of the Property. "Net area" means total area less any area of the Property within:
☐ (i) public roadways;
☐ (ii) rights-of-way and easements other than those that directly provide utility services to the Property; and
☐ (iii) _____.

(c) If the sales price is adjusted by more than _____% of the stated sales price, either party may terminate this contract by providing written notice to the other party within _____ days after the terminating party receives the survey. If neither party terminates this contract or if the variance is less than the stated percentage, the adjustment to the sales price will be made to the cash portion of the sales price payable by Buyer.

- **NOTE: both contract forms indicate that the Sales Price will be calculated based on a price per acre. The contracts don't state that the difference in the acreage amounts will be calculated on a price per acre. This can create disputes between the parties if they have different interpretations of this provision. I see this most often in instances where a ranch is being sold that also includes a house.**

G. Survey Provision

Section 6.C.(1) of the TREC 1-4 Family Contract provides:

SURVEY: The survey must be made by a registered professional land surveyor acceptable to the Title Company and Buyer's lender(s). (Check one box only)
(1) Within _____ days after the effective date of this contract, Seller shall furnish to Buyer and Title Company Seller's existing survey of the Property and a Residential Real Property Affidavit promulgated by the Texas Department of Insurance (T-47 Affidavit). **If Seller fails to furnish the existing survey or affidavit within the time prescribed, Buyer shall obtain a new survey at Seller's expense no later than 3 days prior to Closing Date.** If the existing survey or affidavit is not acceptable to Title Company or Buyer's lender(s), Buyer shall obtain a new survey at ☐Seller's ☐Buyer's expense no later than 3 days prior to Closing Date.

The TREC Farm and Ranch Contract further provides:
The existing survey ☐ will ☐ will not be recertified to a date subsequent to the effective date of this contract at the expense of ☐ Buyer ☐ Seller.

The TAR Contract includes the following provision regarding survey coverage in the Policy:
(2) The standard printed exception as to discrepancies, conflicts, or shortages in area and boundary lines, or any encroachments or protrusions, or any overlapping improvements:
☐ (a) will not be amended or deleted from the title policy.
☐ (b) will be amended to read "shortages in areas" at the expense of ☐ Buyer ☐ Seller.

- **It is important to note upon receipt of the contract as you will want to convey to the parties that the detail and certification of the survey should be satisfactory to the Title Company and its underwriter.**

  Typical Certification language (there may be some variation among the certifications, but basically it should say):

  "The undersigned does hereby certify that this survey was this day made on the ground of the property legally described hereon and is correct and that there are no visible: discrepancies, deed line conflicts, encroachments, overlapping of improvements, visible easements or roadways, except as shown hereon and that said property has frontage on a public roadway, except as shown hereon."

H. Objections. Section 6.D.

OBJECTIONS: Buyer may object in writing to defects, exceptions, or encumbrance to title: disclosed on the survey other than items 6A(1) through (7) above; disclosed in the Commitment other than items 6A(1) through (8) above; or which prohibit the following use or activity: _____ _____.
Buyer must object the earlier of (i) the Closing Date or (ii) _____days after Buyer receives the Commitment, Exception Documents, and the survey. Buyer's failure to object within the time allowed will constitute a waiver of Buyer's right to object; except that the requirements in Schedule C of the Commitment are not waived by Buyer. Provided Seller is not obligated to incur any expense, Seller shall cure the timely objections of Buyer or any third party lender within 15 days after Seller receives the objections and the Closing Date will be extended as necessary. If objections are not cured within such 15 day period, this contract will terminate and the earnest money will be refunded to Buyer unless Buyer waives the objections.

- **Objections (tied to delivery, so it is important from our perspective)**
- **If you receive an objection letter you should respond in a timely manner with a response as to matters that can be addressed by the title company.**

I. HOA Membership. Section 6.E.(2).

MEMBERSHIP IN PROPERTY OWNERS ASSOCIATION(S): The Property ☐is ☐is not subject to mandatory membership in a property owners association(s). If the Property is subject to mandatory membership in a property owners association(s), Seller notifies Buyer under §5.012, Texas Property Code, that, as a purchaser of property in the residential community identified in Paragraph 2A in which the Property is located, you are obligated to be a member of the property owners association(s). Restrictive covenants governing the use and occupancy of the Property and all dedicatory instruments governing the establishment, maintenance, or operation of this residential community have been or will be recorded in the Real Property Records of the county in which the Property is located. Copies of the restrictive covenants and dedicatory instruments may be obtained from the county clerk. **You are obligated to pay assessments to the property owners association(s). The amount of the assessments is subject to change. Your failure to pay the assessments could result in enforcement of the association's lien on and the foreclosure of the Property.**

