

**REPORT:
LOITERING/STRANDED REAL ESTATE TRUST ACCOUNTS
AND
RELEASE OF EARNEST MONEY**

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Chapter 1:

The Loitering/Stranded Earnest Money Problem and Current Statutory Solutions

Introduction

The issue addressed in this investigation is the situation facing real estate brokers who find themselves stuck with loitering or stranded earnest money. Generally, a broker who takes possession of earnest money for a real estate transaction does so in a fiduciary capacity and must hold the funds in trust until the transaction is complete. When a real estate transaction fails and neither the potential buyer, nor the potential seller lays claim to the earnest money, the broker is still under a fiduciary duty to hold the funds in an escrow account, and may be stuck with them indefinitely, unable to put the money to use or commingle it with the broker's own. The same issue may arise when the parties to the original transaction disagree over rights to the earnest money but have not pursued any method of dispute resolution. The problem becomes more pressing when the broker decides to retire, quit, or relocate to another state. Deposits that have languished in the broker's client trust account for years must be disbursed, and the original parties to the transaction may now be unreachable. To avoid the problem of stranded earnest money for real estate brokers, states have created various statutory preemptive and reactive schemes, including specific interpleader provisions and automatic escheat to a state fund. The most common of these solutions are discussed in this report. Additionally, the authors suggest statutory and other changes for efficient disbursement in Ohio.

In Ohio, a small percentage of real estate transactions each year are not completed, for various reasons. Under current Ohio law, when a real estate contract is terminated, if agreement of the parties cannot be reached, the broker may not disburse transactional funds without a court

order. To obtain such an order, brokers or parties may use interpleader. Interpleader is “an equitable proceeding for the determination of adverse claims by rival claimants to [the] same property or fund held by [a] third person as stakeholder.”¹ The “stakeholder” – here, the real estate broker holding earnest money – will not ultimately receive the money, but is asking the court to determine who among the competing parties will receive it. Interpleader recognizes that the parties who actually claim an interest in the funds should litigate among themselves and that the broker has a right to be minimally involved in the controversy.² Once the broker files an interpleader action, if the court decides that the action is proper, it may dismiss the broker upon the deposit of the earnest money with the court.³

Initially, it appears that interpleader is an ideal solution for a broker holding contested earnest money, because the broker may deposit the funds in the court and remove himself from the controversy. But significant problems with this procedure exist.⁴ Because the amount in controversy may be small, the cost of filing the interpleader action, along with the complexity and time involved, make the procedure less attractive.⁵ Additional complications may arise when the interested parties cannot be located. If adverse parties are not available to litigate the action, the broker has few viable options for releasing the funds. The result may be a long-term situation in which a broker is encumbered with the responsibility of holding stranded earnest money.

¹ 45 AM. JUR. 2D *Interpleader* § 1 (2006) (citing *Ehlers v. Perry*, 494 N.W.2d 325 (Neb. 1993); *Balish v. Farnham*, 546 P.2d 1297 (Nev. 1976)).

² 73 OH. JUR. *Parties*, § 87 (2005) (citing 45 AM JUR 2D *Interpleader* § 1 (2006)).

³ 4-158 OH. CIV. PRACTICE WITH FORMS § 158.03.

⁴ See Chapter 4.

⁵ See Lori Garland, THE OHIO ASSOCIATION OF REALTORS’ EARNEST MONEY – WHITE PAPER, http://www.ohiorealtors.org/absolutenm/templates/article_print.aspx?articleid=211&zoid=38 (last visited July 10, 2007) [hereinafter White Paper].

Earnest Money Generally

An earnest money deposit paid during a real estate transaction is “comparatively small” when measured against the cost of the transaction itself and it is “paid down as an assurance that the party making the offer is acting in earnest and good faith.”⁶ If the buyer fails to act earnestly and in good faith, the buyer forfeits the earnest money.⁷ Ideally, the purchase and sale contract between the parties should address the terms of the earnest money deposit specifically and unambiguously to avoid conflict. Clear provisions for the earnest money that discuss various contingencies and are agreed upon by all parties to the contract can circumvent the stranded earnest money problem entirely. In most real estate transactions, earnest money is delivered to the real estate broker when the offer is made, and the broker places the money in a trust account. As the administrator of that account, the broker then has a fiduciary duty to hold the money for the benefit of the parties to the transaction.⁸

Upon closing, depending on the parties’ agreement, the buyer receives either the deposited money or a credit for that amount against the purchase price of the property.⁹ If closing is successful, the broker releases the funds from the trust account according to this agreement. In the vast majority of real estate transactions, closing is successful and the broker’s involvement with the earnest money ends there. Earnest money can become stranded, however, on the rare occasion that the agreed transaction fails and there is no closing. When a transaction is prematurely terminated, it becomes important to discern which party breached the contract. Generally, if the buyer is not at fault, the buyer is entitled to a return of the earnest money

⁶ *Id.*

⁷ *Id.*

⁸ *See* OHIO REV. CODE ANN. § 4735.18(A)(26) (LexisNexis 2006).

⁹ White Paper, *supra* note 5.

deposit.¹⁰ If, however, the buyer has breached the contract, the seller is entitled to the deposit. If the parties cannot reach agreement on ownership of the earnest money, the broker must continue to hold the stranded funds in trust, perhaps for an extended period of time. The broker should not be placed in the situation of having to decide which party is entitled to the money, because this is a legal question. Moreover, the broker owes a fiduciary duty to the party he represents, which could conflict with a duty to decide who has breached the contract.¹¹

Earnest Money in Ohio

In order to prevent the broker from having to make an ownership decision, the current legal solution in Ohio is to require that earnest money not be disbursed to any party unless the other party has “provided him with a release or authorization to do so,” even if “it is obvious to the broker as to which party should receive the deposit.”¹² If the parties are unable to come to an agreement and create an authorization, a court of law must make the decision and order disbursement.¹³

To facilitate finality, the broker should make clear to the parties that the earnest money cannot be released to either without authorization from both or a court order.¹⁴ If either party then files a claim in court, the broker may be named as a party defendant, but can most likely avoid prolonged involvement in the suit by advising the court that he will disburse the funds to whomever the court finds entitled to them.¹⁵ Alternatively, the broker can file an interpleader action naming both buyer and seller as defendants and asking the court to determine which party

¹⁰ *Id.* One situation in which the buyer is entitled to a return of the earnest money deposit is when contingencies in the contract “are not satisfied, notwithstanding good faith efforts by the parties.” In such a situation, the contract is “null and void.” *Id.*

¹¹ *Id.*

¹² White paper, *supra* note 5.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

is entitled to the money.¹⁶ While it is less burdensome for the broker if the parties handle the action themselves, in some situations the broker may need to file an interpleader claim to start the process when the parties have not taken such initiative.

Interpleader, however, has several disadvantages. One problem is the necessity of hiring an attorney. Individual brokers or members of a partnership may represent themselves in court; however, since many brokerages are corporations, they usually must hire an attorney to represent the entity.¹⁷ Attorneys may be reluctant to take on cases with small amounts at stake, and larger amounts may take the case out of small claims court jurisdiction.¹⁸ In either case, retaining counsel will require the broker to expend time and money even though the broker actually has no financial interest in the outcome of the law suit.

Alternatively, Ohio law allows brokers holding funds in a fiduciary capacity to classify those funds as unclaimed if the parties to the transaction have not attempted to claim them after a period of two years.¹⁹ Once money has been classified as unclaimed, the holder of the funds must make a report to the director of commerce, according to statutory provisions.²⁰ Then the funds can be transferred to the director of commerce for placement in the state unclaimed funds trust fund.²¹ This procedure also requires the broker to expend time and money to release the earnest money funds from the broker's escrow account.

Statutory Solutions in Other States

State approaches to handling the stranded earnest money problem vary, particularly in terms of what each legislature has committed to statute.²² Some states have no statute directly

¹⁶ *Id.* See also OHIO. R. CIV. PROC. 22 (LexisNexis 2006).

¹⁷ White paper, *supra* note 5.

¹⁸ *Id.*

¹⁹ OHIO REV. CODE ANN. § 169.02(M)(2) (LexisNexis 2006).

²⁰ *Id.* at § 169.03.

²¹ *Id.* at § 169.05.

²² See Appendix: Figure 1

on point, but other generic statutes, particularly unclaimed property statutes, can be used as a remedy.²³ Yet a few common practices do surface. Every state has some form of interpleader, whether as a general civil procedure rule or as a specific method for handling real estate funds or trust funds.²⁴ Other common remedies include release upon written agreement or court order,²⁵ a specified “release process”²⁶ or deposit of funds in court,²⁷ arbitration or mediation,²⁸ and required provisions for purchase and sale agreements.²⁹ In terms of preserving brokers’ resources, statutes that clearly provide for quick and easy removal of the broker from an earnest money dispute with minimal process are of significant benefit. Three states with especially clear statutes that can serve as models for other states are Florida, Kansas, and North Carolina.³⁰

States that authorize release of earnest money only upon written agreement of all parties or a court order suffer from the same drawbacks discussed above. If the parties do not agree to whom the earnest money belongs, the broker may be forced to hold the money in the broker’s trust account indefinitely, and if the parties do not file suit in court, the broker’s own resources must be used to begin the legal process or the broker must continue to hold the funds. States using these methods for dealing with stranded earnest money include Alabama, Connecticut, Florida, Idaho, Illinois, Kansas, Maryland, Missouri, New Hampshire, South Carolina, Vermont, and Wyoming.³¹

²³ See, e.g., COLO. REV. STATUTE. § 38-13-103 (LexisNexis 2006) (funds “presumed abandoned” after five years).

²⁴ See Appendix: Figure 1. Compare, e.g., ALA. R. CIV. PROC. 22 (2006) (general rule of interpleader), with ALA. ADMIN. CODE r. § 790-X-3-.03(6) (2006) (“This Rule shall not prohibit a broker from depositing with the appropriate court any trust funds which are the subject of disagreement among or between parties under the rules of interpleader...”). Louisiana and New Hampshire appear to be the only states in which interpleader is a common law mechanism and has not been codified in a statute.

²⁵ See, e.g., ALA. ADMIN. CODE r. 790-X-3-.03 (2006).

²⁶ See, e.g., KY. REV. STAT. ANN. § 324.111 (LexisNexis 2006).

²⁷ See, e.g., CONN. GEN. STAT § (2006).

²⁸ See, e.g., FLA. STAT. § 475.25 (2006).

²⁹ See, e.g., IDAHO CODE ANN. § 54-2046 (2006).

³⁰ See Appendix: Figure 2.

³¹ See Appendix: Figure 1.

An explicit release process can reduce the amount of resources a broker must expend in removing disputed funds from an escrow account. While some form of due process in terms of notice to the parties involved is essential, to be efficient a release process should be simple, straightforward, and routine. The simplest release process would most likely be to send notice of the process to the last known addresses of the interested parties and to deposit funds with the court. This would end the broker's fiduciary duties to any parties involved in the transaction and pooled funds deposited with the court could later easily be paid into a state fund if they were determined abandoned or unclaimed. States with specific statutory release processes include Kentucky and New Hampshire.

To handle stranded funds even more efficiently, a state can allow money held in a fiduciary capacity to escheat to a specified state fund (such as a real estate recovery fund) after it has gone unclaimed for a given amount of years. Although most states have some form of an unclaimed property act, a trust-account-specific or even broker-specific act can help clarify the proper procedures to be followed in a failed transaction situation. States that employ some sort of presumption of abandonment include Colorado (5 years), Iowa (3 years), Kansas (5 years), Louisiana (5 years), Massachusetts (3 years), Minnesota (brokers must comply with Unclaimed Property Act), Mississippi (5 years), New York (5 years), Ohio (2 years), Texas (3 years), Utah (5 years), West Virginia (5 years), and Wisconsin (5 years). Of course, this method will not be available when the parties to the original transaction have expressed continued interest in ownership of the funds and are still pursuing some form of dispute over them.

If the buyer and seller of a failed transaction are actively disputing ownership of earnest money, dispute resolution does not have to take the form of litigation, either through interpleader (discussed above) or otherwise. Alternative dispute resolution methods are increasingly used to

handle all types of legal disputes and some states have statutorily provided for alternative dispute methods in real estate cases. For example, Florida specifies that an earnest money dispute can be submitted to arbitration or mediation; in Rhode Island, funds can be deposited with the general treasurer after 180 days, and the treasurer will then hold them pending mediation, arbitration, or litigation; and South Carolina provides for voluntary mediation. While alternative methods of dispute resolution are a favorable alternative to litigation because of their less adversarial nature and mitigated use of resources, this alternative may still initially involve the broker and the broker's resources in most cases. The most beneficial process for the broker would be one akin to Rhode Island's wherein responsibility for stranded funds is removed from the broker prior to any dispute resolution procedure.

Finally, one way to avoid the problem of unclaimed earnest money before it occurs is to include specific provisions and contingencies in every purchase and sale agreement before a transaction has the opportunity to close or fail. In many cases, specific provisions listing who would take ownership of the earnest money upon the occurrence of contingencies will avoid the stranded earnest money problem altogether. Idaho, for example requires a specific earnest money forfeiture provisions in real estate contracts. While this is an attractive solution that would require minimal resources because provisions could be included in form contracts, it is not a complete solution, since fact patterns do not always fit neatly under contract language. Despite a broker's best efforts to account for all possible contingencies, problems are bound to arise that give both sides to a failed transaction arguments for their own claim to disputed earnest money. This contract solution, while powerful, must be used in combination with other procedures for handling the problem.

As mentioned above, Florida, Kansas, and North Carolina have particularly detailed statutes that offer several solutions to brokers placed in the awkward position of holding stranded earnest money. While none is perhaps a perfect model for use in other states, each offers a broad overview of what types of solutions can be efficiently implemented and includes back-up methods to be used when others fail to solve the problem. They also offer brokers some certainty as to when they may be held liable and when they have fulfilled their fiduciary duties with respect to a given transaction. These statutes can serve as models for statutes in states that have not fully addressed the problem of stranded earnest money legislatively, as well as states whose statutes are not nearly as comprehensive and leave room for improvement.

Chapter 2:

Contract Provisions

Introduction

To pre-empt argument or confusion over what happens to earnest money deposited with a broker when a real estate closing is unsuccessful, brokers can encourage use of a specific, detailed earnest money forfeiture clause in the purchase and sale agreement signed by the parties. This is undoubtedly a good start toward avoiding earnest money issues, as many foreseeable contingencies can be placed in the contract, and a written record of the parties' prior agreement is more readily enforced than later self-serving arguments by each party. Still, such a practice is only a beginning. As discussed in Chapter 1, once a real estate transaction falls through, someone other than the broker must determine who breached the contract. Although contingencies may be plainly included in the text of the contract, the parties may not agree upon how to apply the text to actual events. In addition, as hundreds of years of contract litigation have proven, it is impossible and impracticable to include every probable contingency in a written contract. Moreover, even likely contingencies suggested by a broker may be problematic in that one or both parties may refuse to agree to such contract terms. Thus, while negotiating a thorough contract before problems arise may be the solution to some failed transactions, in most cases; it will need to be used in combination with other procedures.

State Contract Provision Requirements

In most states, treatises of "form contracts" and other forms are available for general use, largely among the legal community.³² These form files often contain a generic, boilerplate real

³² See, e.g., ANDERSON'S OHIO FORMS (available on compact disc); see also Samuel H. Young et al., MIDWEST TRANSACTION GUIDE: ILLINOIS, INDIANA, MICHIGAN, both available on LexisNexis.

estate purchase and sale agreement. Standardized forms encourage use of earnest money forfeiture provisions and provide examples of effective, tested contract language. Some states have gone further, however, and have statutorily suggested earnest money forfeiture provisions,³³ required such provisions,³⁴ or in some cases prescribed a basic clause for inclusion in a purchase and sale agreement.³⁵

Anderson's Ohio Forms, a treatise that includes basic forms for use in varied areas, from Criminal Law to School Law, provides an example of a "Contract to Purchase Residential Real Estate." The sample contract contains an earnest money provision:

4. EARNEST MONEY: \$ _____ ("Earnest Money") shall be deposited by _____ upon written acceptance of this contract ("Contract"), in a trust account pending Closing, or returned to the Buyer if this offer is not accepted in writing. The Earnest Money shall be disbursed as follows: (i) if the transaction is closed, the Earnest Money shall be applied to Purchase Price or as directed by Buyer (ii) if either party fails or refuses to perform, or if any contingency is not satisfied or waived, the REALTOR(R) holding the Earnest Money shall retain the Earnest Money, in accordance with state law, until (i) Buyer and Seller have delivered joint written instructions regarding disposition to REALTOR(R); (ii) disposition has been ordered by a final court order; or (iii) the REALTOR(R) deposits the Earnest Money with the court pursuant to applicable court rules or by the rules of any arbitration procedure. Both Buyer and Seller

³³ WASH. REV. CODE ANN. § 64.04.005(1) (Lexis 2006) ("A provision in a written agreement for the purchase and sale of real estate which provides for liquidated damages or the forfeiture of an earnest money deposit to the seller as the seller's sole and exclusive remedy if a party fails, without legal excuse, to complete the purchase, is valid and enforceable, regardless of whether the other party incurs any actual damages. However, the amount of liquidated damages or amount of earnest money to be forfeited under this subsection may not exceed five percent of the purchase price.")

