

# EARNEST MONEY – NO KIDDING

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Most real estate transactions involve something often referred to as “earnest money”. Another common name for it is “good faith deposit.” There doesn’t have to be any earnest money in order to have a valid contract of sale, but most of the time it is an important component.

The Maryland REALTORS® **Residential Contract of Sale** includes this language:

## 7. PAYMENT TERMS:

*The payment of the purchase price shall be made by Buyer as follows:*

*(a) An initial Deposit by way of \_\_\_\_\_ in the amount of \_\_\_\_\_ Dollars(\$ \_\_\_\_\_) at the time of this offer.*

*(b) An additional Deposit by way of \_\_\_\_\_ in the amount of \_\_\_\_\_ Dollars(\$ \_\_\_\_\_) to be paid \_\_\_\_\_.*

*(c) All Deposits will be held in escrow by:*

\_\_\_\_\_.

*(If not a Maryland licensed real estate broker, the parties may execute a separate escrow deposit agreement.)*

*(d) The purchase price less any and all Deposits shall be paid in full by Buyer in cash, wired funds, bank check, certified check or other payment acceptable to the settlement officer at settlement.*

*(e) Buyer and Seller instruct broker named in paragraph (c) above to place the Deposits in:*

*(Check One)*

- A non-interest bearing account;*

*OR*

□ *An interest bearing account, the interest on which, in absence of default by Buyer, shall accrue to the benefit of Buyer. Broker may charge a fee for establishing an interest bearing account.*

It's as if to say: "Seriously dude, I want to buy your house – here's some money for you to hold just to prove it. No kidding man – please don't sell it to anyone else – I really dig this place. Just give me a few weeks to find the rest of the money."

So, the implication here is that it is common practice to offer money to demonstrate the buyers' good faith in pursuing this transaction and in exchange, asking the seller to take their property "off the market" for the amount of time necessary for the buyer to complete their inspections and due diligence, and to secure financing for the purchase if it is needed.

Next question is: How much? Well, the best answer is: It depends.

It depends, to some degree, on the proposed sale price of the property. Remember that, just like the sale price, the amount of earnest money is negotiable – both parties have to agree to it. The buyer may offer one amount, but the seller has the option of agreeing to that amount or insisting on more.

How solid and attractive is the offer to the seller otherwise? Are there other offers to consider? What are current market conditions? Is buyer demand high or low? Is it a full price offer or a bottom feeder insult? How many contingencies are there? Is this purchase going to be contingent on the buyers' existing home selling first? Is that property even on the market yet, or is it already under contract? What kind of financing is being sought? What settlement date is being proposed?

There are many facets for both parties to factor in to their decision before agreeing on an acceptable amount of earnest money.

All that being said - there are local customs that seem to appear in many real estate transactions. An amount of \$500.00 or \$1,000.00 is most commonly offered and accepted on sales of less than \$250,000.00. Sometimes sellers will ask for 1 or 2 percent of the sale price. On a

\$500,000.00 home purchase that would be \$5,000.00 or \$10,000.00. Bottom line though – any amount may be negotiated and agreed to.

Earnest money is most commonly offered in the form of a personal check. There really isn't a need for certified funds or a money order. Cash is almost never accepted by anyone in the business.

Once all the terms of the purchase contract are agreed to and it is signed and dated by all parties (a ratified contract) the earnest money is required to be deposited immediately. If the personal check bounces – that would be a breach of contract – and therefore the seller would be free to put the home back on the market. Sellers, via their agent, should insist on a written receipt from whoever's trust account the money is actually deposited in. A copy of the check is of little value as evidence of good funds being held in escrow – that's not evidence of it being deposited.

Next decision: who should hold the earnest money? Common practice in Maryland has been for the buyers' real estate broker to receive the money into a special escrow account established exclusively for the purpose. Most often, especially with current bank interest rates, these escrow accounts do not earn interest. Some real estate brokers have started to balk at having this responsibility and expense and no longer will hold earnest money at all. Some title/settlement companies will take care of it. Generally speaking, the buyer is going to decide where the money is held – provided appropriate rules are followed.