Section 207.003, Property Code, entitles an owner to receive copies of any document that governs the establishment, maintenance, or operation of a subdivision, including, but not limited to, restrictions, bylaws, rules and regulations, and a resale certificate from a property owners' association. A resale certificate contains information including, but not limited to, statements specifying the amount and frequency of regular assessments and the style and cause number of lawsuits to which the property owners' association is a party, other than lawsuits relating to unpaid ad valorem taxes of an individual member of the association. These documents must be made available to you by the property owners' association or the association's agent on your request.

If Buyer is concerned about these matters, the TREC promulgated Addendum for Property Subject to Mandatory Membership in a Property Owners Association(s) should be used.

- **I find it hard to believe that there are many buyers out there that would not be concerned about these matters and thus the parties should be encouraged to use the TREC HOA Addendum.**
- **This addendum will also give the title company more guidance and protection regarding HOA fees that are to be collected prior to or at closing.**

J. Residential Service Contract. Section 7.H.

RESIDENTIAL SERVICE CONTRACTS: Buyer may purchase a residential service contract from a residential service company licensed by TREC. If Buyer purchases a residential service contract, Seller shall reimburse Buyer at closing for the cost of the residential service contract in an amount not exceeding $_____. Buyer should review any residential service contract for the scope of coverage, exclusions and limitations. **The purchase of a residential service contract is optional. Similar coverage may be purchased from various companies authorized to do business in Texas.**

- **It's best if you allow the Realtors to order the service contract from the provider of their choice with the coverage of their choice. The closer should always remit payment as soon as possible upon funding.**

K. Closing. Section 9

The closing of the sale will be on or before _____, 20___, or within 7 days after objections made under Paragraph 6D have been cured or waived, whichever date is later (Closing Date). If either party fails to close the sale by the Closing Date, the non-defaulting party may exercise the remedies contained in Paragraph 15.

- **If the closing date cannot be met the parties should always execute an amendment extending the date.**
- **It's extremely important to obtain contract revisions and amendments as necessary to correspond with the closing.**
  - **Always have the contract amended if you find that you are not closing in compliance with it.**
- **Do not rely on E-mails as contract amendments or disbursement instructions. You should always have written instructions by the parties to the contract when it comes to deviations from the contract.**

L. Possession. Section 10.

POSSESSION: Seller shall deliver to Buyer possession of the Property in its present or required condition, ordinary wear and tear excepted: ☐upon closing and funding ☐according to a temporary residential lease form promulgated by TREC or other written lease required by the parties. Any possession by Buyer prior to closing or by Seller after closing which is not authorized by a written lease will establish a tenancy at sufferance relationship between the parties. **Consult your insurance agent prior to change of ownership and possession because insurance coverage may be limited or terminated. The absence of a written lease or appropriate insurance coverage may expose the parties to economic loss.**

- **It's always important to make sure your parties understand what "upon closing and funding" means.**

M. **Seller contributions. Section 12.A.(1)(b).**

Seller shall also pay an amount not to exceed $_____ to be applied in the following order: Buyer's Expenses which Buyer is prohibited from paying by FHA, VA, Texas Veterans Land Board or other governmental loan programs, and then to other Buyer's Expenses as allowed by the lender.

- **Should not result in cash back beyond what the buyer has paid into the closing out of their pocket (option fee, earnest money, appraisal paid prior to closing, etc.)**
- **Buyers often interpret this provision to mean they will get these funds regardless of the amount allowed by the lender or by law.**
- **This provision is separate from any other provision in the contract regarding fees. If seller is to provide survey, HOA info or residential service contract then those provisions regarding payment are separate from this provision and those fees should not be used towards the seller contribution.**

N. **Prorations. Section 13.**

PRORATIONS: Taxes for the current year, interest, maintenance fees, assessments, dues and rents will be prorated through the Closing Date. The tax proration may be calculated taking into consideration any change in exemptions that will affect the current year's taxes. If taxes for the current year vary from the amount prorated at closing, the parties shall adjust the prorations when tax statements for the current year are available. If taxes are not paid at or prior to closing, Buyer shall pay taxes for the current year.