³⁴ IDAHO CODE ANN. § 54-2046(5) (2006) ("The purchase and sale agreement must include a provision for division of moneys taken as earnest money when the transaction is not closed and such moneys are retained by any person as forfeited payment.")

³⁵ KAN. STAT. ANN. § 58-3061(h) (2006) ("Nothing in this section shall prohibit the parties to a real estate contract from agreeing, in the sales contract, to the following procedure:

Notwithstanding any other terms of this contract providing for forfeiture or refund of the earnest money deposit, the parties understand that applicable Kansas real estate laws prohibit the escrow agent from distributing the earnest money, once deposited, without the consent of all parties to this agreement. Buyer and seller agree that failure by either to respond in writing to a certified letter from broker within seven days of receipt thereof or failure to make written demand for return or forfeiture of an earnest money deposit within 30 days of notice of cancellation of this agreement shall constitute consent to distribution of the earnest money as suggested in any such certified letter or as demanded by the other party hereto.").

acknowledge and agree that the REALTORS(R) will not make a determination as to which party is entitled to the Earnest Money. This clause is subject to any remedy available to REALTOR(R) by law.³⁶

Similarly, the Midwest Transaction Guide, applicable to Michigan, Indiana, and Illinois, provides an “Agreement for Sale of Real Property” with the following “Failure of Conditions” clause:

7. Should any of the conditions specified in Paragraph 6 of this Agreement fail to occur by _____ [date], Buyer shall have the power, as long as Buyer is not at fault in failure of the condition, exercisable by the giving of written notice to _____ [Seller or the Escrow Agent] to terminate this Agreement and recover any amount paid by Buyer to Seller, or paid into escrow on account of the purchase price of the Property. The exercise of the power by Buyer shall not, however, constitute a waiver by Buyer of any other rights Buyer may have against Seller for breach of this Agreement. Any Escrow Agent involved shall be required, and is irrevocably instructed by Seller, on the failure of conditions and receipt of the notice from Buyer, to refund immediately to Buyer all moneys and instruments deposited by Buyer pursuant to this Agreement.³⁷

While contract terms in form treatises are optional and are provided to simplify a practitioner’s task in creating documents for each transaction, earnest money may be a required term in a sales contract. Idaho statutorily requires inclusion of an earnest money forfeiture provision in the real estate purchase agreement. The state mandates, “[t]he purchase and sale agreement must include a provision for division of moneys taken as earnest money when the transaction is not closed and such moneys are retained by any person as forfeited payment.”³⁸ This requirement serves a dual purpose of forcing parties to address earnest money disputes ex ante and educating brokers on the importance of including such provisions in real estate contracts. Placing a suggested forfeiture provision in a statute or in Real Estate Commission

³⁶ 1-2 ANDERSON’S OH FORMS, *Ohio Residential Real Estate Form 2.1* (Lexis 2006).

³⁷ 1-3 MIDWEST TRANS. GUIDE, *Real Estate Law & Forms* § 3.210 (Lexis 2006).

³⁸ IDAHO CODE ANN. § 54-2046(5) (2006) (emphasis added).

rules regulating the brokerage profession can serve a similar educational purpose, but if the provision has the force of law, brokers may be more successful in convincing parties to come to agreement about earnest money before a final contract is signed.

Problems Applying the Contract Provisions to the Facts

Certain contingencies should appear in most real estate contracts. A financing contingency, based on the buyer's ability to obtain a suitable mortgage, for example, generally is included in a real estate contract. Parties to a specific transaction may also foresee problems that apply uniquely to their situation, such as a buyer's ability to obtain a certain permit or the seller's removal of a zoning ordinance violation. Despite such foresight, however, parties may not agree on many aspects of the contingency or the transaction. For example, the parties may not agree on facts which determine whether the contingency occurred; if the party made a reasonable effort to bring about the contingency; or which party breached the agreement. If they disagree about fundamental facts, entitlement to earnest money cannot be determined, and often the dispute results in litigation.

In *Medical Services Group v. Boise Lodge No. 310*, for example, the buyer and seller agreed to a contract including a contingency provision based on the buyer, Medical Services Group, being able to obtain financing on or before a certain date.³⁹ Several potential closing dates came and went, without the buyer obtaining satisfactory financing,⁴⁰ but it continued active negotiations with its bank to try to obtain satisfactory financing.⁴¹ In addition, the seller, Boise Lodge, agreed to each of these potential closings, thereby acquiescing in the buyer's failure to obtain financing by the contract date.⁴² After the property at issue became unavailable due to

³⁹ 878 P.2d 789, 792 (Idaho App. 1994).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

foreclosure on a deed of trust, the parties sued each other; the seller for the difference between the contract price and the foreclosure sale price, and the buyer for the return of the earnest money.⁴³ Reasonable minds could differ on each issue, because the trial court decided for the seller on summary judgment, and the appeals court vacated the judgment and remanded to the trial court for further proceedings.⁴⁴ The clear-cut, standard financing contingency clause became a cause for heated litigation because the actual facts did not fall neatly within the contract language. The buyer was not clearly in breach because the buyer continued to try to negotiate financing and because the seller acquiesced in the delay. The seller, on the other hand, also was not clearly in breach because although the property at stake was foreclosed upon, the foreclosure occurred after the property should already have been sold. The earnest money involved in the transaction could not have been disbursed by the broker who held it in trust, even though the purchase agreement seemed to deal with this contingency.

Similarly, in *Brigham v. First National Bank*, a buyer and seller ended up litigating in court over what should have been an airtight forfeiture clause.⁴⁵ The clause in their contract read,

The \$ 10,000.00 earnest money...is nonrefundable and shall be forfeited by Buyer to Seller in the event this escrow fails to close for any reason whatsoever other than Seller's failure to perform.⁴⁶

Since every possible event other than failure of the seller's performance (presumably including such unforeseen events as broker misconduct or natural disaster) would result in forfeiture of the transaction earnest money, it would appear that possibility of dispute over the money would be rather minimal in this case. The contract also provided a date by which the contract would

⁴³ *Id.*

⁴⁴ *Id.* at 795.

⁴⁵ 629 P.2d 996 (Ariz. App. 2d Div. 1981).

⁴⁶ *Id.* at 997.

terminate if certain conditions were not met, and reiterated that in that event, the earnest money would be forfeited.⁴⁷ Still, when the buyers failed to make required scheduled payments, and the seller notified buyers' attorney that the buyers had forfeited any interest in the land, the buyers claimed that this was a breach on the seller's behalf and thereby satisfied the only condition under which they could recover their interest money.⁴⁸ Although the buyers were able to make a strong enough argument based on a statutory grace period for installment-type real estate contracts to make a prima facie claim, both the trial and appellate courts decided for the seller.⁴⁹ In this case, the earnest money was placed in escrow and remitted to the seller before litigation commenced.⁵⁰ If, instead, a broker had been holding the funds in trust, the broker would have had to hold the funds during a lengthy, two-year process of litigation and appeal. Even though simple mathematic probability strongly indicated that the buyers had forfeited the earnest money, the broker would have had to have waited for a court order to disburse the funds. (If every single event or occurrence but one meant the seller would keep the earnest money, odds were strongly in favor of the seller being successful).

Finally, in *Waksman Enterprises Inc. v. Oregon Properties, Inc.*, the parties to a commercial real estate transaction agreed to three separate "deposits," each with specific conditions.⁵¹ The first two payments were refundable to the purchaser during a 90-day inspection period and non-refundable thereafter.⁵² The final type of deposit was non-refundable, according to the contract.⁵³ Here again, the forfeiture provisions would appear to be straightforward. Within the 90-day period, the first two payments were refundable. After that

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 999.

⁵⁰ *Id.* at 997.

⁵¹ 862 So. 2d 35 (Fla. 2d Dist. App. 2003).

⁵² *Id.* at 37.

⁵³ *Id.*

period, nothing should have been refundable. Oregon, the buyer, unilaterally terminated the contract after the 90-day period,⁵⁴ so it would seem that Waksman, the seller, should retain the entire amount deposited. However, an addendum to the contract provided that if certain conditions in the contract had not been satisfied, including receipt of a building permit by Oregon, the buyer would have the right to terminate the contract and receive a refund of the first two contract deposits.⁵⁵ This addendum provided no time period.⁵⁶ Because the addendum provided no time limit, and because Oregon was unable to obtain a building permit for the property, despite the fact that cancellation occurred after the 90-day specified period, the court found that Oregon was entitled to return of those first two contract deposits.⁵⁷ This is yet another case of detailed, seemingly straightforward drafting that led to litigation during which a broker could be stuck holding the funds.

Ohio Court Decisions

Pursuant to O.R.C. § 4735.18(A)(6), the Ohio real estate commission may impose disciplinary sanctions upon any licensee (broker) who is found guilty of “[d]ishonest or illegal dealing, gross negligence, incompetency, or misconduct.”⁵⁸ Several landmark Ohio court cases address the issue of broker misconduct in relation to the return or failure to return earnest money deposits.⁵⁹

In *Kiko v. Ohio Department of Commerce*, the Department of Commerce suspended the broker’s license because the broker placed the earnest money funds in an interest-bearing

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 44.

⁵⁸ OHIO REV. CODE ANN. § 4735.18 (A)(6) (Lexis 2007).

⁵⁹ *See, e.g.* *Kiko v. Ohio Department of Commerce*, 549 N.E.2d 509 (Ohio 1990), *Gaskins v. Young*, 2004 WL 1178278 (Ohio App. 2d Dist. 2004), *Ballard v. Cleveland*, 2002 WL 31870134 (Ohio App. 10th Dist. 2002), *McManus v. Palinkas*, 1998 WL 700669 (Ohio App. 6th Dist. 1998), *In re Appeal of Sheaffer*, 686 N.E.2d 1382 (Ohio App. 2d Dist. 1996), *Hughes v. Ohio Division of Real Estate*, 621 N.E.2d 1249 (Ohio 1993).

account and disbursed the funds without the consent of the seller and the buyer.⁶⁰ In this case, the buyer gave to the broker an amount representing fifteen percent of the purchase price.⁶¹ Pursuant to the contract of sale, if the buyer refused to perform, the seller could void the contract, and all monies paid on account, not in excess of fifteen percent, would be forfeited to seller as liquidated damages.⁶² When the buyer was unable to obtain financing, the seller's attorney sent buyer a letter indicating that the buyer was in breach of the contract.⁶³ The attorney sent a copy of the letter to the broker.⁶⁴ Six months later, the broker sent part of the deposit to the seller, without informing the buyer.⁶⁵ The Ohio Supreme Court affirmed the decision of the Ohio Real Estate Commission that the broker engaged in misconduct by placing the deposit in an interest-bearing account and by disbursing the deposit without obtaining the consent of both parties.⁶⁶ The court found that the when the broker disbursed the funds without the consent of both parties to the contract, the broker breached the broker's fiduciary obligation to the parties.⁶⁷

In *In re Appeal of Sheaffer*, the Ohio Court of Appeals applied the *Kiko* decision to uphold a sanction of a real estate broker who returned the buyer's earnest money deposit to the buyer even though the broker knew that the buyer and seller disagreed as to whether the seller or the buyer had breached the contract provision that provided that the seller would return the deposit if the seller refused to repair the premises after an inspection.⁶⁸ The court found that the broker breached the broker's fiduciary duty as defined in *Kiko* and stated:

“In *Kiko*, the court grounded its affirmance of the . . . finding of misconduct partially on its observation that the licensee had betrayed a fiduciary duty contained in one of the

⁶⁰ 549 N.E.2d 509 (Ohio 1990).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 511.

⁶⁷ *Id.* at 513.

⁶⁸ 686 N.E.2d 1382 (Ohio App. 2d Dist. 1996).

ethical canons. The fiduciary duty was not explicitly given expression to in the canon. . . Specifically, the court recognized that *the licensee had an unwritten fiduciary duty not to deliver earnest funds until the licensee had procured the consent of both parties.*⁶⁹

Because of the holdings in *Kiko* and *Sheaffer*, brokers in Ohio may release earnest money deposits only with the consent of all parties to the real estate contract or on the order of the court.

Additional Stranded Earnest Money Procedural Contractual Provisions

Because in isolation contract provisions that provide for disbursement of the earnest money to one of the parties on the happening of an event often are an insufficient remedy to the stranded earnest money problem, the contract provisions should include other procedural solutions. For example, a contract provision could require that a failed transaction immediately be followed by deposit in court of any earnest money being held. This solution would result in the removal of any obligation on the part of the broker to handle earnest money disputes, but, again, might result in additional expense for the broker. If a contract term alters the normal behavior of parties to a real estate contract in a particular state, it will need to be drawn to the parties' attention before the contract is signed. It is important to note that courts will not enforce contract provisions that significantly alter normal, reasonably expected rights and obligations unless the parties against whom it is enforced knowingly and voluntarily agreed to the term.⁷⁰

In states that supply a streamlined release process for stranded earnest money, the process can easily be incorporated into a contract forfeiture provision. The term need merely state to whom earnest money will be disbursed in case of a clear breach, and that if the parties disagree about who breached the contract, the broker will automatically initiate the release process specified by statute or regulation, most likely resulting in deposit of the funds in court. Because

⁶⁹ *Id.* at 116 Ohio App.3d 110-111 (emphasis added).

⁷⁰ *See, e.g.* *Moscatiello v. Pittsburgh Contractors Equip. Co.*, 595 A.2d 1190, 1193 (Pa. Super. 1991) (indicating that when an unusual or unexpected contract term, like a waiver of implied warranty, is included in a standard "boilerplate" contract, it must be conspicuous, so that "attention can reasonably be expected to be called to [it]," thereby avoiding any "fine print waiver of rights).

the parties will then need to take initiative on their own to recover the funds, their attention should be drawn to this provision before they sign the contract.⁷¹ Even in states that do not provide for such a process, if it is described in detail in the contract, and both parties knowingly and voluntarily agree to it, the broker can follow that process in the event of a dispute.

Unclaimed property acts allowing for escheat to a specified state fund after a period of years operate independently of any contractual agreement. But to make these acts more efficient from the broker's point of view, a broker could ask that the parties agree to a provision accelerating the escheat process. For example, in a state with a three-year holding period before funds are considered unclaimed, the broker could ask that the parties agree to a one-year period. Again, since this will alter the rights of the parties by accelerating their obligation to act on the dispute, it will have to be a conspicuous provision in the contract. It may also be more problematic than a release process stipulation; because funds can more easily be recovered by the parties if they are deposited with a local court than if they have become part of a large state fund.

A very common solution to potential contract disputes in many areas is to include an arbitration clause, requiring that any disputes arising from the contract be submitted to arbitration or mediation, rather than to litigation.⁷² While the broker may still be required to hold funds in trust during the arbitration or mediation process, just as during litigation, alternative dispute resolution is often an expedited process when compared to litigation. If the parties agree, the broker may also request that the arbitration clause include a requirement that the broker deposit the disputed funds with a mediator or arbitrator, chosen by the parties or otherwise, within a specified amount of time after failure of the transaction.

⁷¹ See text accompanying notes 20-28, *supra*.

⁷² See Chapter 3. A binding arbitration clause will alleviate the stranded earnest money problem when the parties disagree after they enter into the contract.

Another alternative might include a contract provision that permits the broker to divide the earnest money funds equally between buyers and sellers if two years after the sale breaks down 1) the parties have failed to sign an agreement of disbursement, 2) the parties have failed to obtain an order pursuant to binding arbitration, or 3) neither party has filed a civil complaint for breach of the sales contract. This contract provision would give clear direction to the broker when the parties dispute disbursement of the earnest money funds.

In addition, this contract provision would insure that the broker has satisfied the broker's fiduciary obligations under the *Kiko* decision because the provision provides for an ex ante agreement of the parties. If the parties sign an agreement of disbursement, the broker will disburse the funds according to the agreement, thus satisfying the duty of the broker to disburse according to the parties' agreement. If the broker disburses the funds pursuant to a binding arbitration order, the broker will be performing the contractually agreed term that directs the broker to disburse according to a binding arbitration order. Disbursement under this circumstance should satisfy the broker's obligation, as interpreted in *Kiko*, to obtain the agreement of the parties before disbursement, because the parties agreed ex ante in the contract and at the time of arbitration that the broker should disburse according to the arbitrator's decision. If the parties cannot or will not agree and one or both files a civil complaint, the broker will hold the funds until a final court order with which the broker will comply. Again, when the broker complies with the court order, the broker will satisfy the broker's fiduciary obligation as interpreted in *Kiko*.

If, on the other hand, the parties do not agree to disbursement and they do not obtain a binding arbitration order and neither party files a complaint, the contractually agreed term will permit the broker to divide the earnest money funds equally between both parties.⁷³ The authors submit that this proposed contractual provision that provides for equal division and disbursement by the broker will encourage agreement by the parties or encourage the parties to litigate their dispute, both of which would hasten resolution of the dispute. When both parties know that they may obtain half of the earnest money deposit, instead of nothing, they may fail to act, which will trigger disbursement two years after the contract has not been performed. Or, if one, or both, of the parties believes in his or her right to all of the earnest money (not half), that party should submit to binding arbitration or file a complaint for return of the entire amount. Consequently, a party who claims a right to all of the earnest money deposit must obtain the consent of the other party or submit the claim to alternative dispute resolution or file a law suit. Any of these alternatives would free the broker from spending scarce resources to determine which party has the legal right to the earnest money.