Another decision: Which settlement company is going to be used? This is the choice of the buyer. Some sellers or their agents may express a preference or even try to insist on their chosen company – but the buyer is free to make their own decision.

This aspect is also covered in the Maryland REALTORS® **Residential Contract of Sale** a little further down in paragraph 20.

## 20. DEPOSIT:

*If the Deposit is held by a Broker as specified in Paragraph 7(c) of this Contract, Buyer hereby authorizes and directs Broker to hold the Deposit instrument without negotiation or deposit until the parties have executed and accepted this Contract. Upon acceptance, the initial Deposit and additional Deposits (the "Deposit"), if any, shall be placed in escrow as provided in Paragraph 7(e) of this Contract and in accordance with the requirements of Section 17-502(b)(1) of the Business Occupations and Professions Article, Annotated Code of Maryland. If Seller does not execute and accept this Contract, the initial Deposit instrument shall be promptly returned to Buyer. The Deposit shall be disbursed at settlement. In the event this Contract shall be terminated or settlement does not occur, Buyer and Seller agree that the Deposit shall be disbursed by Broker only in accordance with a Release of Deposit agreement executed by Buyer and Seller. In the event Buyer and/or Seller fail to complete the real estate transaction in accordance with the terms and conditions of this Contract,*

*and either Buyer or Seller shall be unable or unwilling to execute a Release of Deposit agreement, Buyer and Seller hereby acknowledge and agree that Broker may distribute the Deposit in accordance with the provisions of Section 17-505(b) of the Business Occupations and Professions Article, Annotated Code of Maryland.*

...and here is that regulation:

### **Maryland Business Occupations and Professions Section 17-505**

#### **Article - Business Occupations and Professions § 17-505.**

(a) *A real estate broker shall maintain trust money in an account authorized under this Part I of this subtitle until:*

(1) *the real estate transaction for which the trust money was entrusted is consummated or terminated;*

(2) *the real estate broker receives proper written instructions from the owner and beneficial owner directing withdrawal or other disposition of the trust money;*

(3) *on an interpleader filed by the real estate broker, a court orders a different disposition; or*

(4) *the owner or beneficial owner of the trust money fails to complete the real estate transaction for which the trust money was entrusted and the real estate broker, in the real estate broker's sole discretion, decides to distribute the trust money in accordance with subsection (b) of this section.*

*(b) (1) Prior to distributing the trust money under subsection (a)(4) of this section, the real estate broker shall notify both the owner and the beneficial owner that the real estate broker intends to distribute the trust money to the person who, in the good faith opinion of the real estate broker, is entitled to receive the trust money in accordance with the terms of the real estate contract which established the trust.*

*(2) The notice required under this subsection shall:*

*(i) be in writing;*

*(ii) state whether the trust money will be paid to the owner or beneficial owner; and*

*(iii) disclose to the owner and the beneficial owner that:*

*1. either party may prevent distribution of the trust money under subsection (a)(4) of this section by submitting a protest within 30 days from the date the notice was delivered or mailed by the real estate broker; and*

*2. if neither party submits a protest within 30 days from the date the notice was delivered or mailed by the real estate broker, the trust money will be distributed in accordance with the real estate broker's notice.*

*(3) The notice required under this subsection shall be:*

*(i) hand delivered to both the owner and beneficial owner; or*

*(ii) sent by certified mail, return receipt requested, and regular mail to both the owner and beneficial owner.*

*(4) (i) An owner or beneficial owner may protest the distribution of the trust money.*

*(ii) An owner or beneficial owner shall submit the protest to the real estate broker holding the trust money within 30 days from the date the notice required in paragraph (1) of this subsection was delivered or mailed by the real estate broker.*

*(iii) A protest shall be in writing and either:*

- 1. hand delivered; or*
- 2. sent by certified mail, return receipt requested, and regular mail.*

*(5) (i) If a written protest is received by the real estate broker, the real estate broker shall distribute the trust money in accordance with subsection (a)(1), (2), or (3) of this section.*

