



## **If a buyer indicates he won't close, when can a seller terminate the contract?**

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**QUESTION:** I represent a seller and the listed property is under contract. The due diligence period has expired, and the settlement date is 30 days away. Yesterday, the buyer's agent sent me an email stating that his client will not proceed with the purchase. However, the buyer is now refusing to sign a mutual termination agreement unless the seller releases the entire earnest money deposit back to the buyer. The buyer is not claiming any legal right to terminate the contract unilaterally. Apparently, he is hoping that the seller will give up his contractual right to the deposit and terminate now so that he doesn't have to wait 30-45 days to put his property back on the market. Does my seller have to wait until the Settlement Date, or maybe even 14 days after the Settlement Date, to terminate the contract and re-market the property? Or can he terminate now based on what the buyer agent has told me?

**ANSWER:** There is a concept in contract law called anticipatory repudiation of a contract that could potentially be applicable to your situation, but it depends a lot on the facts. The idea is that if, before the time arrives for performance (i.e., the settlement date), the buyer repudiates his obligation to perform under the contract, the seller can treat that repudiation as a breach of contract and legally terminate the contract early based on that breach. Under North Carolina law, for a party's repudiation to result in a breach of contract, that party must express, through words or conduct, a ***positive, distinct, unequivocal and absolute refusal or inability to perform***. This is a high standard. It means that your seller would need very strong evidence that the buyer is absolutely refusing to perform his contractual obligations before he could safely terminate the contract prior to the Settlement Date. If your client wants to go that route, you should strongly encourage him to first seek legal guidance.

If your evidence of repudiation is not strong enough, the next issue is whether the seller has to wait 14 days after the Settlement Date before terminating the contract, as provided in the Delay in Settlement/Closing paragraph of the Contract. Time is not of the essence regarding the Settlement Date. Under North Carolina law, that means the Settlement Date is considered a target date, and a party would have a reasonable time following that target date, *under the circumstances*, within which to complete the transaction. Your seller can argue that the buyer doesn't deserve any additional time to complete settlement and closing because he does not meet paragraph 12's definition of a Delaying Party. Most significantly, the buyer does not intend to complete the transaction. If the buyer is not entitled to a delay in settlement, the buyer's failure to close on the Settlement Date would arguably be considered a breach of contract. If your seller wishes to make this argument, and terminate the contract prior to the expiration of the 14-day period, you should strongly encourage him to first consult with an attorney. Otherwise, the safest course is to wait the 14 days before terminating.

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