The aforementioned contract provision would apply if the broker were able to locate only one of the parties in that the broker would disburse half of the funds (or the equal share) to that party. The broker can use the unclaimed funds procedure for the other shares that should have been given to the missing parties. If the broker is unable to find all parties, the broker, likewise, should use the unclaimed funds procedure. This contract provision would save time and expense for the broker by clearly providing for disbursement as agreed under the contract without asking the broker to decide fault or breach. It is important that the Ohio Revised Code be amended to

⁷³ In the opinion of one of the drafters of this report, this proposal should apply only when the earnest money deposit is \$2000 or less. Another would like to apply this contract provision to all deposits, because the threat of obtaining only half of the deposit would encourage both parties to agree to disbursement or to file a civil complaint, both of which would free the broker from having to decide to whom to send the funds.

permit the broker to act pursuant to this proposed contractual provision. In the alternative, the Ohio Real Estate Commission, pursuant to O.R.C. § 4735.03(A), should include this conduct in the canons of ethics for the real estate industry. If this conduct is permitted, action in accordance with the contract will not constitute broker misconduct under section 4735.18(A)(6).⁷⁴

In states with comprehensive statutes that give brokers several options for dealing with stranded or disputed earnest money, contract provisions can be especially helpful. Not only can they preempt certain disagreements by concretely describing what happens to earnest money upon the occurrence or nonoccurrence of certain conditions, but they can also be used to explain what will happen to the money if something unexpected occurs, or if the parties cannot agree upon whether the required conditions occurred. Moreover, if several options are available, a broker may be able to negotiate with parties to use different remedies in different situations, thereby allowing parties more room to compromise and brokers more options for removing themselves from the situation. Given the flexibility inherent in such a system, contract provisions can become a very powerful tool for avoiding dispute.

⁷⁴ See *Kiko*, 549 N.E. 2d at 509.

Chapter 3:

Alternative Dispute Resolution Through Mediation and Arbitration

Introduction

If the parties cannot or will not agree to the disbursement of the earnest money deposit after a contract for the sale of real estate fails, the parties may, before litigation, agree to subject the disagreement to alternative dispute resolution (ADR). A major part of modern dispute resolution, ADR employs many diverse mechanisms, two of which, mediation and arbitration, will be addressed in this chapter.

“Mediation is a structured process in which the mediator assists the disputants to reach a negotiated settlement of their differences.”⁷⁵ Usually, the parties consent to submit their dispute to mediation after the dispute arises; in some cases, courts order mediation after a party files a complaint with the court. Generally, the mediator is licensed or has received training in mediation. In Ohio, mediators need not be licensed mediators or licensed attorneys -- individuals who have backgrounds in counseling such as psychology and social work make very good mediators.⁷⁶ Like other kinds of ADR, parties may select the person who mediates the dispute. Often, if the parties cannot reach an agreement as to the selection of a mediator, their attorneys may make the selection. The court will select the mediator in court-ordered mediation.

Before mediation, the parties submit all relevant evidence to the neutral mediator. At the mediation session, the parties may, but need not, be represented by an attorney. During mediation, the parties discuss their individual complaints, grievances, and desired outcomes. In

⁷⁵ Katherine Stone, *PRIVATE JUSTICE: THE LAW OF ALTERNATIVE DISPUTE RESOLUTION*, 7 (Foundation Press 2000). [hereinafter Stone].

⁷⁶ See 5A OHIO JUR. 3D *Alt. Dispute Res.* § 129-132 (2006). In Ohio, the Rules of Superintendence for Courts of Common Pleas outline the qualifications for individuals who mediate child custody and visitation issues in domestic relations and juvenile courts.

Ohio, in order to encourage the use of mediation and to encourage full disclosure by the parties, all communications during the mediation process are confidential and generally cannot be introduced in a civil proceeding.⁷⁷

The mediator, using specialized skills and techniques, assists the parties to settlement, which culminates in a settlement agreement signed by all parties. Mediators strive to assist the parties to reach a settlement on their own, but ordinarily are not authorized to issue a binding decision.⁷⁸

The mediation process is simple and inexpensive, and allows a settlement in which there need not be a winning and losing party. Because parties can decide on partial division of the disputed amount, mediation is much more flexible than a court decision in which the winner takes all.

Arbitration “involves the submission of the dispute to a third party who renders a decision.”⁷⁹ Typically, the decision of the arbitrator is binding on all parties. Alternatively, in court-annexed arbitration, a court will refer civil suits to an arbitrator who submits a non-binding decision to the court.

Before the arbitration hearing, the parties submit all relevant evidence to the arbitrator who usually is selected by the parties from a list of available arbitrators. Often, parties submit a list of questions or issues that they want the arbitrator to decide.⁸⁰ Arbitration procedures range from very informal to those that closely resemble a structured formal court proceeding. If the parties agree, attorneys or the parties themselves may present evidence and call witnesses to testify before the arbitrator. Like mediators, arbitrators need not be licensed as arbitrators nor

⁷⁷ The Ohio Uniform Mediation Act, OHIO REV. CODE ANN. §§ 2710.01-10 (Lexis 2007).

⁷⁸ See 5A OHIO JUR. 3D *Alt. Dispute Res.* § 166 (the mediator’s decision may be enforced through contract principles, however, if the “basic elements of contract formation” are present).

⁷⁹ Stone, *supra* at p. 6.

⁸⁰ *Id.* at p. 305.

are they required to be licensed attorneys.⁸¹ Often arbitrators may be respected members of the trade that is the subject of the dispute. Many arbitrators become experts at deciding particular kinds of disputes, e.g., labor, commercial, real estate, etc.

After the hearing, the arbitrator answers the questions presented and issues an award. If the parties agreed to binding arbitration, the award is final. Because arbitration may closely resemble a trial in court, arbitration may be more expensive and time-consuming than mediation, but the fact that arbitration can be binding makes it appealing when the parties can not agree to a solution even when assisted by a mediator.

ADR in Ohio

After a dispute concerning the return of an earnest money deposit, the parties may, but rarely do, voluntarily decide to submit their questions to ADR. Most parties have little information about voluntary, as opposed to court-ordered, ADR. We suggest that the real estate commission include information on ADR in its education and testing of licensees. Also, the commission may want to publish information about ADR; this information would enable brokers to encourage buyers and sellers to voluntarily submit to ADR.

On the rare occasion when parties voluntarily choose ADR, they may use private mediators and arbitrators who will assist the parties for a fee. Other sources for ADR professionals include local courts and law school clinics. For example, the Toledo Municipal Court, pursuant to rule 16 of the Rules of Superintendence for the Courts of Ohio, adopted a Citizens Dispute Settlement Program (CDSP), which provides non-binding mediation services to facilitate resolution of disputes.⁸² Under CDSP, the parties need not be litigants nor must they file a civil complaint in Municipal Court. Referrals to the program include attorneys and

⁸¹ 5A OHIO JUR 3D *Alt. Dispute Res.* § 132.

⁸² TOLEDO MUN. COURT R. 37 (See Appendix: Figure 3).

individual disputants.⁸³ Small claims cases can also use the CDSP program, either before or after a complaint is filed.⁸⁴

Law school clinics also provide ADR services to the public. For example, students registered in the University of Toledo dispute resolution clinic “serve as volunteer mediators in juvenile delinquency and unrul[iness] cases in the Lucas County Juvenile Court, the Wood County Juvenile Court, and the Henry and Defiance County Family Courts. Students also serve as volunteer mediators in the small claims division of the Toledo Municipal Court.”⁸⁵ That clinic or others across the state could offer services to the parties to an earnest money dispute.

Certainly, if the parties agreed to use the ADR services of a law school clinic or a court citizens dispute settlement program, the broker’s aim of settling the dispute quickly and efficiently would be enhanced. Nevertheless, most parties who cannot or will not agree on the disbursement of the deposit will likewise have difficulty agreeing to submit their dispute to ADR.

Contractual ADR Provisions

A simple potential resolution to the stranded earnest money dispute problem would be for the parties to submit the issue to ADR. In the typical earnest money dispute, when the deal breaks down, the buyer will want the broker to disburse all of the earnest money deposit to the buyer and the seller will want the broker to disburse all of the deposit to the seller. Even if the broker agreed with one of the parties, the broker may not unilaterally act. Because the Ohio Supreme Court has ruled that unauthorized disbursement of the earnest money deposit will constitute “misconduct” under O.R.C. § 4735.18(6), at the outset the broker is unable to disburse

⁸³ *Id.*, at R. 37 (C).

⁸⁴ *Id.*, at R. 37 (H).

⁸⁵ U. of Toledo College of Law, DISPUTE RESOLUTION CLINIC, <http://law.utoledo.edu/students/clinics/disputeresolution.htm> (last accessed July 16, 2007).

funds absent an agreement of the parties.⁸⁶ The broker is also unable to unilaterally submit the dispute to ADR. And, as discussed above, after the dispute arises, it may be difficult for the parties to agree to anything, including submitting the dispute to ADR.

If, however, the parties agreed in their contract of sale that disputes concerning return of the earnest money deposit would be subject to mediation, the fiduciary obligations of the broker under the Ohio Revised Code would be satisfied by returning the deposit as provided in the parties' mutual agreement after mediation.⁸⁷ Still, as discussed above, the mediator has no right to order the parties to agree or to sign a mediation agreement. If mediation fails or if one of the parties breaches the contract by refusing to submit to the mediation process, the broker, again, can not return the earnest money deposit absent an agreement by the parties.

A contractual provision can solve the broker's dilemma when the parties cannot agree after mediation. The parties can agree in the real estate contract that, if mediation fails, they will submit their dispute to *binding* arbitration and that the broker must disburse the earnest money in accordance with the arbitrator's decision. In that circumstance, if the broker disburses the deposit, the broker's actions will be in accordance with the prior agreement of the parties. This conduct by the broker, if submitted, would satisfy the requirements of the Ohio Supreme Court in *Kiko*, which ruled that the broker may disburse the deposit pursuant to the agreement of the parties or a court order.⁸⁸ In this situation, the broker would be disbursing pursuant to the prior agreement of the parties. As discussed in Chapter 2, the real estate commission may need to draft a rule or ask the legislature to amend the real estate statute to exclude this situation from unauthorized disbursement by the broker and, perhaps, include an obligation on the part of the broker to remind the parties of their agreement to submit their dispute to mediation and

⁸⁶ OHIO REV. CODE ANN. §4735.18 (6). See *Kiko*, 549 N.E.2d 509. See also Chapters 1 and 2, *supra*.

⁸⁷ 5A OHIO JUR 3D *Alt. Dispute Res.* § 165.

⁸⁸ 549 N.E. 2d at 513.

arbitration. Certainly, broker misconduct should not include actions in accordance with the ex ante agreement of the party.

If the parties agree to these contractual provisions, there will be no need for the parties to submit the earnest money dispute to the jurisdiction of a court. If, however, one or both of the parties breaches the contract by refusing to submit the dispute to binding arbitration, the aggrieved party can file a complaint in court. Although this proposal affords significant protection for the broker, it does not solve the problem that arises when the broker is unable to find one or both of the parties. In that circumstance, there must be other available remedies, as proposed in Chapter 2, or the broker will have to resort to the unclaimed funds solution, as proposed in Chapter 6.

Chapter 4:

The Interpleader Process in Ohio

Introduction

A common recommendation found on state realtor association web sites to brokers who want to affirmatively relieve themselves of the burden of stranded earnest money is for brokers to use an interpleader process.⁸⁹ An interpleader action is a two-stage action in which a stakeholder first interpleads all claimants to a disputed fund, then ordinarily drops out, leaving the claimants to establish who has the valid claim to the fund.⁹⁰ This prevents the stakeholder from paying the wrong claimant and exposing the stakeholder to the possibility of multiple liability.⁹¹

Ohio Civ. R. 22 allows for interpleader actions when claims against a plaintiff “are such that the plaintiff is or may be exposed to double or multiple liability.”⁹² The Ohio interpleader rule plainly provides that the interests of the interpleaded claimants do not have to be identical.⁹³

In Ohio, a Rule 22 interpleader action is initiated when the stakeholder files a complaint.⁹⁴ The prospective claimants who should assert an interest in the money are named as defendants and served with process.⁹⁵ In the case of a broker seeking relief, this typically would be the buyer and seller for whom the broker is holding the earnest money.⁹⁶

⁸⁹ See, e.g., Michigan Association of REALTORS, GUIDE TO INTERPLEADING EARNEST MONEY DEPOSITS, <http://www.mirealtors.com/PDFs/interpleaderguide.pdf> (last accessed July 10, 2007); Seth Weissman, LEGAL EASE: THE NEW GAR PURCHASE AND SALE AGREEMENT, <http://www.garealtor.com/Default.aspx?tabid=179> (last accessed July 10, 2007) (advocating the position of the Georgia Association of REALTORS to use of the interpleader process in settling disputes).

⁹⁰ Lincoln Natl. Life Ins. v. Taylor, 1993 Ohio App. LEXIS 3117, No. 92AP-1724 (Franklin App. June 17, 2003) (citing the staff notes to OHIO CIV. R. 22).

⁹¹ *Id.*

⁹² OHIO CIV. R. 22 (Lexis 2006).

⁹³ *Id.*

⁹⁴ OHIO CIV. R. 3(A) (Lexis 2006).

⁹⁵ See White Paper, *supra* note 5.

⁹⁶ *Id.*

The Ohio Association of Realtors recommends the use of an interpleader action in situations where the broker wishes to clear the broker's trust account.⁹⁷ However, the Association recommends that in the event of irreconcilable differences between the buyer and seller, the broker should leave the earnest money in the broker's trust account.⁹⁸ The White Paper explains:

To avoid placing the broker in [the] difficult situation [of making a legal decision as to which party is entitled to the earnest money], ... a broker shall not disburse earnest money to any party unless the other party to the transaction has provided him with a release or authorization to do so. If the parties refuse to give the broker appropriate authorization to disburse the funds, then the broker is required to keep the funds in his trust account until the parties provide him with an appropriate authorization or until a court of law orders him to disburse the funds."⁹⁹

This recommendation is consistent with the position of the Department of Real Estate Commission that by maintaining the status quo of funds held on deposit, a broker "reflects a neutral position of the fiduciary awaiting ambiguous instructions."¹⁰⁰ It is also consistent with Ohio Supreme Court decisions.¹⁰¹

In the event the broker cannot obtain the consent of both parties, the White Paper instructs the broker to advise the buyer and seller that one of them must bring a court action to determine who is entitled to the earnest money deposit.¹⁰² Nevertheless, the White Paper acknowledges that there may still be situations in which the broker will want to commence the action.¹⁰³

On its face, having no exception to the rule that a broker should not disburse earnest money to either party until both parties have executed an agreement authorizing the

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *See In re Sheaffer*, 686 N.E.2d at 1389.

¹⁰¹ *See, e.g. Kiko*, 549 N.E.2d at 509.

¹⁰² White Paper, *supra* note 2

¹⁰³ White Paper, *supra* note 5.

disbursement or until a court has ordered disbursement seems unworkable. Most real estate contracts do not include alternative dispute provisions, and full blown court actions can be very cumbersome and expensive. The broker does not want to drain an entire year's earnings to resolve a dispute involving an amount that is often less than five hundred dollars.

Is there any remedy presently available for such a situation? The White Paper suggests that this problem could be resolved in small claims court by filing an interpleader action.¹⁰⁴ We tend to agree with that suggestion, but have some reservations which we will explore later in this chapter. Although this advice may have been on suspect legal ground in 2002 when it was originally given, the current tone of the Ohio Supreme Court suggests that there is a possibility that small claims might be an appropriate forum today.¹⁰⁵

Small Claims Court

In many real estate transactions, earnest money is a diminutive amount, such as five hundred dollars. Hence, when there is a disagreement over earnest money, the most logical forum for settling the dispute would seem to be small claims court.

In Ohio, the Small Claims Court Act provides for a small claims division in every county and municipal court.¹⁰⁶ The small claims court is a subdivision of the municipality or county and has jurisdiction over civil damage suits for amounts not exceeding \$3,000.¹⁰⁷ The jurisdictional limit is smaller than the limits in some other states. For example, the magistrate court in South Carolina has a jurisdictional limit of \$7,500.¹⁰⁸

¹⁰⁴ *Id.*

¹⁰⁵ *Cf.* Cleveland Bar Association v. Pearlman, 832 N.E.2d 1193 (Ohio 2005) (stating that in “small claims cases, where no special legal skill is needed, and where proceedings are factual, nonadversarial, and expected to move quickly, attorneys are not necessary”).

¹⁰⁶ OHIO REV. CODE ANN. §§ 1925.01-1925.18 (Lexis 2007).

¹⁰⁷ *Id.*

¹⁰⁸ S.C. CODE ANN. § 22-3-25 (Lexis 2006).

Proceeding Without an Attorney in Small Claims Court

One of the advantages of small claims courts is that attorneys generally have a limited role in the proceedings. In Ohio small claims courts, corporations have a limited statutory right to proceed without representation.¹⁰⁹ The original small claims legislation created problems for corporations who wanted to be represented by a corporate officer or manager.¹¹⁰ In response to these difficulties, the legislature revised the small claims law to provide a narrow *in propria persona* representation for corporations in cases “based on a contract to which the corporation is an original party or to any other claim to which the corporation is an original claimant ... provided such corporation does not ... engage in cross-examination, argument, or other acts of advocacy...”¹¹¹

In theory, any bona fide corporate officer should be allowed to file and present the corporation’s claim or defense. However, in *Washington Cty. Dept. of Human Servs. v. Rutter*, the court of appeals found a similar law to be unconstitutional on the grounds that only the Supreme Court of Ohio had the power to allow a layperson to practice law.¹¹² Consequently, the ability of a corporation to proceed in small claims court without an attorney was open to question.