(ii) *If no written protest is received by the real estate broker holding the trust money, the real estate broker shall distribute the trust money in accordance with the terms of the notice as required in this section.*

(c) *When the duty of the real estate broker to maintain trust money in an account terminates, the real estate broker promptly shall account for all trust money.*

(d) *A real estate broker may invest trust money:*

(1) *as the owner and beneficial owner of the trust money instruct in writing; or*

(2) *as the real estate broker, owner, and beneficial owner of the trust money agree in writing.*

(e) *A real estate broker may not be liable to an owner or beneficial owner of the trust money for:*

(1) *a good faith decision to distribute the trust money under subsection (a)(4) of this section; or*

(2) *a decision not to distribute the trust money under subsection (a)(4) of this section.*

(f) *An agreement under which a real estate broker is entrusted with the trust money shall contain a statement that the real estate broker may distribute the trust money in accordance with subsection (b) of this section if the owner or beneficial owner of the trust money fails to complete the real estate transaction for which the trust money was entrusted.*

Sounds like serious business. When the seller and buyer disagree about the release and disposition of the earnest money it can become quite contentious. Legal advice or action may be appropriate and necessary.

Here is what the Maryland Real Estate Commission has to say about it:

<https://www.dllr.state.md.us/license/mrec/mrecdeposit.shtml>

### ***Return of Deposit - Real Estate Commission***

*The Maryland law that regulates real estate brokers, associate brokers, and salespersons requires that trust money be deposited in the broker's trust account promptly after both parties accept the contract of sale.*

*Although most contracts contain a provision governing the disposition of the deposit money if the property does not go to settlement, disputes often arise as to the*

*underlying facts as well as the specific reasons for the cancellation. For this reason, brokers are often unwilling to release the funds on the request of a party claiming the right to them.*

*The law directs the broker to retain the funds in a trust account until one of the following four circumstances occurs:*

*The transaction for which the money was entrusted is consummated or terminated;*

*The broker receives proper written instructions from both parties directing withdrawal or other disposition of the money;*

*A court orders disposition of the money in an interpleader case filed by the broker; or*

*The broker has followed a specific procedure of notification to both parties giving them an opportunity to contest the broker's good faith determination of proper distribution after one of the parties has failed to complete the transaction.*

*The Real Estate Commission does not have the authority to order a broker to release trust money. If you are a party to a real estate transaction and believe that you are entitled to deposit monies, you should first contact the broker holding the funds to determine his/her position on the matter.*

*If the other party will not agree to sign a written release, you may ask the broker to file an interpleader case in court requesting the judge to determine who is entitled to the deposit.*

*If the other party failed to complete the transaction, you may ask the broker to initiate the notification process provided that the broker agrees with you that you are entitled to the money. If the broker is not willing to pursue either of these options, you may need to file a claim for the funds in court.*

*You should also be aware that some real estate contracts contain a provision that all disputes between the parties must first be submitted to mediation. You should read this part of your contract carefully, and check with the broker to see if it applies to this situation.*

*Keep this in mind when agreeing the amount of earnest money deposit in the first place. Is it going to be worth several thousand dollars in legal expenses to recover a \$500 earnest money deposit that is in dispute?*

*Here is the Maryland REALTORS<sup>®</sup> standard form that is used to attempt a meeting of minds of the parties:*



**UNILATERAL NOTICE OF TERMINATION UNDER CONTRACT OF SALE**

(To be used when unilateral termination is appropriate)

Regarding Contract of Sale between Buyer \_\_\_\_\_  
and Seller \_\_\_\_\_  
for Property known as \_\_\_\_\_.

