

Earnest Money and Option Fee

Paragraph 5 of the TREC 1 to 4 regarding the EM and Option Fee is the most common source of disputes in a purchase agreement.

Facts regarding EM and Option Fee:

- Both EM and Option Fee go to title office now;
- Due 3 days after the effective date – Saturday, Sunday and legal holidays do not count;
- If buyer provides a combined payment and it is an insufficient amount, 1st applied to Option Fee – so seller has a right to terminate;
- EM can be zero dollars;
- Option Fee must be some amount -- cannot be zero dollars;
- If the buyer does not pay the EM by the time required, the seller may terminate the contract – the contract is considered voidable – not void;
- If the buyer has not paid the EM by the time required, but the seller has not terminated, the buyer can pay the EM and the seller loses the right to terminate;
- If the buyer does not pay the EM, they do not have a right to terminate – the contract is still binding for the buyer;
- If the buyer does not pay the Option Fee or the Option Fee is zero dollars, they do not have a right to terminate;
- Time is of the essence – a legal term meaning there is 100% strict compliance with deadlines;
- The Option Fee can be released if requested by the seller;
- The EM and Option Fee always applies towards the purchase price;
- A buyer's notice of termination is due by 5:00 pm on the last day of the option period;
- I suggest a seller negotiate a release of the EM after the option period ends. If a dispute over EM occurs, it is much better to have possession of the EM vs. the title office having this;
- Suggested clause in Paragraph 11: If the closing does not occur by X date and no amendment has extended this date, the Escrow Agent is authorized to release the EM to the seller without any further direction or signature from the buyer;
- If a buyer or seller is nonresponsive regarding an EM demand, the Escrow Agent may release the funds 15 days after notice (Paragraph 18D); and
- If a defaulting party refuses to release EM, they could be liable for 1) the EM, 2) attorneys fees and 3) costs of suit.

If you would like to learn more about how Ceshker Group Title can assist you in your real estate efforts, reach out to schedule a time to meet with us.

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