Recently, in *Cleveland Bar Association v. Pearlman*, the Ohio Supreme Court examined the status of a non-attorney corporate officer appearing in small claims court on behalf of a corporation.¹¹³ Although Pearlman, the owner of two limited-liability investment companies, had never been admitted to the practice of law, he filed 13 complaints in the small claims

¹⁰⁹ See OHIO REV. CODE ANN. § 1925.17 (Lexis 2007).

¹¹⁰ Robert J. Hollingsworth, et al., Note, THE OHIO SMALL CLAIMS COURT: AN EMPIRICAL STUDY, 42 U. Cin. L. Rev. 469 (1973).

¹¹¹ OHIO REV. CODE ANN. § 1925.17 (Lexis 2007).

¹¹² 651 N.E. 2d 1360 (Ohio App. 4th Dist. 1995) (noting that filing a complaint in small claims court pursuant to Section 1925.18 is an act of advocacy, and therefore falls within the practice of law).

¹¹³ 832 N.E.2d 1193 (Ohio 2005).

division of municipal court in Cleveland on behalf of the two companies.¹¹⁴ The Cleveland Bar Association filed suit, alleging Pearlman was providing legal services for the corporation by appearing in small claims court on behalf of the two companies.¹¹⁵

The Ohio Supreme Court disagreed, stating that an important balancing of interests was necessary.¹¹⁶ Although the Court certainly had the power through its regulation of the legal profession to prohibit those not admitted to the bar from representing corporations, the Court indicated that, under these circumstances, it also had the power to allow non-lawyers certain privileges when the interests of society outweighed the interests in prohibiting a limited representation by corporate officers.¹¹⁷ In refusing to prohibit Pearlman's activities within the scope of the statute, the Court recognized the need for a limited exception to the general rule that corporations may only be represented by licensed attorneys.

The *Pearlman* case can be seen as important precedent for brokers who want to represent a brokerage in small claims court. Had the court ruled in favor of the Cleveland Bar Association, the prospects for economically resolving an earnest money dispute through an interpleader action in small claims court would have been extremely dim. Requiring an attorney to represent the brokerage in a small earnest money case makes small claims court an uneconomical alternative.

Ohio Interpleader and Small Claims Court

In order to shed the burden of stranded earnest money, it has been suggested that a broker should file an interpleader action in small claims court on behalf of the firm.¹¹⁸ The Ohio Revised Code specifically grants interpleader jurisdiction to Ohio courts.¹¹⁹ However, such

¹¹⁴ *Id.* at 1194.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 1198.

¹¹⁷ *Id.*

¹¹⁸ See White Paper, *supra* Note 2

¹¹⁹ OHIO REV. CODE ANN. §§ 1901.18(A)(6), 1907.031(A)(5) (Lexis, 2007).

jurisdiction might not exist in small claims courts. Small claims courts are divisions of the municipal and county courts and consequently should be vested with the same jurisdiction subject to the enabling charge given by the state in section 1925.02(A)(1). That section provides that “a small claims division ... has jurisdiction in civil actions for the recovery of taxes and money only, for amounts not exceeding three thousand dollars, exclusive of interest and cost.”¹²⁰

Interpleader is an action concerning money, but associated with interpleader is the ability to bar certain types of claims against the stakeholder. One concern is that this equitable relief normally associated with interpleader is not found in the enabling statute establishing small claims courts and therefore might be outside the scope of their jurisdiction, even though they are a division of their respective municipal or county court system. Another concern is that even if there is interpleader jurisdiction in small claims courts right now, any ancillary equitable relief is a potential source of trouble under the current statutes. It would be prudent to pass legislation or obtain a declaratory judgment on the matter.

The interpleader procedure in small claims court seems to have worked well in some states. As discussed below, states like South Carolina have specifically provided that jurisdiction for interpleader actions regarding earnest money deposited with brokers lies with the magistrate courts that have jurisdiction of amount up to \$7,500.¹²¹ In addition, the legislation provides for standardize forms for brokers to use.¹²²

It seems possible to prescribe a common form for the Ohio broker to use. A common form would be particularly useful in establishing the simplicity that should accompany small claims court as forum for interpleader in small earnest money disputes.

¹²⁰ OHIO REV. CODE ANN. § 1925.02(A)(1) (Lexis 2006).

¹²¹ S.C. CODE ANN. § 22-3-25 (Lexis 2006).

¹²² *Id.*

Problems Associated with Interpleader

Interpleader in any forum has not worked well for Ohio brokers with regard to earnest money. Several factors have created this issue.

One problem is a general belief that the corporate brokerage firm must be represented by an attorney. At a minimum of \$200 an hour for an attorney, when the earnest money amount is only \$1,000 or less, it would not be a prudent business decision for a broker to hire an attorney to pursue this procedure. Even if it is not true that a corporation must be represented by an attorney, a prevailing view is that it must be.¹²³ Consequently, there is a belief impediment as much as there is a real legal impediment. Thus, it is logical to assume that at this point any interpleader action involving a corporate brokerage firm must be filed by an attorney.

Another problem with using the small claims court and interpleader to resolve the stranded earnest money problem is the relatively low jurisdictional amount in the Ohio Small Claims Court. The current amount is \$3,000, which is substantially smaller than some other states.¹²⁴ For example South Carolina recently passed legislation that provided for a jurisdictional limit of \$7,500 in their magistrate courts which are the equivalent to Ohio's small claims courts.¹²⁵ For those wanting to solve the earnest money problem as quickly and inexpensively as possible, the low jurisdiction limit in small claims court is troubling. If the jurisdictional amount of \$3,000 is exceeded, then a claim will have to be filed in municipal or county court. For corporate brokerages, this certainly means that an action could not be filed without an attorney.¹²⁶ This implies that the most economical solution for stranded earnest money amounts greater than \$3,000 will not be an interpleader action. Table 4.1 outlines

¹²³ See e.g., SYLVANIA MUN. CODE ORDIN. (Ohio) § 2(B) (2002) (requiring corporations and partnerships to be represented by counsel).

¹²⁴ OHIO REV. CODE ANN. § 1925.02(A)(1) (Lexis 2007).

¹²⁵ S.C. CODE ANN. § 22-3-10 (Lexis 2006).

¹²⁶ See OHIO REV. CODE ANN. § 4705.01 (Lexis 2007).

possible results. Again, it would be advisable to adopt legislation that permits interpleader without an attorney up to a higher level than allowed by the small claims jurisdiction.

Table 4.1
INTERPLEADER IN OHIO

AMOUNT	JURISDICTION	NO LAWYER
Small Claims 0 - \$3,000	PROBABLY	PROBABLY
Higher court over \$3,000	YES	NO

Advantages of Using the Small Claims Court

Small claims courts seem to be a reasonable forum in which to shed the responsibility of stranded earnest money, provided that there is no requirement that an attorney represent the brokerage, and that the small claims court is vested with reasonable equitable power. The filing fees are reasonable – usually in the range of \$25 to \$37.¹²⁷ Although there may be some fees for the sheriff’s office or a local process server to deliver notice of a claim to the defendants, there are still substantial benefits to using small claims court in terms of speed and economy.¹²⁸ Service is by certified mail by clerk, return receipt, sheriff, bailiff or court-approved adult.¹²⁹ The courts proceedings are usually fast.¹³⁰ If difficult issues arise, the court may transfer the case and it will be tried under regular civil procedure of an appropriate court.¹³¹ In short, the forum is economical and convenient if attorneys are not required for these small dollar amount earnest money disputes.

¹²⁷ Sherrie Bennett, OHIO SMALL CLAIMS, <http://research.lawyers.com/Ohio-Small-claims.html> (last accessed July 11, 2007).

¹²⁸ *Id.*

¹²⁹ *Id.*; see also Consumer’s Affairs, OHIO SMALL CLAIMS COURT, http://www.consumeraffairs.com/consumerism/small_oh.html (last accessed July 11, 2007).

¹³⁰ *Id.*

¹³¹ *Id.*

Guidance from Other States

The interpleader small claims jurisdiction of several other states can serve as good examples for Ohio to follow. In particular, the laws in three states – Oklahoma, South Carolina, and Pennsylvania – are a helpful resource.

The Oklahoma legislature specifically granted jurisdiction to its small claims courts for interpleader actions under \$6,000.¹³² To further simplify the process, Oklahoma provides a standard filing form to be used in interpleader actions.¹³³ It would be beneficial for Ohio lawmakers to also adopt a standard form like this one. Any law which resolves uncertainty associated with the process would be advantageous.

In 2002, South Carolina passed an act providing magistrates with concurrent jurisdiction of interpleader actions filed over claims of disputed real estate earnest money of less than \$7,500.¹³⁴ The law provides that the Office of Court Administration must design appropriate legal forms for proceeding under this section and make those forms available for distribution.¹³⁵ Enabling legislation like this should serve as a model for legislation in Ohio

In a recent proposed revision of Pennsylvania administrative law, a subcommittee recommended that the broker should be entitled to recovery costs including attorney fees of the interpleader actions.¹³⁶ Though the proposal ultimately was disregarded, it does submit a progressive concept. Any legislation passed in Ohio should allow the broker to recover any costs associated with interpleader after notifying the buyer and seller of the broker's intent to file an interpleader action.

¹³² OKLA. STAT. TIT. 12 § 1751(A)(3) (2007).

¹³³ See Okla. Real Estate Commn., TRUST ACCOUNT AND INTERPLEADER PROCEDURES, <http://www.ok.gov/~orec/pdf/trust.pdf> (last updated Nov. 2001) This form is included in the Appendix.

¹³⁴ S.C. CODE ANN. § 22-3-25 (Lexis 2006).

¹³⁵ *Id.*

¹³⁶ 29 PA. BULL. 565 (Jan. 30, 1999) (regarding PA. CODE TIT. 49 § 35.327 (2007)).

Conclusion

There may be interpleader jurisdiction in small claims court right now. One interpretation of the statute would provide for that. However, without the Supreme Court of Ohio endorsing this interpretation, it would not be prudent for a brokerage firm to proceed without an attorney in small claims court at this time. There may be a problem particularly where there are local rules prohibiting corporate representation by an officer, an act of the legislature or, alternatively, a decision by the Ohio Supreme Court would be very helpful in clearly establishing the jurisdiction which may exist now. In courts of general jurisdiction, an interpleader action may require the use of an attorney. In the case of a large earnest money deposit requiring an attorney may make sense, but it may not make sense when the deposit is in the \$3,000-\$5,000 range. This suggests that the jurisdictional limit of small claims may be too low.

Chapter 5:

Setting a Time Limit for Recovery

Introduction

One of the frustrating aspects of the stranded earnest money issue is that inconvenience is visited upon the broker, who is an innocent party. Meanwhile, the buyer and seller who should be resolving the issue sometimes appear to be indifferent. This situation could be improved by giving the buyer and seller greater incentive to solve their differences in a timely manner. Setting a time limit for recovery could provide such incentive.

A real estate contract terminates in one of four ways. First, the sale can go through so that the executory real estate contract is performed and becomes a completed sale. Second, the parties can terminate the contract by agreement. Third, the matter can be decided by the courts. Fourth, the parties can ignore the problem, leaving the real estate broker in a precarious situation.

In cases such as the latter, the unclaimed or disputed funds languish in the active broker's escrow account for years, sometimes with the parties moving and leaving no forwarding addresses.¹³⁷ Public policy directs that people should not sit on their rights to avoid adverse consequence to society as whole.¹³⁸ An additional problem may be the diminished nature of the title to the associated real estate. An executory contract could be a cloud of the title to the property. Given the public policy in favor of alienability of real estate, it makes senses to cut off the claims at some point.

¹³⁷ See White Paper, *supra* Note 5.

¹³⁸ See *e.g.* Blankenship v. Blackwell, 817 N.E.2d 382, 391 (Ohio 2004).

It is reasonable to develop policies and institutions that minimize the disruptions caused by these lax individuals. Cutting off stale claims is one way to deal with the situation.¹³⁹ This should be constitutional as long as the parties have adequate opportunity to exercise and defend their rights. Completely cutting off their rights after a period of years makes sense in most cases because the amount of money involved is usually *de minimus*. A solution could be forfeiture of the funds to the state after a period of years. This is more favorable than transferring the assets to the state unclaimed fund because the latter simply delays the inevitable. If the parties have done nothing for five years, they are not likely to pursue the issue later. The three traditional types of limitations of actions – statutes of limitation, statutes of repose, and laches – are discussed below.

Statutes of Limitation

The most common form of limitation of action is a statute of limitation, which establishes the period within which lawsuits must be filed after a cause of action occurs. The general concept of statutes of limitation suggests that complaints filed after a statute of limitation should be dismissed irrespective of the specific merits of the case.¹⁴⁰

There are four policy considerations supporting statutes of limitation in Ohio. The first is ensuring fairness to the defendant.¹⁴¹ Defendants at some point are entitled to relief from their past actions, and should not have to be vigilant in maintaining defenses against aged claims. The second is to encourage prompt prosecution of causes of action.¹⁴² Judicial resources are scarce and expensive, and to delay prosecution expends these resources. The third is to suppress

¹³⁹ The problem with a simple statute of limitations would be the public perception that the broker was being unjustly enriched. Consequently, the better public policy is to have the money forfeited to the state. (Perhaps to the real estate education and research fund?)

¹⁴⁰ See 66 OHIO JUR. 3D *Limitations and Laches* § 1 (2006).

¹⁴¹ *Doe v. Archdiocese of Cincinnati*, 489 N.E.2d 268, 272 (2005).

¹⁴² *Id.*

stale and fraudulent claims.¹⁴³ The fourth is to avoid the inconveniences brought about by delay.¹⁴⁴ To reconstruct events years after they occurred is more expensive, less efficient, and in some cases impossible. Prudence dictates that limited resources be expended when there is a high probability of a just outcome which is not the prosecution of stale claims. In theory, these statutes provide incentive to file suit in a reasonable, prudent and timely manner.

Statutes of limitation make a great deal of sense from society's standpoint as a reasonable response to balancing competing interests. In its original form, the doctrine applied to causes of action and began on the date of the occurrence giving rise to the cause of action.¹⁴⁵ However, many courts have found that applying a statute of limitation too strictly is unfair to the individual claimant in certain circumstances.¹⁴⁶ As a result, time limitations placed on the plaintiff's ability to file a lawsuit have been less rigidly interpreted than a literal reading of the statutes of limitation would suggest. For example, the injured party must have knowledge that an injury occurred in order to pursue a claim.¹⁴⁷

One byproduct of this flexibility is ambiguity as to when a cause of action is extinguished by a statute of limitation.¹⁴⁸ A large part of the problem is the courts' willingness to substitute a more flexible standard in cases where imposition of the statute of limitation would result in a manifestly unfair outcome.¹⁴⁹ The net result of this is accumulation of precedents which makes

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ See *Mason v. Bd. of Educ.*, 826 A.2d 433, 434 (Md. 2003).

¹⁴⁶ See *Ayers v. Morgan*, 154 A.2d 788 (Pa. 1959) This is one of the early cases to apply the "discovery" rule.

¹⁴⁷ For an extended discussion on the discovery rule, see Student Author, NOTE: THE FAIRNESS AND CONSTITUTIONALITY OF STATUTES OF LIMITATIONS FOR TOXIC TORT SUITS, 96 Harv. L. Rev. 1683 (1983).

¹⁴⁸ See Gail Heriot, A STUDY IN THE CHOICE OF FORM: STATUTE OF LIMITATIONS AND THE DOCTRINE OF LACHES, 1992 BYU L. Rev. 917 (1992).

¹⁴⁹ *id*

the computation of the actual statute of limitation difficult and the aims of the statute of limitation frustrated.¹⁵⁰

Statutes of Repose

One response to the ambiguity created by statutes of limitation has been the creation of statutes of repose. Statutes of repose are designed to give the potential defendants to lawsuits absolute certainty by cutting off stale claims regardless of concerns of fairness.¹⁵¹ The statutes initially focused on engineering and construction cases, but the doctrine has been applied in other areas, such as medical malpractice.¹⁵² In such cases, a statute of repose may bar any action before a cause of action has accrued.

In contrast to statutes of limitation, statutes of repose completely limit the time during which a defendant faces possible suit for injuries against plaintiffs.¹⁵³ The principal difference between the two is that the statute of repose unequivocally begins to run from the occurrence of the incident raising liability; the time a cause of action accrues or an injury is discovered is irrelevant.¹⁵⁴ Since the statute of repose is an absolute bar, defendants can escape liability regardless of the magnitude and culpability of their acts.¹⁵⁵ On the other hand, statutes of repose impose absolute certainty as to when a cause of action must be filed.

In spite of the potential that an individual may be left without a redress for a serious grievance or injury, some state and federal courts have held statutes of repose to be

¹⁵⁰ *Id*

¹⁵¹ See 66 OHIO JUR. 3D *Limitations and Laches* § 5 (2006).

