

## QUESTION:

Dear TREC Legal,

I am a real estate broker and member of the Highland Lakes Association of Realtors in Marble Falls, Texas. Currently there is one large condominium complex that has quite a few short sales listed in the MLS. Given that short sales have not been very common in our area I believe there is a lack of understanding by the majority of Realtors in our area as to when they actually have a contract. A number of the short sale listings in the MLS are listed in active status, but upon calling the listing agent I have found that the short sale listings currently have contracts that are pending approval of the lender. It is the policy of our MLS to enter the listing into a pending or pending taking backup status once a contract has been executed. Upon questioning the listing agents they have replied that they are not pending because the lender has not approved the sale. In some cases the earnest money has not been paid and receipted with the tile company. In all cases the contracts have been signed by both the buyers and the sellers.

According to the TREC short sale addendum (see attached), paragraph C clearly states that "The contract to which this addendum is attached is binding upon execution by the parties and the earnest money and the option fee must be paid as provided in the contract." Based on that language would you not agree that both the earnest money and option money, if applicable, must be paid and receipted? Paragraph C goes on to say "Except as provided by this addendum, neither party is required to perform under the contract while it is contingent upon obtaining lien holder's consent and agreement." This is the language that I believe the agents are misinterpreting to mean that they do not need to collect and receipt the earnest money. It is my opinion that the existing "contracts" that these agents have without earnest money are not even valid.

Our board of Realtors is in the process of addressing this issue and would like for TREC Legal to guide us in educating our entire membership. Your answers and feedback to the above comments/questions will be of vital importance to us as a board.

I look forward to your timely response.

Sincerely,

## ANSWER:

You are correct in your interpretation of paragraph C of the short sale addendum. The earnest money and the option fee must be paid even if the contract to which the addendum is attached is pending approval from the lender. Please note, however, that final execution by both parties creates the contract, and failure to pay the earnest money may be considered a breach of contract. Additionally, failure to pay the option fee within the period in paragraph 23 of the main contract may result in a contract without an option to terminate.

The short sale addendum works just like the back-up addendum in that performance under the contract is contingent on something else occurring, i.e. lender approval for the short sale addendum or termination of the first contract for the back-up addendum. However, as you have described below, there is a separate paragraph in both addenda that addresses the payment of the the earnest money and the option fee under the terms of the contract.

Feel free to forward this response to your membership. Please let me know if you have any additional questions or concerns.

Regards,  
Loretta DeHay  
General Counsel and Interim Administrator  
Texas Real Estate Commission  
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