



BREACH OF CONTRACT

CONSUMER 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**.

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 buyer should seek legal counsel to help the buyer determine whether the buyer should pursue specific performance of the contract.

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.

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 EMD 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 determining whether the amounts of any Due Diligence Fee and Earnest Money Deposit contained in an offer are acceptable, the seller should understand that these amounts are all the seller will be entitled to receive if the buyer breaches the contract.