

WEBINAR

# DEPOSIT DISPUTES

**BREWER**  
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# BASICS OF EARNEST MONEY DEPOSITS





# EARNEST MONEY DEPOSITS

## DIFFERENCE BETWEEN DOWN PAYMENT AND EARNEST MONEY (or “EMD”)

- EMD – Money Paid at Inception To “Seal the Deal” and Potentially for Purposes of Liquidated Damages
- Down Payment – More Commonly Used to Refer to “Cash” Paid in Addition to Amount Borrowed To Close the Sale



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# EARNEST MONEY DEPOSITS

## PURPOSE OF AN EMD

- Indicate Serious Interest
- Hold Property from Market
- Applied to Final Purchase Price



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# EARNEST MONEY DEPOSITS

## CAN BE ANY AMOUNT, BUT...

- 3% is Most Common
  - This is Due to Statutory Limitation on Liquidated Damages
- When Saving - Be Aware of Additional Expenses:
  - Inspections
  - Closing Costs
  - Fees
  - Other potential expenses



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# EARNEST MONEY DEPOSITS

## DEADLINE TO TENDER FUNDS

- CAR<sup>®</sup> Form — 3 Business Days (Section 3A)
- PRDS<sup>®</sup> Form — 3 Business Days (Section 2A)
- Extra Time
  - Must Be Specified in Purchase Agreement



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# NOT DEPOSITING FUNDS ON TIME IS A BREACH OF CONTRACT





# EARNEST MONEY DEPOSITS

## MAKING AN OFFER

- Buyer & Agent Draft Purchase Contract
- Agent Submits Purchase Contract to Seller
- Seller Accepts, Rejects, or Counters
  - Buyer Accepts, Rejects or Counters Seller's Counter
- Parties Come to Agreement — or Not



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# EARNEST MONEY DEPOSITS

## SELLER'S ACCEPTANCE OF OFFER

- Buyer Opens an Escrow Account
- Escrow Agent Receives Deposit Within 3 Days, from Buyers or Buyer's Agent
  - Default: Electronic Transfer
  - Optional: Cashier's Check, Personal Check, Other



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# DISPUTES OVER DEPOSITS





# SCENARIO 1: CANCELLED BY CONTINGENCY

## BUYER WITHDRAWS

- Buyer Communicates by Deadline That They Will Exercise Contingency to Cancel Contract
  - Exercise of Contingency Requires Good-Faith
  - Entire Deposit Returned
- Release/Waiver of Contingency Does Not Justify Withdrawal if Contingency Fails
  - Release of Contingencies Put Deposit At Risk

### Examples:

- Appraisal
- Loan
- Sale of Buyer's Property



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# SCENARIO 2: CANCELLED BY NON-PERFORMANCE

## PARTY FAILS TO PERFORM

- A Party Does Not Perform a Required Contractual Action After Notice to Perform
  - Cannot Cancel Before Time for Performance Has Expired

### Examples:

- Fail to Deposit EMD
- Fail to Provide Disclosures
- Failure to Release Contingency



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# CANCELLING ESCROW

## RIGHTS AFTER CANCELLATION (IN GENERAL)

- Money Deposited in Escrow Returnable to Buyer
  - Even If Buyer is Who Cancelled the Contract
- Neither Party Entitled to Accrued Interest
- Documents Provided to Escrow Also Returnable



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# CANCELLING ESCROW

## RIGHTS AFTER CANCELLATION (IN REAL LIFE)

- Escrow Holder Must Receive Instructions To Distribute Earnest Money Deposit
  - Buyer & Seller Must Work Together
  - Escrow Holder Will Not Make a Decision as to Who Gets the Deposit



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# CANCELLING ESCROW

## FAILURE TO EXECUTE WRITTEN INSTRUCTIONS

- Absent *Good Faith Dispute*, If Either Party Fails to Execute Document Within 30 Days of Written Demand, **Party is Liable for:**
  - Amount of Funds Deposited in Escrow Not Held in Good Faith to Resolve a Good Faith Dispute
  - Damages: Not Less than \$100 and Not More than \$1,000
  - Attorney Fees



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# ASSESSING DAMAGES





# LIQUIDATED DAMAGES

## LIMIT ON AMOUNT TO BE DISPUTED

- Triggered by Buyer's Breach – NOT by Seller's Breach
- When Buyer's Breach – Seller Retains Buyer's Earnest Money Deposit
  - Shall Not Exceed 3% of Purchase Price
  - Excess Returned to Buyer
- Release of Funds Require Signed Release from Both Buyer & Seller



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# OTHER DAMAGES

## CONSEQUENTIAL DAMAGES

- If Escrow Fails to Close Due to Breach By Buyer, Likely Limited to Liquidated Damages
- If Breach by Seller, May Be Liable for Additional Damages
  - Broker Fees
  - Rent
  - Etc.
- Contract vs. Cover

### NOTE:

Parties May Sue for Additional Damages Only If Liquidated Damages Clause Is Not Executed



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# NEGOTIATION FOR BREACH

## TIMELY RESOLUTION

- Must Arrive at Agreement By Both Parties to Execute Escrow Instructions
- Cost/Benefit Analysis
  - Lawsuits Are Expensive
  - Attorney Fee Provision Not a Guarantee
- Fast Resolution & Distribution Best for All Parties



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# QUESTIONS?

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