The TREC Farm and Ranch Contract further provides:
ROLLBACK TAXES: If this sale or Buyer's use of the Property after closing results in the assessment of additional taxes, penalties or interest (Assessments) for periods prior to closing, the Assessments will be the obligation of Buyer. If Seller's change in use of the Property prior to closing or denial of a special use valuation on the Property claimed by Seller results in Assessments for periods prior to closing, the Assessments will be the obligation of Seller. Obligations imposed by this paragraph will survive closing.

- **Tax prorations are required under the standard contracts. If the parties choose not to prorate then they should either strike this provision and initial it or execute an amendment that deletes the provision.**

O. **Default. Section 15.**

DEFAULT: If Buyer fails to comply with this contract, Buyer will be in default, and Seller may (a) enforce specific performance, seek such other relief as may be provided by law, or both, or (b) terminate this contract and receive the earnest money as liquidated damages, thereby releasing both parties from this contract. If Seller fails to comply with this contract, Seller will be in default and Buyer may (a) enforce specific performance, seek such other relief as may be provided by law, or both, or (b) terminate this contract and receive the earnest money, thereby releasing both parties from this contract.

- **It is not the Escrow Officer's role to determine who is in default. You should help to facilitate the closing and to notify the parties if a party has failed to perform under a provision of the contract (e.g., delivery of existing survey, payment of additional earnest money, bounced earnest money check, etc.). See discussion on earnest money below.**

P. **Section 18 (Escrow, Expenses and Demand):**

Escrow: The escrow agent is not (i) a party to this contract and does not have liability for the performance or nonperformance of any party to this contract, (ii) liable for interest on the earnest money and (iii) liable for the loss of any earnest money caused by the failure of any financial institution in which the earnest money has been deposited unless the financial institution is acting as escrow agent.

Expenses: At closing, the earnest money must be applied first to any cash down payment, then to Buyer's Expenses and any excess refunded to Buyer. If no closing occurs, escrow agent may: (i) require a written release of liability of the escrow agent from all parties, (ii) require payment of unpaid expenses incurred on behalf of a party, and (iii) only deduct from the earnest money the amount of unpaid expenses incurred on behalf of the party receiving the earnest money.

Demand: Upon termination of this contract, either party or the escrow agent may send a release of earnest money to each party and the parties shall execute counterparts of the release and deliver same to the escrow agent. If either party fails to execute the release, either party may make a written demand to the escrow agent for the earnest money. If only one party makes written demand for the earnest money, escrow agent shall promptly provide a copy of the demand to the other party. If escrow agent does not receive written objection to the demand from the other party within 15 days, escrow agent may disburse the earnest money to the party making demand reduced by the amount of unpaid expenses incurred on behalf of the party receiving the earnest money and escrow agent may pay the same to the creditors. If escrow agent complies with the provisions of this paragraph, each party hereby releases escrow agent from all adverse claims related to the disbursal of the earnest money.

Q. **Notices.** All notices from one party to the other must be in writing and are effective when mailed to, hand-delivered at, or transmitted by facsimile or electronic transmission to the parties at the address and/or numbers listed for each party under section 21 of the contract.

R. **Earnest Money Disputes.**

When dealing with earnest money it is always important for the escrow agent to remember they are not a party to the contract but rather a third-party fiduciary who is charged with holding the earnest money and applying the funds as instructed, in writing, by the parties to the contract. (An escrow agent owes a fiduciary duty to both parties, seller and buyer, to the underlying contract. Trevino v. Brookhill Capital Resources, 782 S.W.2d 279, 281 (Tex.App.—Houston [1st Dist.] 1989, writ denied); Capital Title Co. v. Donaldson, 739 S.W.2d 384, 389 (Tex.App.—Houston [1st Dist.] 1987, no writ).) The three elements of this fiduciary duty are:

i. a duty of loyalty;
ii. a duty to make full disclosure; and

iii. a duty to exercise a high degree of care to conserve the money and pay it only to those persons entitled to receive it. *City of Fort Worth v. Pippen*, 439 S.W.2d 660, 665 (Tex.1969).