¹⁵² *Id*

¹⁵³ Klein v. Catalano, 437 N.E.2d 514, 516 (Mass. 1982); Sch. Bd. v. U.S. Gypsum Co., 360 S.E.2d 325, 327-28 (Va. 1987).

¹⁵⁴ Town of Weymouth v. James J. Welch & Co., 6 Mass. L. Rptr. 197, 198 (Mass. Super. 1996).

¹⁵⁵ *Id*

constitutional.¹⁵⁶ However, the Ohio Supreme Court has not supported statutes of repose. In *Brennaman v. R.M.I. Co.*, the Ohio Supreme Court struck down O.R.C. § 2305.131, which barred tort actions against designers and engineers for improvements to real property brought more than ten years after completion of the construction services.¹⁵⁷ The Court reasoned that it “effectively close[d] the courthouse to ... individuals ... in contravention of the express language of Section 16, Article I, thereby violating constitutionally protected rights.”¹⁵⁸ In *State ex rel. Ohio Acad. Of Trial Lawyers v. Sheward*, the court reiterated its disapproval of statutes of repose as originally discussed in *Brennaman*.¹⁵⁹ In response to the decision of the Ohio Supreme Court, the Ohio legislature amended the statutes of repose to address some of the objections of the Ohio Supreme Court.¹⁶⁰ The constitutionality of these additional statutes has yet to be addressed by the Ohio Supreme Court.¹⁶¹

Some of the policy considerations involved in statutes of repose are related to rationale put forth in support for limitations of actions in general.¹⁶² One argument in favor of statutes of repose is based upon the evidentiary difficulties of meeting the burden of proof when evaluating a defendant’s liability in court.¹⁶³ A second argument states that defendants should not suffer protracted, potential liability, since this would interfere with their ability to “plan their affairs

¹⁵⁶ See e.g. *Britt v. Schindler Elevator Corp.*, 637 F. Supp. 734, 737 (D.C. Cir. 1986). The constitutionality has generally been upheld with regard to Federal Due process, but Ohio cases involving state due process guarantees have not been as supportive.

¹⁵⁷ 639 N.E.2d 425 (Ohio 1994).

¹⁵⁸ *Id.* at 430 (citing *Sedar v. Knowlton Constr. Co.*, 551 N.E.2d 938, 950 (Ohio 1990) (Douglas, J. dissenting)).

¹⁵⁹ 715 N.E.2d 1062 (Ohio 1999).

¹⁶⁰ Ohio Sen. 281, 124th Gen. Assembly, Reg. Sess. 2001-2002 (2001) (effective Apr. 11, 2003); Ohio Sen. 80, 125th Gen. Assembly, Reg. Sess. 2003-2004 (2003) (effective Apr. 7, 2005); Ohio Sen. 154, 126th Gen. Assembly, Reg. Sess. 2005-2006 (2005) (effective May 17, 2006) (revising OHIO REV. CODE ANN. §§ 2305.113, 2305.131).

¹⁶¹ Richard D. Schuster & Thomas R. Winters, OHIO TORT REFORM: A ROAD MAP FOR SUCCESS, <http://www.vssp.com/CM/Articles/Articles1201.asp> (last accessed July 12, 2007).

¹⁶² Mark W. Peacock, Comment, AN EQUITABLE APPROACH TO PRODUCTS LIABILITY STATUTES OF REPOSE, 14 N. Ill. U. L. Rev. 223, 229-32 (1994).

¹⁶³ *Id.*

with a degree of certainty.”¹⁶⁴ There is a public interest in granting defendants immunity after a certain period of time has elapsed so that they may conduct their activities with the “reasonable expectation” that they will not be liable for “ancient obligations.”¹⁶⁵

Laches

Laches is an affirmative defense that originally arose in courts of equity for reasons similar to the statute of limitations, which applied to courts of law.¹⁶⁶ The doctrine is invoked when a plaintiff fails to assert a right in a timely manner and, as a result, harms the defendant.¹⁶⁷ As an affirmative defense, the defendant bears the burden of proof in showing both unreasonable delay and harm, with reliance upon mere passage of time being insufficient.¹⁶⁸

Like modern statutes of limitation, the equitable doctrine of laches focuses on the plaintiff’s conduct after a reasonable time for discovery of an injury.¹⁶⁹ Laches thus serves essentially the same interests as the modern statutes of limitations, protecting defendants who are prejudiced by a plaintiff’s delay, but only if it is reasonable that the plaintiff should be held accountable for his tardiness.¹⁷⁰ Although the equitable defense plays a limited role in modern tort suits, it is still available in some contexts, such as suits for fraud.¹⁷¹

Stale Claims and Stranded Earnest Money

Claimants cannot, in fairness, sit on their rights forever. The parties to a real estate contract should resolve their disputes in a timely manner. By failing to pursue their rights, they create an undue burden on the real estate broker and the courts that may be requested to resolve the dispute under the cloud of faded evidence. The statute of limitation for written contracts in

¹⁶⁴ *Id.*

¹⁶⁵ *Klein v. Catalano*, 437 N.E.2d 514, 520 (Mass. 1982).

¹⁶⁶ 27A AM. JUR. 2D *Equity* §§ 140-143 (2006).

¹⁶⁷ *Nat’l R.R. Passenger Corp. V. Morgan*, 536 U.S. 101, 121 (2002).

¹⁶⁸ *White v. Daniel*, 909 F.2d 99, 102 (4th Cir. 1990).

¹⁶⁹ *Bashton v. Riko*, 517 N.E. 2d 707, 710 (Ill. App. 3d Dist. 1987).

¹⁷⁰ *Id.*

¹⁷¹ *Mother Earth, Ltd. v. Strawberry Camel, Ltd.*, 390 N.E.2d 393, 406 (Ill. App. 1st Dist. 1979).

the state of Ohio is fifteen years.¹⁷² This seems like an excessive amount of time to wait for a final resolution to an earnest money problem. Perhaps a shorter statute of limitations should be applicable in these cases. For instance, after five years the earnest money could escheat to the state if no litigation has been initiated to resolve the dispute.

A five-year period would be consistent with the five-year general presumption of abandonment under the Uniform Unclaimed Property Act (UUPA).¹⁷³ According to the statute, property is unclaimed if, for the applicable period set forth in the statute, the apparent owner has not communicated in writing or by other means with the holder concerning the property or the account in which the property is held and has not otherwise indicated an interest in the property.¹⁷⁴ The UUPA makes it clear that property is reportable notwithstanding the failure of the owner to present to the holder evidence of ownership or to make a demand for payment.¹⁷⁵

North Carolina Earnest Money Escheat Law

An interesting version of a limitation of actions application can be found in a 2005 law enacted in North Carolina.¹⁷⁶ The law provides that the broker holding the money may choose to pay the disputed funds to the Clerk of Court in the county where the property is located after first providing 90 days written notice to the buyer and the seller.¹⁷⁷ If the disputed funds are deposited with the Clerk of Court, the buyer or seller has to initiate a special proceeding with the Clerk to recover the funds.¹⁷⁸ If no one institutes a special proceeding within a year of the funds

¹⁷² OHIO REV. CODE ANN. § 2305.06 (Lexis 2007).

¹⁷³ UNIF. UNCLAIMED PROPERTY ACT § 2(a)(15) (Natl. Conf. of Commrs. for Unif. St. L. 1995).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at § 2(e) cmt. (citing *Conn. Mut. Life Ins. Co. v. Moore*, 333 U.S. 541 (1948)).

¹⁷⁶ N.C. Gen. Stat. § 93A-12 (Lexis 2007). See Appendix: Figure 2.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

being deposited with the Clerk, they will be deemed unclaimed and delivered to the State Treasurer's Office as escheated funds.¹⁷⁹

The North Carolina statute has the appearance of a limitation of action and should probably give the buyer and seller some incentive to deal with the earnest money issue in a timelier manner. This has the potential effect of a one-year statute of limitations.

The Unclaimed Funds Alternative

The Ohio unclaimed funds statute is similar, but not equivalent, to the UUPA. The next chapter will examine the unclaimed funds statute in Ohio and discuss how it might be used to resolve the earnest money problem. Because there are economies of scale associated with custodial and ministerial functions, it is not unreasonable to suggest that after a period of time, earnest money from a real estate contract can and should be transferred to a more convenient, efficient and safer location. This can be done without compromising the interests of the parties.

An effective scheme would be a statute of limitation which would move stranded earnest money after some statutory period to a more secure location such as the Ohio Division of Unclaimed Funds. Such a transfer would yield a number of benefits. First, the dormant funds would be in a more secure location -- a division of the state government is much less likely to disappear than the broker. Second, there are economies of scale in the ministerial and custodial functions to be realized. Third, there are procedures for resolving disputes at the unclaimed funds office which could be useful. Finally, the broker would also be relieved of the burden assumed by possessing these funds -- responsibilities such as legally-mandated accounting for

¹⁷⁹ Funds are delivered by the Clerk of Court to the State Treasurer in accordance with the provisions of Article 4 of Chapter 116B of the North Carolina Code, which are really the unclaimed funds provisions. However, the unclaimed funds provisions in North Carolina are different than in Ohio in that the escheat and unclaimed funds are integrated into the same code section.

the stranded monies. Such an arrangement would not compromise the interests of the owners of the dormant funds but would allow for a proper accounting of the funds.

Uncertainty, particularly in property rights, has a true economic cost. The market value of property explicitly incorporates the degree of uncertainty. Consequently, the swift resolution of disputes is a matter of concern to the state. Clear and unclouded title to property is essential for the economic system to operate at maximum efficiency.¹⁸⁰ An unexecuted real estate contract remains a cloud on a real estate title if it is recorded or if the purchaser had reason to know of its existence. Thus, an efficient method of relocating funds and removing uncertainty would be an ideal solution to the stranded earnest money problem.

¹⁸⁰ The Coase theorem, attributable to Ronald Coase, assumes that economic efficiency can be obtained if ownership in property is clearly defined and there are no transaction costs. If there are transaction costs Coase suggests that the property rights be assigned to minimize the transaction costs.
Ronald Coase, 3 *Journal of Law and Economics* 1, (1960)

Chapter 6:

Earnest Money and Unclaimed Property Laws

One potential solution to the stranded earnest money problem lies with the state's unclaimed property laws. The legal and philosophical bases for limiting people's rights were discussed in the previous chapter, which introduced the Uniform Unclaimed Property Act (UUPA). Ohio has its own version of an unclaimed funds act that contains a particular provision that deals with funds held by real estate agents.¹⁸¹

Under unclaimed property laws, when the applicable prescribed period has passed, the holder of property is required to turn the property (or its cash value) over to the state, which then holds it until it is claimed by its rightful owner. If the true owner never makes a claim, then the property escheats and belongs to the state. Unclaimed property typically is intangible property, such as a bank account, that the owner has not used or made an ownership claim on within a certain period of time.¹⁸²

To the extent that stranded funds could be transferred from a broker's account to an unclaimed property fund, a broker would be relieved of some of the burden to store the funds in a trust account. In the past, earnest money was deposited by brokers pursuant to the unclaimed funds statute.¹⁸³ Yet that solution was not without its problems. State unclaimed property laws still require that certain ministerial records be retained for a period of time.¹⁸⁴ Also, requiring stranded funds to escheat to the state unclaimed property fund may create a new problem: brokers who are unaware that their trust funds should be deposited with the state unclaimed property fund may unintentionally be in violation of the law.

¹⁸¹ OHIO REV. CODE ANN. § 169.02(M)(2) (Lexis 2006).

¹⁸² *Id.*

¹⁸³ Interview with Kim Cole, Legal Counsel, Ohio Dept. of Com. Div. of Unclaimed Funds (Oct. 16, 2006).

¹⁸⁴ *See* UNIF. UNCLAIMED PROPERTY ACT § 21.

Earnest Money as Abandoned, Lost and Unclaimed Property

Abandoned property under the common law is defined differently than in the UUPA. Under the common law, abandoned property is that “to which the owner has voluntarily relinquished right, title, claim and possession with the intent of terminating his or her ownership, but without vesting ownership in any other person, and with the intention of not reclaiming any future right therein.”¹⁸⁵ The UUPA defines such property as “that which has remained unclaimed by its owner for a stated period of time.”¹⁸⁶

Stranded earnest money can be of many types. In some cases, the parties may have a continuing dispute but they may be working on a potential agreement. However, most stranded earnest money results from an initial disagreement over property rights (who was in breach and who was entitled to possible liquidated damages). In some cases, the parties lose interest with the passage of time and the funds go unclaimed.¹⁸⁷

Earnest Money and the Ohio Unclaimed Property Act

Earnest money is covered by the Ohio unclaimed property act. O.R.C § 169.02(M)(2) applies to “[any] escrow funds, security deposits or other moneys that are received by a licensed broker in a fiduciary capacity ... held or owed by a licensed broker unclaimed for two years.”¹⁸⁸

The Ohio statute converts only monies “unclaimed” for two years, not those *deposited* for a period of two years.¹⁸⁹ Consequently, the statute allows some relief from strict enforcement, because “unclaimed” would likely apply at least two years after the original closing date in the

¹⁸⁵ 1 AM. JUR. 2D *Abandoned, Lost and Unclaimed Property* § 3 (2006).

¹⁸⁶ UNIF. UNCLAIMED PROPERTY ACT § 2(a).

¹⁸⁷ We suggest that this is because of the small amount involved many of these cases.

¹⁸⁸ OHIO REV. CODE ANN. § 169.02(M)(2) (Lexis 2007). There is no comparable provision in the UUPA.

¹⁸⁹ *Id.*

real estate transaction, and more likely would apply two years after the last contact of the broker with the parties.¹⁹⁰

Considerable confusion over the scope of the unclaimed property statute with regard to earnest money currently exists. Currently, the Division of Unclaimed Funds does not actively enforce Section 169.02(M)(2) as it applies to earnest money real estate deposits, but it is willing to revisit the issue.¹⁹¹ The Division has procedures for resolving disputes over unclaimed property, and, subject to review of their attorneys, has indicated a willingness to take deposits from retiring brokers.¹⁹²

Part of the confusion arose as a consequence of an inquiry by Margaret J. Ritenour, Vice President of Legal Services, Ohio Association of Realtors, seeking clarification from the Ohio Division of Unclaimed Property regarding the application of the unclaimed funds laws to the trust accounts that brokers must maintain. Her letter read:

In [the] situation [where a real estate transaction does not close], can the earnest money be turned over to the Division of Unclaimed Funds? . . .

Clarification on the following questions needed:

1. Are all licensed real estate brokerages “holders” by virtue of accepting earnest money and other funds in a fiduciary capacity?
2. Are all licensed real estate brokerages required to file an Annual Report of Unclaimed Funds even if no funds are reportable?
3. When would earnest and other funds a broker is holding become “dormant”?
4. Will the Division of Unclaimed Funds accept disputed earnest money deposits to which both buyer and seller claim entitlement, and if so at what point?¹⁹³

In response, Superintendent Moore interpreted the statute to apply only to situations where the possible unclaimed real estate funds were “truly unclaimed.”¹⁹⁴ He wrote,

¹⁹⁰ The point here is that there is no clear demarcation of the time in which the unclaimed funds must be delivered to the state. When the funds are no longer contested is a murky standard.

¹⁹¹ Telephone Interview with Kim Cole, (Oct. 2, 2006). An inquiry by Dr. Gary S. Moore indicated a desire by the Div. of Unclaimed Funds to be as fair as possible to Ohio brokers in the light of possible conflicting requirements of the Ohio Statutes. In 2001, the Division decided not to actively pursue the issue.

¹⁹² *Id.*

¹⁹³ Ltr. from Margaret J. Ritenour, V.P. Leg. Servs., Ohio Assn. of Realtors, to David L. Moore, Superintendent, Ohio Dept. of Com. Div. of Unclaimed Funds (Aug. 11, 2000) See Appendix.

Funds held by licensed real estate brokers are covered in the Ohio Unclaimed Funds Law, and may ultimately be considered unclaimed and reportable only if the requirements of Chapter 169 of the Ohio Revised Code have been met

[Funds held by a licensed real estate broker are specifically addressed in Chapter 169 of the Ohio Revised Code.]

...However...the funds are not reportable unless they are truly unclaimed. Specifically, if the holder has documentation that the owner has taken any of the actions set forth in R.C. 169.01(B) (1) during the statutory dormancy period, the funds are not unclaimed. These actions include, but are not limited to, the owner corresponding with the holder, transacting business with the holder, or otherwise indicating an interest in or knowledge of the funds. Therefore, if the real estate broker has documentation that either the buyer or seller, in this particular situation, has contacted the real estate broker regarding the funds, expressed an interest in the funds, inquired into obtaining funds, or taken any other similar action, the funds are not unclaimed and the statutory dormancy period begins to run anew with each owner-, buyer-, or seller-initiated activity or contact. If the funds are subject to a legal dispute between the buyer and seller, either of whom has taken any action in regard to the funds, or if any formal legal action has been threatened or commenced, the funds are not unclaimed. Only if there has been no activity in regard to the funds for the statutory dormancy period may the funds even possibly be considered unclaimed and reportable, and only then after the performance of due diligence. The real estate broker in this situation must first perform due diligence in regard to the funds before possibly reporting and remitting said funds to the Division.

