



BREACH OF CONTRACT

BROKER VERSION

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

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

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

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 as required by paragraph 8(g). Examples include the discovery of a fence 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 can’t be discharged.
- Failure to provide the buyer reasonable access to the property through Closing as required by paragraph 8(c), including the seller’s failure to provide existing utilities operating at the seller’s expense.

- Failure to make any agreed-upon repairs in a good and workmanlike manner as required by paragraph 8(n).
- Removal of an item on the list in paragraph 2(b) that has not been excluded from the sale, such as a storage shed or hot tub.
- Failure to perform all of the seller’s obligations by the Settlement Date (or for up to 14 days following the Settlement Date)

What are common breaches of contract by 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 and/or any Initial or Additional Earnest Money Deposit.
- Failure to complete the transaction by the Settlement Date (or for up to 14 days following the Settlement Date) due to the inability to obtain financing or close on an existing property.

Breach of Contract would be a failure by either the seller or the buyer to perform a promise made in **Form 2-T**.

When does a breach of contract take place?

A breach of contract usually takes place 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 performed for a buyer during the Due Diligence Period 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 and terminate the contract because the seller's duty is to deliver good title by Settlement and the seller still has time to remove the encroachment.

Example #2: Assume a contract provides for the payment of an Additional Earnest Money Deposit by 5:00 PM on a specified date. Buyer/buyer agent fail to deliver the Additional Earnest Money Deposit by 5:00 PM. Since time is "of the essence" regarding the delivery of the Additional Earnest Money Deposit, the seller can declare the buyer in breach of contract and terminate the contract immediately.

A breach of contract usually takes place when a party fails to timely perform a promise made in the contract.

Under certain circumstances, if a party repudiates the obligation to perform a promise, the other can treat that as a breach of contract.

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. Under certain circumstances, if, before the time arrives for a party's performance of a promise under the contract, that party repudiates the obligation to perform the promise, the other party can treat that repudiation as a breach of contract and legally terminate the contract early based on that breach.

In order for a party's repudiation to result in a breach of contract, the party seeking to terminate the contract would need very strong evidence that the other party is absolutely refusing to perform its contractual obligations before the contract can be terminated safely. 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?

In general, if one party to a contract commits a material breach of the contract, it discharges the other party from any further duty to perform its obligations under the contract.

In such an event, the contract is not void; however, it is *voidable* at the option of the non-breaching party.

Whether or not a breach is material will depend on the circumstances, so the concept of materiality is necessarily inexact and flexible. In general, a breach of contract is "material" if it has influence or

effect on the transaction that is not insubstantial. For example, a seller would likely not be in material breach of contract for failing to comply with the obligation to remove all of the seller's personal property, garbage and debris from the property if a buyer discovers during a final walk-through that the seller has left a single bag of trash in the garage.

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

If the seller is in material breach of the contract, which includes but is not limited to a failure to materially comply with any of the seller's obligations under paragraph 8, the buyer may elect to terminate the contract and recover damages as well as any Earnest Money Deposit.

According to paragraph 8(n), the buyer's damages would include, but are not necessarily limited to, the recovery of any Due Diligence Fee and costs incurred by the buyer in conducting Due Diligence.



The buyer may also seek to enforce the contract rather than terminate it; this is the remedy of "specific performance." Whether the remedy of specific performance is available in a particular situation will depend on the circumstances. Among other requirements, the party seeking specific performance must show that the terms of the contract are so definite and certain that the acts to be performed can be clearly determined by a court. A broker should advise a buyer to seek legal counsel to help the buyer determine whether the buyer should pursue specific [performance of the contract](#).

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

Paragraph 1(e) provides that if the buyer breaches the contract, payment of the Earnest Money Deposit to the seller, and the seller's retention of any Due Diligence Fee, shall together serve as liquidated damages, and as the seller's sole and exclusive remedy for the buyer's breach of contract.

In discussing the amounts of any Due Diligence Fee and Earnest Money Deposit that the seller may be willing to accept to put the property under contract, the listing agent should make it clear to the seller that these amounts are all the seller will be entitled to receive if the buyer breaches the contract.



If something happens to the property after the buyer makes an offer that changes the property's condition, is the seller in breach of contract if the seller fails to restore the property to its previous condition?

No. The contract does not require the seller to make any repairs that the seller has not agreed to make; thus, the seller's failure to restore the property to its previous condition would not be considered a breach of contract.

According to paragraph 11, the buyer has the right to terminate the contract and get a refund of the Earnest Money Deposit if the property is not in substantially the same or better condition at closing as on the date of the buyer's offer, reasonable wear and tear excepted.



The buyer may also elect to complete the transaction, in which case the buyer would be entitled to the proceeds of any insurance claim made by the seller on account of any damage or destruction to the property.

Are there any standard forms that can be used for a party to terminate a contract due to the other party's breach of contract?

For a few breaches, yes. Examples include termination for a party's failure to timely complete Settlement and Closing, or the buyer's failure to timely deliver any Due Diligence Fee or Earnest Money Deposit. See forms 350-T, 351-T, 352-T, and 353-T.

If a buyer or seller has questions about their rights to terminate a contract, and how to terminate, the buyer or seller should be advised to consult with an attorney.