With this high degree of care that is required, the escrow agent walks a fine line when trying to interpret the provisions of the contract and make the determination of entitlement to the earnest money based on who may or may not have complied with the terms of the contract. Each title company must make their own internal decisions on how to handle these issues (e.g., release of earnest money because 1) financing was not obtained, 2) failure to close by a date certain, 3) cancellation within option period, 4) failure to make required repairs, 5) failure to appraise for a certain value, etc.). My company has elected to take the more conservative approach and require either 1) written agreement between the parties or 2) a court order.

TREC has often and recently revised the standard TREC forms to try and better address these issues. The forms do provide agreed procedures and safeguards for the escrow agent. For instance, section 18.C. of the TREC 1-4 Family Contract provides:

> If only one party makes written demand for the earnest money, escrow agent shall promptly provide a copy of the demand to the other party. If escrow agent does not receive written objection to the demand from the other party within 15 days, escrow agent may disburse the earnest money to the party making demand reduced by the amount of unpaid expenses incurred on behalf of the party receiving the earnest money and escrow agent may pay the same to the creditors. If escrow agent complies with the provisions of this paragraph, each party hereby releases escrow agent from all adverse claims related to the disbursal of the earnest money.

However, the party losing the earnest money might claim and decide to litigate over whether: 1) they never received the notice, 2) the funds were disbursed before the expiration of 15 days, 3) they delivered their own demand within the 15 day period, or 4) some other creative excuse to sue for the breach of fiduciary duty.

It's my opinion that the Title Company is far safer and can easily avoid any possibility of litigation if it simply requires written agreement between the parties.

If your company chooses to follow the "Demand" procedure set forth in the standard TREC 1-4 Family Contract, I would encourage you to require a cushion of 2-3 days on top of the 15 days' notice required by the contract. This will help to remove any question as to the timing of delivery and the calculation of the 15 day period. Furthermore, I would also require that the same notice be sent to any Realtors or attorneys that may be representing the parties. All notices should be sent via certified mail with a return receipt requested.

Although we always want to please our customers, the escrow agent should avoid getting caught up in playing judge and jury over the entitlement to the earnest money. Absent an agreement between the parties, the escrow agent is entitled to ask the court to decide the issue by placing the funds in the registry of the court by an interpleader action *(Interpleader is the procedure when two parties are involved in a lawsuit over the right to collect a debt from a third party, who admits the money is owed but does not know which person to pay. The debtor deposits the funds with the court ("interpleads"), asks the court to dismiss him/her/it from the lawsuit and lets the claimants settle their dispute in court.).* Additionally, the settlement agent is often entitled to have its attorney's fees paid out of the funds deposited with the court. An interpleader action should only be used as a last resort in situations when

the parties or the whole situation have become intolerable. If either party files suit on their own, then the Company can simply interplead the funds in that suit and request their attorney fees be paid from the funds upon settlement of the action.

It is often very difficult for clients to understand why the escrow agent cannot release the funds when, in their mind, they are clearly in the right. In an effort to help explain this position to the clients, I usually send out a letter upon receipt of conflicting demand letters explaining the escrow agent's position. Below is an example of the letter I send that has helped in settling the disputes:

> Dear Mr. and Mrs. Doe:
>
> Enclosed herewith please find a copy of the "Release of Earnest Money" form that I received from Mr. John Smith which is dated _____. As you can see, Mr. Smith is requesting that the earnest money be disbursed to him in full. This request is obviously in contradiction to the letter that you mailed to my attention on _____.
>
> It is very important to note that the escrow agent is not a party to the contract and does not have liability for the performance or nonperformance of any party to the contract. It is the escrow agent's responsibility to follow precisely, and without special advantage to one party over another, the written instructions given by such parties. In the present situation, we have two parties that have made written demand to our office for the earnest money. It is my understanding that there are only two ways to resolve the issue of entitlement to the earnest money: 1) written agreement between the parties (which is absent here) or 2) an order of the court.
>
> It is also important to note that even though the amount of earnest money may not be very substantial, the losing party in any suit litigating the issue of entitlement to the earnest money and/or contract termination could end up losing more than the earnest money. Paragraph 17 of the standard Texas Real Estate Commission (TREC) residential contract provides that the prevailing party is entitled to recover reasonable attorney fees and court costs from the non-prevailing party in any action brought with respect to the transaction described in the contract. As such, I would encourage the parties to work together to reach an agreement regarding the release of the earnest money.
>
> I am very sorry that this dispute has occurred but please note that I cannot play judge and jury (if you will) as to who is right and who is wrong in an earnest money dispute. I hope that the parties can work to resolve this issue, and I will be happy to assist in any way that I can. Please do not hesitate to call or email me with any questions or concerns.
>
> Sincerely,
>
> Joe Closer

Most parties, when they step back and look at the big picture, will come to an agreement.

