BREACH OF CONTRACT CONSUMER VERSION

What is a "breach of contract as the term is used in the Offer to Purchase & Contract (Form 2-T)?

Generally speaking, a breach of contract is a failure, without legal excuse, to perform any promise contained in a contract.

For Form 2-T, a breach of contract would be a failure by either the seller or the buyer to perform a promise made within Form 2-T.



A breach of contract claim is not related to allegations of fraud or misrepresentation. If a buyer or seller claims that the other has made a misrepresentation - for example, imagine that a seller claims that the buyer has misrepresented that they will pay in cash, or imagine a buyer claims that the seller has provided misleading information about square footage - then they should seek legal counsel. These sorts of claims do not relate to any promise, obligation, or term of the contract. Rather, these sorts of claims are rooted in the assertion that had the alleged misled party been given accurate information, then the contract would not have been formed in the first place.

What are common breaches of contract by the seller?

Breaches of contract by the seller include, but are not limited to:

- Failure to deliver "good title" to the property at Settlement. Examples include the discovery of a fence significantly encroaching onto the seller's property from an adjoining property; the failure or refusal of a necessary party to sign a deed to property; or the existence of a lien on the property that cannot be discharged.
- Failure to make any agreed-upon repairs in a good and workmanlike manner.
- Removal of an item specified as included in the sale under the Fixtures or Exclusions section that has not been excluded from the sale, such as a storage shed or hot tub.
- Failure to perform all the seller's obligations by the Settlement Date (or for up to 7 days following the Settlement Date, if applicable).



What are common breaches of the buyer?

Breaches of contract by the buyer include, but are not limited to:

- Failure to timely deliver, in an agreed-upon form of payment, any Due Diligence Fee or any Initial Earnest Money Deposit, although it should be noted that the seller will not have a right to terminate for this breach until a written demand is made by the seller and then the buyer fails to pay within one business day (Additional Earnest Money Deposit is different and addressed below).

- Failure to complete the transaction by the Settlement Date (or for up to 7 days following the Settlement Date, if applicable) because of an inability to obtain financing or close on an existing property.

When does a breach of contract take place?

Usually, when a party fails to *timely* perform a promise made in the contract. What is considered timely performance will depend on what the contract says.

Example 1: Assume a survey reveals that a neighbor's fence encroaches onto the seller's property. If the Settlement Date is two weeks away, it would be premature for the buyer to immediately declare the seller in breach of contract because the seller's duty is to deliver good title by Settlement and the seller still has time to remedy the encroachment.

Example 2: Assume a contract states that the buyer pays an Additional Earnest Money Deposit by 5:00 pm. Since time is "of the essence" for the delivery of the Additional Earnest Money Deposit, the seller can declare the buyer in breach of contract immediately and terminate.



Is a non-breaching party always required to wait until the other party fails to timely perform a promise before the non-breaching party can terminate the contract?

Not necessarily. If a party rejects their obligation to perform a promise before the promise is due, the other party can treat that rejection as a breach of contract and legally terminate the contract early.

To terminate the contract safely, the party seeking to terminate the contract needs very strong evidence that the other party is refusing to perform its contractual obligations. A party seeking to terminate the contract early should be strongly encouraged to first seek legal guidance.

What are a party's rights if the other party breaches the contract?

If one party commits a *material* breach of the contract, the non-breaching party has a choice to make. Legally the non-breaching may choose to be released from any further duty to perform its obligation under the contract, but they may instead decide to work with the breaching party to complete the contract. In such circumstances, the contract is *voidable* for the non-breaching party. Voidable is not the same as void, because it is a choice that must be made by the non-breaching party.

A breach of contract is "material" if its influence or effect on the transaction is more than insubstantial. For example, if a buyer discovers a single bag of trash in the garage during a final walk-through, a seller likely is not likely to be in material breach of contract for failing to fulfill their obligation to remove all of the seller's personal property, garbage and debris. As a further example, if the seller has left a significant amount of trash for the buyer, then they may be in material breach.



What are the buyer's rights if the seller breaches the contract?

If the seller is in material breach of the contract, such a failure to materially comply with any of the seller's obligations, the buyer can choose to terminate the contract and recover damages as well as any Earnest Money Deposit.

The buyer's damages could include, but are not limited to, the recovery of any Due Diligence Fee and costs incurred by the buyer in conducting Due Diligence.

The buyer can also try to enforce the contract rather than terminate it with the remedy of "specific performance." Whether specific performance is available depends on the circumstances.

A buyer should seek legal counsel to determine the proper remedies following a seller's breach.

What are the seller's rights if the buyer breaches the contract?

If the buyer breaches the contract, the seller is entitled to keep the Earnest Money Deposit and Due Diligence Fee as liquidated damages for the buyer's breach. Sellers should keep this limitation of remedy in mind when negotiating contract terms.

If a seller wishes to pursue other legal remedies, then they should seek legal counsel.