Pursuant to the R.C. 169.03 (D), the holder, the real estate broker, shall send a due diligence notice to both owners of the funds -- the buyer and the seller -- via first class mail. Said notice must include the nature and amount of the funds and notify the buyer and seller that the funds will be reported as unclaimed unless the buyer or seller informs the holder of a continued interest in the funds within the specified time frame. The holder shall provide both the buyer and seller with a self-addressed, stamped envelope in which to return an acknowledgment.

...Once the holder has sent the required notice, if either the buyer or seller acknowledges the funds by signing and returning the notice provided by the holder, said funds are not reportable as unclaimed and the dormancy period starts to run again. Only if neither the buyer nor seller signs and returns the notice acknowledging the funds, pursuant to R.C. 169.03 (D), are the funds considered unclaimed and, hence, reportable....

[Furthermore] [a]ll holders subject to Chapter 169 are to file an annual unclaimed funds report regardless of whether there are funds actually being reported. A report filed in this situation is called a "None" report and the holder is to insert the word "None" in the space provided for the aggregate unclaimed

¹⁹⁴ Ltr. from David L. Moore to Margaret J. Ritenour (Sept. 8, 2000). See Appendix, Figure 5.

funds total. The holder is also to provide applicable dates for the report, which is also to be certified by the holder in an officer of the holder organization...¹⁹⁵

Kim Cole, currently the legal counsel for the Division of Unclaimed Funds, has indicated that the letter from Superintendent Moore continued to be, in her opinion, “a correct interpretation of Ohio Law.”¹⁹⁶ She has indicated that the Unclaimed Funds Division would be willing, if instructed by appropriate administration officials, to receive real estate earnest money that qualified as unclaimed funds under the Ohio unclaimed funds law.¹⁹⁷

A subsequent article in the Ohio Realtor reflected what seems to be an alternative interpretation of the law.¹⁹⁸ The article stated:

[In August 2001], it was the Department of Commerce, Division of Unclaimed Funds’ position that if certain, very specific statutory requirements were met, such as dormancy period and “due diligence notice,” disputed earnest money deposits should be remitted to the Division of Unclaimed Funds (“Division”) The Division has since changed their position and have determined that the brokerage trust account is not subject to Ohio’s unclaimed funds law. Therefore, earnest money deposits ... must be maintained in the broker’s trust account until either the parties agree on a release or a court order is issued directing the broker to release the money. . . .

Having said the brokerage trust account is not subject to the unclaimed funds law does not mean a broker has no responsibilities under that law....

The unclaimed funds law requires all “holders” to file an Annual Report with the Division ...

A real estate broker is a holder and therefore required to file the Annual Report. As stated in the beginning of this article, the brokerage trust account is not subject to the unclaimed funds regulations.... Other brokerage accounts may hold funds subject to the unclaimed funds regulations. These accounts may include operating accounts, payroll, expense reimbursements and workers’ compensation payments

....¹⁹⁹

¹⁹⁵ Ltr. from David L. Moore to Margaret J. Ritenour (Sept. 8, 2000). See Appendix: Figure 5.

¹⁹⁶ Telephone Interview with Kim Cole (Oct. 16, 2006).

¹⁹⁷ *Id.*

¹⁹⁸ Lorie Garland, *Unclaimed Funds Law Impacts Brokers*, OHIO REALTOR (October, 2001). From conversations with the Div. of Real Estate, it seems apparent that this position was supported by someone in the Dept. of Com.

¹⁹⁹ *Id.*

It is not surprising that many are confused as to the proper scope of O.R.C. § 169.02 (M)(2), the Ohio Unclaimed Funds law. The tone of the article quoted above is clearly different than the tone of Superintendent Moore’s original reply to Ritenour.²⁰⁰ Based on the article, one can infer that there was a retreat by some in the Department of Commerce with respect to the need for earnest money to be deposited in the Ohio unclaimed funds.²⁰¹ The Department of Commerce and the Ohio Association of Realtors may have detected a potential conflict in the law, since brokers are required to keep escrow funds in their account until the parties either agree to disbursement or the broker gets a court order to transfer the funds.²⁰² This was not an unreasonable interpretation, because the Court of Appeals for the Second District has found that “the licensee [has] an unwritten fiduciary duty not to deliver earnest funds *until the licensee [procures] the consent of both parties.*”²⁰³ Literal interpretation of the court’s language could potentially invalidate section 169.02(M)(2). In any event, the net result is considerable confusion as to the proper scope of section 169.02(M)(2) in this situation.

As shown in Table 6.1, after there has been no communication with either party for two years, the correct legal status of stranded earnest money is unclear. Legislation clarifying the legal status of earnest money would be beneficial. The present situation puts real estate brokers in danger of unintentionally violating the law. The unclaimed funds act has substantial penalties for failing to comply with its provisions, and Ohio brokerage regulations are also enforced. The Ohio broker may be in a potentially precarious situation.

²⁰⁰ We suspect that we are missing some correspondence between the parties.

²⁰¹ Again this is speculation by Dr. Gary Moore based upon the existence of the article.

²⁰² See, e.g. Kiko, 549 N.E.2d 509; see also In re Appeal of Sheaffer, 686 N.E.2d 1382 (1996).

²⁰³ In re Appeal of Sheaffer, 686 N.E.2d at 1391 (emphasis added).

Table 6.1
PROPER LOCATION FOR EARNEST MONEY IN OHIO

CURRENT SITUATIONS	LOCATION OF ESCROW FUNDS	EXPLANATION	CURRENT LEGAL STATUS
INTERPLEADER LAW SUIT	COURT	"Contested" Amount paid to court	Clean Situation
"CONTESTED" COMMUNICATION WITHIN THE LAST 2 YEARS	TRUST ACCOUNT	"Contested" Amount not "abandoned"	Clean Situation
NO COMMUNICATION WITHIN THE LAST 2 YEARS	UNCLAIMED FUNDS?	Proper Notification and Consent required before Transfer?	May be in conflict with Kiko decision

Proposed legislation should eliminate the perceived incompatibility described above. Moreover, it would be helpful to draw a very clear line as to when property should be turned over to the Ohio unclaimed funds. For example, unclaimed earnest money could be defined as earnest money that has been the subject of no formal litigation initiated within two years of the date of closing in the original real estate contract.²⁰⁴ The real estate regulations (and the parties' contract) should be changed to incorporate any anticipated transfer to the unclaimed funds two years after the closing.

There are several reasons behind a transfer deadline of two years. First, if any litigation is going to be initiated by the parties, it will most likely start within two years of the date of closing. Any longer period risks the possibility of the claims becoming stale. A two-year limit would give some incentive for the parties to resolve the issue in a more expeditious manner. Second, O.R.C. § 169.02(M)(2) provides for transfer after two years. Although the definition of unclaimed is not very clear, it seems that two years is an acceptable waiting period. Because

²⁰⁴ Two years from the date of closing is a precise date. The typical language in the unclaimed funds statute defines unclaimed as resulting from a lack of communication from the parties. Unless the broker has excellent records, it may be difficult to determine when this period has occurred.

there are important notification requirements in the unclaimed funds act, however, it may be useful to extend the period to three years, allowing a one-year period to comply with the notification requirements in the unclaimed funds act.

Conclusion

This chapter outlined the confusing state of the law of earnest money held without communication from either the buyer or seller. The current state of the law is ambiguous and in need of change. Legislation is needed to eliminate the ambiguity, but beyond that, legislation should delineate a prescribed custody path for earnest money held in a broker's trust account. A clear line should be drawn as to when money should be transferred out of the brokerage account into the Ohio unclaimed funds. Although an ideal period would be two years from the date of closing, a slightly longer period may be justified as well.

Chapter 7:

Summary of Proposals for Release of Earnest Money

Chapter 1 discusses existing statutory schemes that serve as models for possible legislative action in Ohio.²⁰⁵ For example, Ohio may decide to model regulatory legislation on the comprehensive real estate transaction laws of Florida,²⁰⁶ Kansas²⁰⁷ or North Carolina.²⁰⁸ Specific statutory procedures for the release of earnest money deposits may be patterned after the Kentucky or New Hampshire statutes. Also, real estate dispute resolution statutory procedures may use the Florida or Rhode Island statutes as examples. Moreover, as discussed in previous chapters, Ohio may decide to draft an unclaimed property act that specifically addresses release of funds held by a real estate broker.

Chapters 2 and 3 describe specific contractual provisions that could be used to address the release of earnest money. In particular, the release of the funds should receive specific attention in the real estate contract. In addition, some states, such as Idaho and Kansas, have enacted statutory provisions that require real estate contracts to contain forfeiture and release provisions.²⁰⁹ Ohio may decide to draft such a legislative provision.

In Chapters 2 and 3, the authors suggest that every contract contain a provision that mandates Alternative Dispute Resolution procedures when the parties are available and cannot agree on return of the earnest money. A contract provision that requires binding arbitration if the parties cannot agree would encourage the parties to negotiate and would ensure that the earnest money would be released according to an order of the arbitrator.

²⁰⁵ See Chapter 1.

²⁰⁶ Appendix: Figure 2, pp. B-1 – B-8.

²⁰⁷ Appendix: Figure 2, pp. B-9 – B-10.

²⁰⁸ Appendix: Figure 2, p. B-11.

²⁰⁹ See notes 34 and 35 and accompanying text, *supra*.

The contract must also address the situation when one or more of the parties is unwilling to give consent to disbursal or is unwilling to submit to ADR or binding arbitration. In Chapter 2, the authors suggest contract language that would address the efficient release of earnest money when the parties are available. Under that provision, if the parties cannot agree on disbursal of the funds, the broker has the right to divide the earnest money among the parties. When, however, one or more of the parties is unavailable, the broker will have the contractual obligation to deposit that party's share in the Ohio unclaimed property fund. The contract also should provide that, in any of these situations, the broker should be reimbursed for the broker's expenses. The sample contractual provision should contain a provision that addresses reasonable broker expenses.

If the Division endorses particular contract provisions, the Division should publish those provisions. Moreover, the Division should propose legislation that contains default rules that would provide for release of the earnest money when the parties fail to perform the real estate contract. These default rules which would provide procedures that the broker must follow to return the earnest money would apply unless the real estate contract provided otherwise. In addition, the Division may want to require continuing education for brokers so that the brokers will learn how to contract for the release of earnest money.

Chapters 4, 5, and 6 examine public institutions for dealing with stranded earnest money. Some of the suggested actions are outlined in **Table 7.1**. Chapter 4 indicates that brokerage firms may be able to file an interpleader action without an attorney in small claims court, but this may not be possible in every jurisdiction at his time. A recent Ohio Supreme Court decision dealing with representation by corporate officials indicated that corporations may be entitled to a limited representation by corporate officers in small claims court. As the Supreme Court bases

its jurisdiction over the practice of law in the Ohio Constitution, it is unlikely that the legislature could pass a law allowing actions like interpleader to proceed by a brokerage firm without the assistance of an attorney. Consequently, interpleader is a potential solution for amounts less than the statutory jurisdiction of the small claims court. The statutory jurisdictional amount could potentially be raised, but this is probably as far as the legislature could go without a Constitutional amendment.

Because interpleader actions filed by attorneys are simply too expensive to be commercially feasible, attorneys who file interpleader cases are likely filing as a courtesy to their clients, rather than for the economic benefit. It would be useful to clarify the legal status of earnest money interpleader in small claims court. This could be done by having a test broker file a declaratory action addressing allowance of earnest money interpleader in small claims without an attorney. The potential disadvantage of this approach is that the decision may be binding only in a local court. Unless the case goes to the Ohio Supreme Court, there would be no closure on the issue.

Legislation specifically allowing earnest money interpleader in small claims without need for an attorney is a particularly attractive alternative. In the context of its recent decision, the Ohio Supreme Court seems to allow a limited exception to the prohibition against corporations being represented by corporate officers, partly based on the specific limitation of the action in the small claims statute. The Ohio Supreme Court would be more likely to allow interpleader without an attorney in small claims court if there was specific language allowing it. Still, there would not be complete closure on the issue until the new statute was reviewed by the Court.

Legislation allowing earnest money interpleader in small claims without need for attorney should provide a uniform interpleader form for use in small claims court. The use of a

uniform document increases the likelihood that the Ohio Supreme Court would allow the legislation. The less discretion involved in this situation, the less likely the need for legal representation, and the more the state interest of speed and economy is advanced. This is what South Carolina recently did in its interpleader act.

Allowing recovery of attorney's fees in interpleader actions would be salutary. Specifically, allowing recovery of attorney's fees in interpleader actions when the amount is greater than \$3,000 (the small claims jurisdictional limit) would permit useful flexibility to the broker who is the injured party in the stranded earnest money situation.

The current state of earnest money in the context of the unclaimed funds statute is an intolerable situation. Regardless of whether the unclaimed funds are a proper location for stranded earnest money, the current ambiguous situation is unjustifiable. Brokers should not have to choose between potential problems with brokerage regulations and potential penalties under the unclaimed funds act. Specifically, the conflicting rules between unclaimed funds and broker escrows regulations should be clarified. The unclaimed funds alternative is particularly attractive when the amount involved in the dispute exceeds the jurisdictional limits of the small claims court. Because brokers would probably have to use an attorney to file an interpleader action when the amount exceeds \$3,000, it would seem that unclaimed funds would be economically preferable in these larger cases.

Table 7.1
Actions to Improve Public Institutions Dealing With “Earnest Money” Situation in OHIO

ACTIONS	COMMENTS
1. Declaratory Judgment specifically addressing allowing Earnest Money interpleader in SMALL CLAIMS WITHOUT Need for ATTORNEY	This could be done by an individual broker or the attorney general’s office.
2. Legislation specifically allowing Earnest Money interpleader in SMALL CLAIMS WITHOUT Need for ATTORNEY	This would clarify the issue for all courts and possibly remove any restrictions that are imposed by local practice rules.
3. UNIFORM INTERPLEADER FORM for Small Claims	This would speed up the process and make it simpler.
4. RAISE SMALL CLAIMS JURISDICTION	This would allow more cases to go the route of small claims consequently saving a lot of money.
5. CLARIFY Conflicting Rules between Unclaimed FUNDS AND BROKER ESCROWS Regulations	This current situation is intolerable. It is patently unfair to the real estate brokers to have conflicting regulations and laws.
6. Allow recovery of Attorney fees in interpleader actions greater than small claims Jurisdiction limit	Hopefully, this would give the parties some incentive to resolve these issues before the court would have to intervene.

Figure 1: State Approaches to Stranded Earnest Money Problem

State	Statutory Code	Can Release Funds	Interpleader
Alabama	Ala. Admin. Code r. 790-X-3-.03 (2006). <i>Deposit of Funds</i>	Written agreement signed by all parties or court order	*In statute* § 6-6-253 Ala. R. Civ. P. 22
Alaska	Alaska Stat. § 08.88.351 (2006). <i>Accounts; Records of Transactions</i>	N/A	Alaska R. Civ. P. 22
Arizona	A.R.S. § 32-2151.01. <i>Broker requirements; record keeping requirements</i>	N/A	Ariz. R. Civ. P. 22
	A.R.S. § 41-2180. <i>Trust and escrow requirements; rules; exemptions</i>	Transaction terminated & complete accounting	
Arkansas	A.C.A. § 18-12-703. <i>Closing and settlement services -- Disbursement of funds -- Penalties</i>	Received & available for immediate withdrawal	§ 16-61-113 § 16-61-114 AR R. Civ. P. 22
California	Cal Bus & Prof Code § 10145. <i>Deposit of funds belonging to others</i>	May be disbursed "in accordance with instructions from the person entitled to the funds."	§ 386
Colorado	C.R.S. 38-13-103. <i>Property presumed abandoned - general rule</i>	After 5 years, "presumed abandoned"	Col. R. Civ. P. 22
Connecticut	Conn. Gen. Stat. § 20-324k. <i>Brokers to maintain escrow or trust account for certain moneys held. Disputed deposits</i>	Deposit with the court	§ 52-484
Delaware	24 Del. C. § 2923. <i>Deposits and trust fund accounts; accounting; records inspection and audit</i>	N/A	§ 3910 § 3911 Del. Com. Pl. Ct. R. Civ. P. 22
Florida	Fla. Stat. § 475.25. <i>Discipline</i>	**Commission can issue an escrow disbursement order **Can submit to arbitration/mediation	*In statute* Fla. R. Civ. P. 1.240
	Fla. Stat. § 475.711. <i>Interpleader or other proceedings; deposit of reserved proceeds in court registry; discharge of closing agent from further liability</i>	**Closing-agent-specific interpleader **Deposit funds with court	*In statute*
Georgia	O.C.G.A. § 43-40-20. <i>Trust or escrow checking account for real estate business; when entitled to commission</i>	Transaction terminated	§ 9-11-22
Hawaii	HRS § 467-1.6. <i>Principal brokers</i>	The principal broker managing a firm is responsible for managing trust accounts and creating accounting practices.	§ 634-11 Haw. R. Civ. P. 22