TERMINATING PARTY: (initial one) \_\_\_\_\_/\_\_\_\_\_ BUYER \_\_\_\_\_/\_\_\_\_\_ SELLER

REASON FOR TERMINATION: (initial one)

\_\_\_\_\_/\_\_\_\_\_ Termination within contingency period  
(specify contingency \_\_\_\_\_)

\_\_\_\_\_/\_\_\_\_\_ Termination due to default  
(specify default \_\_\_\_\_)

In accordance with the terms of the Contract of Sale identified above, the Terminating Party, as identified above, hereby declares the Contract null and void and of no further legal force and effect. The Terminating Party acknowledges that any liability the Terminating Party may have for the payment of brokerage fees or compensation to the Terminating Party's broker is governed by a separate listing contract and/or exclusive buyers agency representation agreement. **The Terminating Party may exercise the right to unilaterally terminate the Contract without executing a Mutual Release of Deposit Agreement. If the Deposit is held by a broker, the Terminating Party acknowledges and agrees that the Deposit shall be distributed in accordance with the Deposit Paragraph of the Contract.**

\_\_\_\_\_  
Signature of Terminating Party Date

\_\_\_\_\_  
Signature of Terminating Party Date

**MUTUAL RELEASE OF DEPOSIT AGREEMENT**

(If the Deposit is held by a broker, Buyer and Seller acknowledge and agree that the Deposit shall be distributed in accordance with the Deposit Paragraph of the Contract)

Buyer and Seller irrevocably and unconditionally direct \_\_\_\_\_  
\_\_\_\_\_ to disburse the Deposit as follows:

\$ \_\_\_\_\_ to \_\_\_\_\_

\$ \_\_\_\_\_ to \_\_\_\_\_

\$ \_\_\_\_\_ to \_\_\_\_\_

Buyer and Seller acknowledge that any liability they may have for the payment of brokerage fees or compensation to their respective brokers is governed by a separate listing contract and/or exclusive buyers agency representation agreement.

\_\_\_\_\_  
Buyer Signature Date

\_\_\_\_\_  
Seller Signature Date

\_\_\_\_\_  
Buyer Signature Date

\_\_\_\_\_  
Seller Signature Date



In a real estate transaction, earnest money is clearly a conditional giving of something of value to accompany a good faith pledge to pursue all specified contingent actions that will lead to a purchase of the property with a transfer of title of ownership. It is offered in exchange for a promise to not sell the property to anyone else – to take the property off the market for an agreed upon period of time.

Typically, the buyer will trust that if a good faith effort is made –but is unsuccessful, they will be entitled to a return of their earnest money deposit. Some sellers will agree – some will not. Depending on the circumstances and events that occur during the “escrow period”, some sellers may feel entitled to keep the earnest money as compensation or “damages” resulting from having taken their property off the market and perhaps missing other opportunities to sell their property to capable buyers. This risk must be considered when decided on how much earnest money is proffered at the onset of the purchase agreements.

By the way, in a successfully settled real estate sale, the earnest money shows up as a credit to the buyer on the closing statement and typically gets applied to the down payment or other closing costs – thus reducing the amount of money needed for settlement.

#### **DISCLAIMER**

**John P. Hale is a licensed real estate agent in Maryland and Pennsylvania. He is affiliated with Coldwell Banker Residential Brokerage in Westminster, Maryland. John has been licensed since 2000 and also practiced in Tucson, Arizona for many years. Mr. Hale holds the following designations and certifications awarded by the National Association of REALTORS® (NAR) and other authorized institutions: ABR-Accredited Buyers Representative, AHWD-At Home With Diversity, CNE-Certified Negotiation Expert, CRMS-Certified Risk Management Specialist, CRS-Certified Residential Specialist, CTA-Certified Tourism Ambassador, e-PRO-Online Real Estate Practice, GRI-Graduate of Realtor Institute, MRE-Master of Real Estate, MREP-Mortgage Real Estate Professional, and MRP-Military Relocation Professional.**

**Please note that this article was written by John to provide objective information and to also reflect his opinion of good practice at the time of its' writing for the general benefit of those considering sale or purchase of real estate. It is not intended as definitive legal advice and you should not act upon it as such without seeking independent legal and financial counsel. Frequent changes in the law and standards of practice may cause this information to become outdated and no longer applicable or incorrect.**