Now, suppose that you have either followed the 15-day "Demand" procedure or the parties have agreed to release the earnest money, but you have a 3rd party(ies) that has provided services (e.g. appraisal, survey, legal work, inspections, etc.) and is expecting to be paid from the earnest money. What should you do in this situation? TREC has attempted to help with this issue by adding provisions to the 1-4 Family Contract. Sections 18.B. and 18.C. both contain provisions that say the "escrow agent **MAY** deduct from the earnest money the amount of unpaid expenses incurred on behalf of the party receiving the earnest money. This seems simple enough at first glance, but I would urge caution in following these provisions. Personally, I would not disburse funds to 3rd parties without the written instructions of the party designated to receive the earnest money. As stated previously, the escrow agent is a third-party fiduciary who is charged with holding the earnest money and applying the funds as instructed, in writing, by the parties to the contract. It's been my experience that the expenses incurred on behalf of the party often exceed the amount of earnest money that is being held. Thus, you run into the issue of priority of claims. If you are instructed by the entitled party (seller or buyer) to pay out the earnest money in a particular fashion or priority then do so as long as it is in writing. Again, this is a decision that each company needs to make internally. It is unfortunate that parties perform services but fail to get paid for it, but it is the buyer and seller that should decide whether or not they are going to pay for the services rendered and the dispute over the failure to pay for those services should not involve the escrow agent.

S. Backup Contracts

- It's not uncommon to see the sellers hold out and refuse to release the earnest money until they are ready to close with another purchaser. This places the Escrow Agent in a very difficult position as they should not be accepting "backup contracts" and producing title commitments until the previous contract is formally terminated and the earnest money is released.
- This can create potential liability on the escrow agent's part as it relates to confidentiality.

PROMULGATED BY THE TEXAS REAL ESTATE COMMISSION (TREC) 12-05-11

EQUAL HOUSING OPPORTUNITY

ADDENDUM FOR RESERVATION OF OIL, GAS, AND OTHER MINERALS

ADDENDUM TO CONTRACT CONCERNING THE PROPERTY AT

_____

(Street Address and City)

_____

NOTICE: For use only if Seller reserves all or a portion of the Mineral Estate.

A. "Mineral Estate" means all oil, gas, and other minerals in or under the Property, any royalty under any existing or future lease covering any part of the Property, surface rights (including rights of ingress and egress), production and drilling rights, lease payments, and all related benefits.

B. The Mineral Estate owned by Seller, if any, will be conveyed unless reserved as follows (check one box only):

❑ (1) Seller reserves all of the Mineral Estate owned by Seller.

❑ (2) Seller reserves an undivided _____% interest in the Mineral Estate owned by Seller. *NOTE: If Seller does not own all of the Mineral Estate, Seller reserves only this percentage of Seller's interest.*

C. Seller ❑ waives ❑ does not waive Seller's surface rights (including rights of ingress and egress). *NOTE: Any waiver of surface rights by Seller does not affect any surface rights that may be held by others.*

D. If B(2) applies, Seller shall, on or before the Closing Date, provide Buyer contact information known to Seller for any existing lessee.

If either party is concerned about the legal rights or impact of the above provisions, that party is advised to consult an attorney BEFORE signing.

TREC rules prohibit real estate licensees from giving legal advice.

_____ _____

Buyer Seller

_____ _____

Buyer Seller

The form of this addendum has been approved by the Texas Real Estate Commission for use only with similarly approved or promulgated forms of contracts. Such approval relates to this contract form only. TREC forms are intended for use only by trained real estate licensees. No representation is made as to the legal validity or adequacy of any provision in any specific transactions. It is not intended for complex transactions. Texas Real Estate Commission, P.O. Box 12188, Austin, TX 78711-2188, 512-936-3000 (http://www.trec.texas.gov) TREC No. 44-1. This form replaces TREC No. 44-0.