Idaho	Idaho Code § 54-2047. <i>Disputed earnest money</i>	At broker's discretion if reasonable under PSA; court order	§ 5-321 Id. R. Civ. P. 22
	Idaho Code § 54-2046. <i>Trust account disbursements</i>	**Written authorization of parties required. **Must include earnest money forfeiture provision in PSA.	
Illinois	§ 225 ILCS 454/20-20. <i>Disciplinary actions; causes</i>	Transaction terminated or written agreement of parties or court order.	§ 735 ILCS 5/2-409
Indiana	Burns Ind. Code Ann. § 25-34.1-4-5. <i>Trust accounts required - Authority of commission to take custody</i>	Upon "termination of broker" (and other listed conditions), the Real Estate Commission can take custody of a broker's trust account	Burns Ind. TR 22
Iowa	Iowa Code § 543B.46. <i>Trust accounts</i>	N/A	Iowa R. Civ. P. 1.251
	Iowa Code § 556.2. <i>Property held by banking or financial organizations or by business associations</i>	Funds are "presumed abandoned" after 3 years.	
Kansas	K.S.A. § 58-3061. <i>Trust accounts</i>	Court order, agreement of parties, K clause, *real estate recovery fund after 5 years*	§ 60-222
Kentucky	KRS § 324.111. <i>Escrow account of broker - Interest - Audit - Contract deposit release - Separate property management account</i>	**Called "contract deposit" **May release as provided in the contract; may use specified "release process." **Release process requires notification of parties by certified mail	Ky. R. Civ. P. 22
Louisiana	La. R.S. § 9:154. <i>Presumptions of abandonment</i>	Money presumed abandoned "five years after the obligation to pay or distribute the property arises."	No statute
Maine	32 M.R.S. § 13178. <i>Trust accounts</i>	Termination of transaction & full accounting.	14 M.R.S. § 6352 Me. R. Civ. P. 22
Maryland	Md. BUSINESS OCCUPATIONS AND PROFESSIONS Code Ann. § 17-505. <i>Maintenance and disposition of trust money</i>	**Called "trust money" **Instruction from parties, court order, discretion of broker. **Broker can use discretion as long as he gives notice & allows parties an opportunity to protest	*In statute* Md. R. Civ. P. 2-221 Md. R. Civ. P. 3-221
Massachusetts	ALM GL ch. 200A, § 5. <i>Abandonment of Instruments, Documents, and Money</i>	Presumed abandoned after 3 years	Related statute: ALM GL 167D, § 24 Mass. R. Civ. P. 22

Michigan	MCLS § 339.2512. <i>Prohibited conduct; penalties</i>	Transaction terminated & complete accounting.	MCR § 3.603
Minnesota	Minn. Stat. § 82.50. <i>Trust account requirements</i>	Within a reasonable time after termination; in accordance with terms of agreement or after proper accounting.	Minn. R. Civ. P. 22
	Minn. Stat. § 82.51. <i>Unclaimed Property Act compliance</i>	Brokers must comply with Unclaimed Property Act.	
	Minn. Stat. § 559.217. <i>Cancellation of residential purchase agreement</i>	Upon cancelation of purchase agreement, court may make a determination of who is entitled to earnest money.	
Mississippi	Miss. Code Ann. § 89-12-13. <i>Presumed abandonment of intangible personal property held by fiduciary</i>	Presumed abandoned after 5 years	Miss. R. Civ. P. 22
Missouri	§ 339.105 R.S.Mo. <i>Separate bank escrow accounts required -- service charges for account may be made by personal deposit by broker, amount allowed</i>	**Report & deliver the moneys to the state treasurer within 365 days of the date of the initial projected closing date; conform with Unclaimed Property Act. **Parties may agree in writing that the funds are not in dispute and shall notify the broker.	§ 507.060 S. Ct. Rule 52.07
Montana	Mont. Code Anno., § 37-51-313. <i>Duties, duration, and termination of relationship between broker or salesperson and buyer or seller</i>	Upon termination of broker relationship, must "account for all money and property."	§ 25-31-119 Mont. R. Civ. P. 22
Nebraska	R.R.S. Neb. § 81-885.21. <i>Broker; separate trust account; notify commission where maintained; examination by representative of commission; broker entitled to money; when</i>	Transaction is closed or otherwise terminated.	§ 25-325
Nevada	Nev. Rev. Stat. Ann. § 645.310. <i>Deposits and trust accounts: Accounting; commingling; records; inspection and audit</i>	Deposits must be accounted for upon termination.	Nev. R. Civ. P. 22
New Hampshire	RSA 331-A:13. <i>Escrow Accounts of Broker; Interest; Audit</i>	**Called "contract deposits" **Contract terminated; contemporaneous agreement in writing between all parties; court order. **After 90 days, may use "release process."	No statute
New Jersey	N.J. Stat. § 45:15-12.5. <i>Maintenance of special account required</i>	N/A	N.J. Court Rules R. 4:31
	N.J. Stat. § 45:15-16.49. <i>Rules and regulations</i>	Real estate commission shall promulgate rules regarding when it "deems it appropriate to permit such funds to be released."	

New Mexico	<Real estate law in flux>	N/A	N.M. Dist. Ct. R. Civ. P. 1-022
New York	NY CLS Aban Prop § 1315. <i>Miscellaneous unclaimed property</i>	Considered abandoned after 5 years; delivered to state comptroller.	§ 1006 N.Y. CLS Ct. C. § 14
North Carolina	N.C. Gen. Stat. § 93A-12. <i>Disputed monies</i>	**90 days after notifying parties claiming interest, may deposit funds with clerk of court. **If no party proceeds to claim funds from court after one year, paid to state treasurer.	N.C. R. Civ. P. 22
North Dakota	N.D. Cent. Code, § 43-23.4-05. <i>Disposition of funds upon dissolution</i>	Upon dissolution, remaining assets shall be paid to "exempt purposes" under Internal Revenue Code.	§ 28-02-22 thru -24 N.D. R. Civ. P. 22
Ohio	ORC Ann. 169.02(M)(2). <i>Unclaimed Funds Defined</i>	Determined "unclaimed" after two years.	Ohio R. Civ. P. 22
	ORC Ann. 169.03. <i>Reporting unclaimed funds; notice to owner</i>	Notice to last known address of parties; report to director of commerce.	
	ORC Ann. 169.05(A). <i>Transfer of funds to state; trust fund; allocation</i>	Paid to director of commerce	
Oklahoma	59 Okl. St. § 858-358. <i>Duties of broker following termination, expiration, or completion of performance</i>	After termination of transaction, broker owes no further duty except to account for the related funds.	§ 2022
Oregon	ORS § 696.241. <i>Clients' Trust Accounts; notice to agency; authority to examine account; branch trust account; interest earnings on trust account; when broker entitled to earnest money; funds not subject to execution; rules</i>	Person who deposited the funds can request them, and broker's delivery to that person does not affect another's claim to the funds.	Or. R. Civ. P. 31
Pennsylvania	63 P.S. § 455.604. <i>Prohibited acts</i>	Complete accounting upon termination.	§ 7522 Pa. R. Civ. P. 2308, 2318
Rhode Island	R.I. Gen. Laws § 5-20.5-26. <i>Escrows</i>	**Money may be deposited with the general treasurer within one hundred eighty (180) days of the date of the original deposit. **General treasurer will hold funds in trust until the dispute is mediated, arbitrated, litigated, or otherwise resolved by the parties	R.I. R. Civ. P. 22

South Carolina	S.C. Code Ann. § 22-3-10. <i>Extent of civil jurisdiction</i>	Magistrates have concurrent civil jurisdiction over interpleader actions to recover real estate earnest money if less than \$7500.	*In statute* S.C. R. Civ. P. 22
	S.C. Code Ann. § 22-3-25. <i>Interpleader actions</i>		*In statute*
	S.C. Code Ann. § 40-57-135. <i>Duties of broker-in-charge, property manager-in-charge, and licensees; policies and recordkeeping; management of residential multi-unit rental locations; unlicensed employees</i>	Reasonable interpretation of the K by the parties; order of court (interpleader); voluntary mediation	*In statute*
South Dakota	S.D. Codified Laws § 36-21A-150. <i>Post-transaction duties of broker or licensee</i>	After termination of transaction, broker owes no further duty except to account for the related funds.	§ 15-6-22 § 21-35-7
Tennessee	Tenn. Code Ann. § 16-15-731. <i>Actions in the nature of interpleader</i>	**If interpleader involves real estate moneys, real estate commission prescribes forms to be used. **May be filed in general sessions court as long as earnest money doesn't exceed jurisdictional amount	*In statute* § 16-15-731
Texas	Tex. Prop. Code § 72.101. <i>Personal Property Presumed Abandoned</i>	Presumed abandoned after 3 years	Tex. R. Civ. P. 43
Utah	Utah Code Ann. § 67-4a-209. <i>Property held by agents and fiduciaries</i>	Presumed abandoned after 5 years	Utah R. Civ. P. 22
Vermont	26 V.S.A. § 2214. <i>Trust and escrow accounts</i>	Termination of transaction, written agreement of all parties, order of court	Vt. R. Civ. P. 22
Virginia	Va. Code Ann. § 54.1-2137. <i>Commencement and termination of brokerage relationships</i>	Termination of brokerage relationship and accounting	§ 8.01-364 Va. Sup. Ct. R. 3:15
Washington	Rev. Code Wash. (ARCW) § 64.04.005. <i>Liquidated damages -- Earnest money deposit -- Exclusive remedy - Definition</i>	Liquidated damages clause providing for forfeiture of earnest money to seller is enforceable	§ 4.08.150 Wa. R. Civ. P. 22
	Rev. Code Wash. (ARCW) § 18.86.070. <i>Duration of agency relationship</i>	Termination of brokerage relationship and accounting	
West Virginia	W. Va. Code § 30-40-19. <i>Refusal, suspension or revocation of a license</i>	Must account for funds within a reasonable time.	§ 56-10-1 W. Va. R. Civ. P. 22
	W. Va. Code § 36-8-2. <i>Presumptions of abandonment</i>	Presumed abandoned after 5 years	

Wisconsin	Wis. Stat. § 452.14. <i>Investigation and discipline of licensees</i>	Must account for funds within a reasonable time.	§ 803.07
	Wis. Stat. § 177.02. <i>Property presumed abandoned; general rule</i>	Presumed abandoned after 5 years	
Wyoming	Wyo. Stat. § 33-28-122. <i>Broker's trust accounts; disposition of interest; commingling with personal funds prohibited; disputed deposits; cooperative transactions</i>	Written release from parties or civil action filed.	Wyo. R. Civ. P. 22

Figure 2: Example Statutes

Fla. Stat. § 475.25 (2006)

§ 475.25. Discipline

- (1) The commission may deny an application for licensure, registration, or permit, or renewal thereof; may place a licensee, registrant, or permittee on probation; may suspend a license, registration, or permit for a period not exceeding 10 years; may revoke a license, registration, or permit; may impose an administrative fine not to exceed \$ 5,000 for each count or separate offense; and may issue a reprimand, and any or all of the foregoing, if it finds that the licensee, registrant, permittee, or applicant:
 - (a) Has violated any provision of s. 455.227(1) or s. 475.42. However, licensees under this part are exempt from the provisions of s. 455.227(1)(i).
 - (b) Has been guilty of fraud, misrepresentation, concealment, false promises, false pretenses, dishonest dealing by trick, scheme, or device, culpable negligence, or breach of trust in any business transaction in this state or any other state, nation, or territory; has violated a duty imposed upon her or him by law or by the terms of a listing contract, written, oral, express, or implied, in a real estate transaction; has aided, assisted, or conspired with any other person engaged in any such misconduct and in furtherance thereof; or has formed an intent, design, or scheme to engage in any such misconduct and committed an overt act in furtherance of such intent, design, or scheme. It is immaterial to the guilt of the licensee that the victim or intended victim of the misconduct has sustained no damage or loss; that the damage or loss has been settled and paid after discovery of the misconduct; or that such victim or intended victim was a customer or a person in confidential relation with the licensee or was an identified member of the general public.
 - (c) Has advertised property or services in a manner which is fraudulent, false, deceptive, or misleading in form or content. The commission may adopt rules defining methods of advertising that violate this paragraph.
 - (d) 1. Has failed to account or deliver to any person, including a licensee under this chapter, at the time which has been agreed upon or is required by law or, in the absence of a fixed time, upon demand of the person entitled to such accounting and delivery, any personal property such as money, fund, deposit, check, draft, abstract of title, mortgage, conveyance, lease, or other document or thing of value, including a share of a real estate commission if a civil judgment relating to the practice of the licensee's profession has been obtained against the licensee and said judgment has not been satisfied in accordance with the terms of the judgment within a reasonable time, or any secret or illegal profit, or any divisible share or portion thereof, which has come into the licensee's hands and which is not the licensee's property or which the licensee is not in law or equity entitled to retain under the circumstances. However, if the licensee, in

good faith, entertains doubt as to what person is entitled to the accounting and delivery of the escrowed property, or if conflicting demands have been made upon the licensee for the escrowed property, which property she or he still maintains in her or his escrow or trust account, the licensee shall promptly notify the commission of such doubts or conflicting demands and shall promptly:

- a. Request that the commission issue an escrow disbursement order determining who is entitled to the escrowed property;
- b. With the consent of all parties, submit the matter to arbitration;
- c. By interpleader or otherwise, seek adjudication of the matter by a court; or
- d. With the written consent of all parties, submit the matter to mediation. The department may conduct mediation or may contract with public or private entities for mediation services. However, the mediation process must be successfully completed within 90 days following the last demand or the licensee shall promptly employ one of the other escape procedures contained in this section. Payment for mediation will be as agreed to in writing by the parties. The department may adopt rules to implement this section.

If the licensee promptly employs one of the escape procedures contained herein and abides by the order or judgment resulting therefrom, no administrative complaint may be filed against the licensee for failure to account for, deliver, or maintain the escrowed property. Under certain circumstances, which the commission shall set forth by rule, a licensee may disburse property from the licensee's escrow account without notifying the commission or employing one of the procedures listed in sub-subparagraphs a.-d. If the buyer of a residential condominium unit delivers to a licensee written notice of the buyer's intent to cancel the contract for sale and purchase, as authorized by s. 718.503, or if the buyer of real property in good faith fails to satisfy the terms in the financing clause of a contract for sale and purchase, the licensee may return the escrowed property to the purchaser without notifying the commission or initiating any of the procedures listed in sub-subparagraphs a.-d.

2. Has failed to deposit money in an escrow account when the licensee is the purchaser of real estate under a contract where the contract requires the purchaser to place deposit money in an escrow account to be applied to the purchase price if the sale is consummate:

- (e) Has violated any of the provisions of this chapter or any lawful order or rule made or issued under the provisions of this chapter or chapter 455.
- (f) Has been convicted or found guilty of, or entered a plea of nolo contendere to, regardless of adjudication, a crime in any jurisdiction which directly relates to the activities of a licensed broker or sales associate, or involves moral turpitude

or fraudulent or dishonest dealing. The record of a conviction certified or authenticated in such form as to be admissible in evidence under the laws of the state shall be admissible as prima facie evidence of such guilt.

- (g) Has had a broker's or sales associate's license revoked, suspended, or otherwise acted against, or has had an application for such licensure denied, by the real estate licensing agency of another state, territory, or country.
- (h) Has shared a commission with, or paid a fee or other compensation to, a person not properly licensed as a broker, broker associate, or sales associate under the laws of this state, for the referral of real estate business, clients, prospects, or customers, or for any one or more of the services set forth in s. 475.01(1)(a). For the purposes of this section, it is immaterial that the person to whom such payment or compensation is given made the referral or performed the service from within this state or elsewhere; however, a licensed broker of this state may pay a referral fee or share a real estate brokerage commission with a broker licensed or registered under the laws of a foreign state so long as the foreign broker does not violate any law of this state.
- (i) Has become temporarily incapacitated from acting as a broker or sales associate with safety to investors or those in a fiduciary relation with her or him because of drunkenness, use of drugs, or temporary mental derangement; but suspension of a license in such a case shall be only for the period of such incapacity.
- (j) Has rendered an opinion that the title to any property sold is good or merchantable, except when correctly based upon a current opinion of a licensed attorney at law, or has failed to advise a prospective purchaser to consult her or his attorney on the merchantability of the title or to obtain title insurance.
- (k) Has failed, if a broker, to immediately place, upon receipt, any money, fund, deposit, check, or draft entrusted to her or him by any person dealing with her or him as a broker in escrow with a title company, banking institution, credit union, or savings and loan association located and doing business in this state, or to deposit such funds in a trust or escrow account maintained by her or him with some bank, credit union, or savings and loan association located and doing business in this state, wherein the funds shall be kept until disbursement thereof is properly authorized; or has failed, if a sales associate, to immediately place with her or his registered employer any money, fund, deposit, check, or draft entrusted to her or him by any person dealing with her or him as agent of the registered employer. The commission shall establish rules to provide for records to be maintained by the broker and the manner in which such deposits shall be made. A broker may place and maintain up to \$ 5,000 of personal or brokerage funds in the broker's property management escrow account and up to \$ 1,000 of personal or brokerage funds in the broker's sales escrow account. A broker shall be provided a reasonable amount of time to correct escrow errors if there is no shortage of funds and such errors pose no significant threat to economically

harm the public. It is the intent of the Legislature that, in the event of legal proceedings concerning a broker's escrow account, the disbursement of escrowed funds not be delayed due to any dispute over the personal or brokerage funds that may be present in the escrow account.

