

## Minnesota Residential Real Estate Purchase Agreements; Earnest Money

The Minnesota Association of Realtors (hereinafter, “M.A.R.” or the “Association”), is a private trade group comprised of thousands of individual real estate Salespersons and Brokers who are licensed by the Minnesota Department of Commerce.

The Association has created several “**standard**” purchase agreement forms which may be used by its members with respect to real estate transactions in Minnesota.

The Association’s purchase agreement forms are copyrighted, so they will not be reprinted on this site.

However, this discussion addresses the **earnest money** provisions found in the 2012 version of the primary agreement (hereinafter, the “Association’s Agreement”), which may be of interest to both buyers and sellers of Minnesota real property.

### Earnest Money; M.A.R. Purchase Agreement Line 5-9

In Minnesota, **earnest money** is a conditional payment of money that a buyer customarily makes upon acceptance of an offer to purchase real property.

Earnest money - although common - is not a requirement for any real estate transaction, because the promises that the buyer and the seller make to each other in the purchase agreement constitute adequate legal consideration for the transaction.

Theoretically, the buyer will forfeit any earnest money if:

- ◆ the buyer defaults on the agreement,  
and
- ◆ fails to close the purchase transaction.

However, since:

- ◆ the earnest money is typically deposited with the listing broker upon acceptance of the purchase agreement,  
and
- ◆ the listing broker is limited by statute as to when it can release the earnest money to either the buyer or the seller if the transaction fails to close,

often the seller is unable to receive the earnest money.

Nevertheless, earnest money tends to provide some evidence of the seriousness of a buyer's interest in a seller's real property, even if it is not definitively available to a seller in the event of the buyer's breach of a purchase agreement.

### **(i) Form of Earnest Money to be Provided**

Line 6 of the Association's Agreement indicates that any earnest money to be provided can take the form of a **check, cash**, or a (promissory) **note**.

However, it is customary for any earnest money to be provided in the form of a personal check.

### **(ii) Deposit of Earnest Money Received by Broker**

Minnesota Statutes, Section 82.75 identifies that any earnest money received by a listing broker must be deposited in the broker's trust account no later than the third business day after delivery of the earnest money to the broker, and acceptance of the purchase agreement by the parties:

- ◆ except as it may be paid to some other person, including the seller,
- ◆ pursuant to an express written agreement between the parties to the transaction.

### **(iii) Earnest Money Options**

While the Association's purchase agreement generally provides that the earnest money is to be deposited with the listing broker:

- ◆ such an arrangement is not required by statute,  
and
- ◆ the seller can be allowed to receive the earnest money prior to closing pursuant to an express written agreement between the parties to the transaction.

The standard purchase agreement for residential real property produced by the **Minnesota State Bar Association Real Property Section** specifically provides an option for the earnest money to be held by the seller until closing.

Sellers would be in a better position if they had the right to retain the earnest money pending closing - but they must get the buyer to agree to such an arrangement.

However, buyers would be better off if the earnest money were held by the listing broker, or some other independent party - including perhaps, the buyer's broker.

#### (iv) Interest Earning Trust Accounts

While a real estate broker's trust account is required to be interest-earning, neither the buyer nor the seller will be entitled to any interest earned on the earnest money - absent an expressed written agreement between the parties with respect to such interest.

### Minnesota Real Property Purchase Agreements

While Minnesota "*fill in the blank*" real property purchase agreement forms are routinely completed by licensed Minnesota real estate brokers and salespersons on behalf of their clients - it may be advisable in your situation to either:

- ◆ have a Minnesota real property purchase agreement **prepared by a licensed attorney**,
- or
- ◆ **have a licensed attorney review** any Minnesota real property purchase agreement prepared by a real estate broker or salesperson - before it is signed by the parties.

The vast majority of Minnesota real property transactions are completed using a real property purchase agreement prepared by a Minnesota real estate broker or salesperson.

Most of the time, the transaction closes, and things work out just fine.

However, there is much that can go wrong with Minnesota real property purchase agreements, and mistakes can be difficult to correct.

Minnesota attorneys may prepare a real property purchase agreement in a different manner than a purchase agreement which was prepared by a Minnesota real estate broker or salesperson, in order to better serve the client.

Minnesota real estate brokers provide a valuable public service, but they have an interest in protecting the broker from liability in the transaction, and the Association's standard documents may reflect such interests.

Some of the larger Minnesota real estate brokers may even have an interest in promoting the services provided by related title insurance companies.

On occasion, the interests of a Minnesota real estate broker may not be completely consistent with the interests of its clients.

However, even if a Minnesota real estate broker is acting consistent with the interests of its clients, unless a Minnesota real estate broker or salesperson is also licensed as a Minnesota attorney, they are not permitted to give legal advice.

## Unauthorized Practice of Law

Minnesota real estate brokers and salespersons are limited in the advice that they can provide to their clients, since M.S. Section 481.02, Subd. 1 provides in part as follows:

### ***481.02 UNAUTHORIZED PRACTICE OF LAW.***

#### ***Subdivision 1. Prohibitions.***

*It shall be unlawful for any person or association of persons, except members of the bar of Minnesota admitted and licensed to practice as attorneys at law, . . . by word, sign, letter, or advertisement, to hold out as competent or qualified to give legal advice or counsel, or to prepare legal documents, or as being engaged in advising or counseling in law or acting as attorney or counselor at law, or in furnishing to others the services of a lawyer or lawyers, or, for a fee or any consideration, to give legal advice or counsel, perform for or furnish to another legal services, . . . , or, for a fee or any consideration, to prepare for another person, . . . any other legal document, except as provided in subdivision 3.*

M.S. Section 481.02, Subd. 3a carves out a limited exception for Minnesota real estate brokers and salespersons, by providing as follows:

#### ***Real estate closing services.***

*Nothing in this section shall be construed to prevent a real estate broker, a real estate salesperson, or a real estate closing agent, as defined in section 82.55, from drawing or assisting in drawing papers incident to the sale, trade, lease, or loan of property, or from charging for drawing or assisting in drawing them, except as hereafter provided by the Supreme Court.*

M.S. Section 82.81, Subd. 11 also prohibits Minnesota real estate brokers and salespersons from discouraging the use of Minnesota attorneys, by providing as follows:

#### ***Prohibition against discouraging use of attorney.***

*Licensees shall not discourage prospective parties to a real estate transaction from seeking the services of an attorney.*

## Conclusion

The terms of any purchase agreement are unique to the circumstances of a particular transaction, and may have significant legal consequences.

Therefore, all parties to a Minnesota real property purchase agreement should separately retain legal counsel in order to properly advise them with respect to such matters.

Please note that an enforceable contract may be created once any purchase agreement has been signed by both the buyer and the seller, and it may not be possible to make any changes to the contract thereafter.

Therefore, it is always best to seek legal counsel before any purchase agreement is signed.

Please contact Minnesota Attorney Gary C. Dahle for assistance with the preparation, or review, of any Minnesota real property purchase agreement.

If you have an e-mail account, and a good Internet connection, Attorney Gary C. Dahle can assist you in any Minnesota County.

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### **Legal Disclaimer**

Information provided herein is only for general informational and educational purposes. The laws regarding Minnesota real property purchase agreements involve many complex legal issues. **If you have a specific legal problem about which you are seeking advice, either consult with your own attorney or retain an attorney of your choice.**

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