- (l) Has made or filed a report or record which the licensee knows to be false, has willfully failed to file a report or record required by state or federal law, has willfully impeded or obstructed such filing, or has induced another person to impede or obstruct such filing; but such reports or records shall include only those which are signed in the capacity of a licensed broker or sales associate.
- (m) Has obtained a license by means of fraud, misrepresentation, or concealment.
- (n) Is confined in any county jail, post adjudication; is confined in any state or federal prison or mental institution; is under home confinement ordered in lieu of institutional confinement; or, through mental disease or deterioration, can no longer safely be entrusted to competently deal with the public.
- (o) Has been found guilty, for a second time, of any misconduct that warrants her or his suspension or has been found guilty of a course of conduct or practices which show that she or he is so incompetent, negligent, dishonest, or untruthful that the money, property, transactions, and rights of investors, or those with whom she or he may sustain a confidential relation, may not safely be entrusted to her or him.
- (p) Has failed to inform the commission in writing within 30 days after pleading guilty or nolo contendere to, or being convicted or found guilty of, any felony.
- (q) Has violated any provision of s. 475.2755 or s. 475.278, including the duties owed under those sections.
- (r) Has failed in any written listing agreement to include a definite expiration date, description of the property, price and terms, fee or commission, and a proper signature of the principal(s); and has failed to give the principal(s) a legible, signed, true and correct copy of the listing agreement within 24 hours of obtaining the written listing agreement. The written listing agreement shall contain no provision requiring the person signing the listing to notify the broker of the intention to cancel the listing after such definite expiration date.
- (s) Has had a registration suspended, revoked, or otherwise acted against in any jurisdiction. The record of the disciplinary action certified or authenticated in such form as to be admissible in evidence under the laws of the state shall be admissible as prima facie evidence of such disciplinary action.
- (t) Has violated any standard for the development or communication of a real estate appraisal or other provision of the Uniform Standards of Professional Appraisal

Practice, as defined in s. 475.611, as approved and adopted by the Appraisal Standards Board of the Appraisal Foundation, as defined in s. 475.611. This paragraph does not apply to a real estate broker or sales associate who, in the ordinary course of business, performs a comparative market analysis, gives a broker price opinion, or gives an opinion of value of real estate. However, in no event may this comparative market analysis, broker price opinion, or opinion of value of real estate be referred to as an appraisal, as defined in s. 475.611.

- (u) Has failed, if a broker, to direct, control, or manage a broker associate or sales associate employed by such broker. A rebuttable presumption exists that a broker associate or sales associate is employed by a broker if the records of the department establish that the broker associate or sales associate is registered with that broker. A record of licensure which is certified or authenticated in such form as to be admissible in evidence under the laws of the state is admissible as prima facie evidence of such registration.
 - (v) Has failed, if a broker, to review the brokerage's trust accounting procedures in order to ensure compliance with this chapter.
- (2) A license may be revoked or canceled if it was issued through the mistake or inadvertence of the commission. Such revocation or cancellation shall not prejudice any subsequent application for licensure filed by the person against whom such action was taken.
 - (3) The department shall reissue the license of a licensee against whom disciplinary action was taken upon certification by the commission that the licensee has complied with all of the terms and conditions of the final order imposing discipline.
 - (4) The commission may adopt rules allowing the director of the Division of Real Estate to grant to a licensee placed on probation additional time within which to complete the terms of probation, but the rules must allow the licensee to appeal any denial to the commission.
 - (5) An administrative complaint against a broker, broker associate, or sales associate shall be filed within 5 years after the time of the act giving rise to the complaint or within 5 years after the time the act is discovered or should have been discovered with the exercise of due diligence.
 - (6) The department or commission shall promptly notify a licensee's broker or employer, as defined in this part, in writing, when a formal complaint is filed against the licensee alleging violations of this chapter or chapter 455. The department shall not issue a notification to the broker or employer until 10 days after a finding of probable cause has been found to exist by the probable cause panel or by the department, or until the licensee waives his or her privilege of confidentiality under s. 455.225, whichever occurs first.

- (7) The commission shall promptly report to the proper prosecuting authority any criminal violation of any statute relating to the practice of a real estate profession regulated by the commission.

Fla. Stat. § 475.711 (2006)

§ 475.711. Interpleader or other proceedings; deposit of reserved proceeds in court registry; discharge of closing agent from further liability

- (1) The closing agent shall, by interpleader action or other legal proceeding, seek adjudication of the rights of the parties with respect to disputed reserved proceeds by the county court or circuit court, whichever may have jurisdiction of controversies in the amount of the disputed reserved proceeds, in a county where all or a portion of the commercial real estate is located if, after the closing of a transaction for the disposition of the commercial real estate, all of the following conditions are met:
 - (a) The closing agent has reserved all or a portion of the owner's net proceeds pursuant to s. 475.709 and the owner disputes the release to the broker of all or any portion of the reserved proceeds.
 - (b) The owner and the broker have not agreed in writing, within 5 days after the closing, regarding the closing agent's release of the disputed reserved proceeds.
 - (c) Neither the owner nor the broker has commenced a civil action to determine the rights of the parties with respect to the disputed reserved proceed.
- (2) Unless otherwise agreed to by the owner and the broker in writing, the closing agent shall deposit the net amount of disputed reserved proceeds in the registry of the court having jurisdiction of any legal action or proceeding to determine the rights of the parties in the disputed reserved proceeds, whether commenced by the closing agent under subsection (1) or commenced by the owner or the broker under s. 475.713 or otherwise. The closing agent shall determine the net amount of disputed reserved proceeds deposited in the court registry by deducting from the disputed reserved proceeds:
 - (a) Any costs incurred by the closing agent to commence such action or proceeding, or to appear in any such action or proceeding commenced by the owner or the broker, including reasonable attorney's fees.
 - (b) The costs of recording the affidavit described in subsection (3) if any commission notice has been recorded.
 - (c) The service charges of the clerk of court under s. 28.24 for receiving the net amount of such disputed reserved proceeds into the registry of the court.
- (3) If a commission notice has been recorded in the public records of the county or counties where the commercial real estate is located, upon depositing the net disputed reserved proceeds with the clerk of court pursuant to subsection (2), the closing agent shall execute and record an affidavit referring to the recorded commission notice and stating that the net disputed reserved proceeds have been so deposited in accordance with this

part. The recording of the affidavit shall operate to release the recorded commission notice.

- (4) If a closing agent deposits the net disputed reserved proceeds with the clerk of court pursuant to subsection (2), the closing agent is discharged from any further liability or responsibility concerning the disputed reserved proceeds.

K.S.A. § 58-3061 (2006)

58-3061. Trust accounts.

- (a) Unless exempt under subsection (f), each broker shall maintain, in the broker's name or the broker's firm name, a separate trust account in this state, or in an adjoining state with written permission of the commission, designated as such. All down payments, earnest money deposits, advance listing fees or other trust funds received in a real estate transaction by the broker or by the broker's associate brokers or salespersons on behalf of a principal or any other person shall be deposited or invested in such account unless all parties having an interest in the funds have agreed otherwise in writing. The account shall be with an insured bank or savings and loan association or credit union which is insured with an insurer or guarantee corporation as required under K.S.A. 17-2246 and amendments thereto. A broker shall not retain any interest accrued on moneys held in an interest-bearing trust account without the written consent of all parties to the transaction.
- (b) Each broker shall notify the commission of the name of the bank, credit union or savings and loan association in which the trust account is maintained and of the account name by completing a consent to audit form obtained from the commission. A broker may maintain more than one trust account if the commission is advised of each such account as required by this subsection and authorized to examine all such accounts. If a separate trust account is maintained for a branch office, the branch broker shall maintain trust account records required by rules and regulations of the commission and all transaction files related to the branch office trust account.
- (c) Each broker shall grant full access to all records pertaining to the broker's trust account to the commission and its duly authorized representatives. A trust account examination shall be made at such time as the commission directs.
- (d) No payments shall be made from the broker's trust account other than a withdrawal of earned commissions payable to the broker or distributions made on behalf of the beneficiaries of the trust account. A broker shall not be entitled to any part of the earnest money or other money paid to the broker in connection with any real estate transaction as part or all of the broker's commission or fee until the transaction has been consummated or terminated unless otherwise agreed in writing by all parties to the transaction.
- (e) A broker shall make available, for inspection by the commission and its duly authorized representatives, all records relating to the broker's real estate business. Such records shall be kept in a form and for a term prescribed by the commission. An inspection shall be made at such time as the commission directs.
- (f) The requirement of maintaining a trust account shall not apply to: (A) A broker whose license is on deactivated status; (B) a broker who acts as an associate broker; (C) a broker who is an officer of a corporation, a member of an association or a partner of a partnership and who is not the supervising broker of an office of the corporation, association or partnership; or (D) a broker whose real estate activities, in the opinion of the commission, do not necessitate the holding of trust funds.

(g) Upon acceptance of an offer and deposit of earnest money in a broker's trust account, such deposit may be disbursed only:

(1) Pursuant to written authorization of buyer and seller;

(2) pursuant to a court order; or

(3) when a transaction is closed according to the agreement of the parties.

(h) Nothing in this section shall prohibit the parties to a real estate contract from agreeing, in the sales contract, to the following procedure:

"Notwithstanding any other terms of this contract providing for forfeiture or refund of the earnest money deposit, the parties understand that applicable Kansas real estate laws prohibit the escrow agent from distributing the earnest money, once deposited, without the consent of all parties to this agreement. Buyer and seller agree that failure by either to respond in writing to a certified letter from broker within seven days of receipt thereof or failure to make written demand for return or forfeiture of an earnest money deposit within 30 days of notice of cancellation of this agreement shall constitute consent to distribution of the earnest money as suggested in any such certified letter or as demanded by the other party hereto."

(i) The commission may direct a broker to remit moneys from the broker's trust account to the commission for deposit into the real estate recovery revolving fund established within the state treasury by K.S.A. 58-3023 and amendments thereto, upon the following determinations having been made by the commission:

(1) That the money has been in the broker's trust account for five or more years;

(2) if the money was an earnest money deposit, that an earnest money dispute existed or the broker did not obtain written authorization of buyer and seller to disburse the funds; and

(3) that the funds do not meet the criteria for payment to the state treasurer under the disposition of unclaimed property act.

N.C. Gen. Stat. § 93A-12 (2007)

§ 93A-12. Disputed monies

- (a) A real estate broker licensed under this Chapter may deposit with the clerk of court in accordance with this section monies, other than a residential security deposit, the ownership of which are in dispute and that the real estate broker received while acting in a fiduciary capacity.
- (b) The disputed monies shall be deposited with the clerk of court in the county in which the property for which the disputed monies are being held is located. At the time of depositing the disputed monies, the real estate broker shall certify to the clerk of court that the persons who are claiming ownership of the disputed monies have been notified in accordance with subsection (c) of this section that the disputed monies are to be deposited with the clerk of court and that the persons may initiate a special proceeding with the clerk of court to recover the disputed monies.
- (c) Notice to the persons who are claiming ownership to the disputed monies required under subsection (b) of this section shall be provided by delivering a copy of the notice to the person or by mailing it to the person by first-class mail, postpaid, properly addressed to the person at the person's last known address.
- (d) A real estate broker shall not deposit disputed monies with the clerk of court until 90 days following notification of the persons claiming ownership of the disputed monies.
- (e) Upon the filing of a special proceeding to recover the disputed monies, the clerk shall determine the rightful ownership of the monies and distribute the disputed monies accordingly. If no special proceeding is filed with the clerk of court within one year of the disputed monies being deposited with the clerk of court, the disputed monies shall be deemed unclaimed and shall be delivered by the clerk of court to the State Treasurer in accordance with the provisions of Article 4 of Chapter 116B of the General Statutes.

Figure 3: Toledo Municipal Court Rules

RULE 37 CITIZENS DISPUTE SETTLEMENT PROGRAM

(A) Pursuant to Rule 16 of the Rules of Superintendence for the Courts of Ohio wherein referrals to appropriate and available alternatives dispute resolution programs shall be set forth in the local rules, the Citizens Dispute Settlement Program (CDSP) is recognized as providing the people of Toledo an alternative means of solving interpersonal disputes other than by going through the judicial court system, i.e., resolutions through mediation. "Mediation" is a non-binding process involving a neutral mediator who acts as a facilitator to assist the parties to craft a mutually acceptable resolution for themselves.

(B) Case Selection. Cases considered appropriate for the program are those involving disputes with people having ongoing relationships such as family members, friends, neighbors, and civil cases identified for the Early Dispute Resolution Program. All civil cases may be referred to mediation. Before the initial pre-trial conference in a case, counsel shall discuss the appropriateness of mediation in the litigation with their clients and with opposing counsel.

Mediation shall not be used as an alternative to the prosecution or adjudication of domestic violence; to determine whether to grant, modify or terminate a protection order; to determine the terms and conditions of a protection order; or to determine the penalty for violation of a protection order.

(C) Sources of referrals to this program include the city prosecutor's office, the judges, magistrates, the police department, community agencies, attorneys, and individuals. Civil cases may be referred to the civil mediation program by sua sponte judicial order, motion of any party or by agreement of the parties.

(D) Agreements reached by the parties are written and signed. The case is disposed after payment of costs and a Judgment Entry reflecting the parties' written agreement is signed by a judge. All remaining court orders shall remain in effect. No order is stayed or suspended during the mediation process.

(E) Mediator's Duty. The Mediator shall inform the Court who attended the mediation, whether the case settled, and whether efforts to settle the case through mediation are being continued or if the case is being returned to the Court for further proceedings. No other information shall be directly or indirectly communicated by the Mediator to the Court, unless all who hold a mediation privilege, including the Mediator, have consented to such disclosure. The Mediator shall keep mediation communications confidential, unless all who hold a mediation privilege, including

the Mediator, have consented to such disclosure.

The efforts of the Mediator shall not be construed as giving legal advice. The Court may have materials for legal or other support services available in the community. The Mediator is authorized to provide such resource information; however, such distribution shall not be construed as a recommendation of or referral to such resource. The recipient of that information is charged with the duty to evaluate those resources independently.

(F) Attendance. All participation in mediation is voluntary except in civil cases. Civil referrals require mandatory participation per TMC Rule 35.

(G) Administrative Dismissal. If the parties fail to dismiss a settled case within the later of sixty (60) days or the time noted in the entry that gave the Court notice of the settlement, then the Court may dismiss the case administratively. Upon such administrative dismissal, court costs shall be paid from the funds deposited. If court costs exceed the funds deposited, each party shall bear their own costs.

(H) Small claims court cases can also use CDSP's Alternative Dispute Resolution Program. Cases can be mediated either before the case is filed or after the filing fee is paid and the case has been put on the Small Claims court docket.

(I) The Check Resolution Service is offered by the Toledo Municipal Court to promote successful resolution of passing bad check complaints through mediation thereby providing an alternative to the criminal process.

The clerk's office, prosecutor's office, or Toledo Police Department shall refer all complainants who wish to file a complaint, affidavit or warrant for a misdemeanor charge of passing bad checks to the Citizens Dispute Settlement Program Check Resolution Service.

The complainant shall provide proof to the Check Resolution Service of notice to the drawer or endorser pursuant to Ohio Revised Code Section 2913.11(B)(2) or Toledo Municipal Code Section 545.09(b)(2) or similar ordinance. The Check Resolution Service shall require the complainant to complete an application form and to pay a case processing fee of \$15.00. A case is defined for purposes of this Rule as no more than 10 passing bad checks written by one individual. The Service shall send a letter by regular mail to the drawer or endorser advising the party of the complaint and to discharge the check by payment in full to the complainant. The payment to the complainant shall include the application fee. The letter shall also advise the drawer or endorser of a date scheduled for mediation. The drawer or endorser shall be advised to attend the mediation at the appointed time if payment has not been made to the complainant prior to the scheduled mediation date.

Mediations will be held in the offices of the Citizens Dispute Settlement Program. If an agreement is reached between the two parties, the endorser may pay the monies

owed directly to the complainant or the parties may set forth the terms of repayment in writing. The application fee (\$15.00) shall be reimbursed by the endorser to the complainant. The Check Resolution Service shall not collect any monies for disbursement to the complainant. If the mediation is unsuccessful or if it is determined that the offender is ineligible to participate in the Program, the Check Resolution Service shall refer the complainant to the appropriate law enforcement agency to secure a police report, or if a report has already been filed, to the prosecutor's office.

Passing bad check cases which reach the court without a mediation through the Check Resolution Service may be referred to the Program for mediation at the discretion of the court. If a case is referred to the Service, no plea will be taken and the case will be scheduled for mediation. If there is a successful mediation, the Check Resolution Service shall recommend dismissal to the prosecutor who shall recommend dismissal to the court. The application fee shall be waived and the defendant will be required to pay court costs on at least one check. If the defendant shows proof of full payment to the court at the arraignment and prior to a referral to the Check Resolution Service, the case may be directly referred to the prosecutor's office for a recommendation. If the prosecutor recommends dismissal, the defendant shall pay court costs on at least one passing bad check complaint.

(J) The Collection Mediation Service (CMS) is offered by the Toledo Municipal Court to promote successful resolution of delinquent unpaid accounts through mediation.

Collection Mediation Program will accept referrals from businesses, individual professionals or collection agencies. The complainant business must reside in the City of Toledo, Washington Township or Ottawa Hills. The service requires the complainant to complete an application form and pay a processing fee of \$15.00 per case. Per case is defined as one account per individual. The service shall send a letter to the respondent advising the party to discharge the delinquent account by paying the complainant in full, any restitution prior to mediation shall, include the court processing fee. If payment is not paid in full prior to mediation, the respondent is expected to attend the scheduled mediation set forth in the complaint letter. If a mediation is held and an agreement is reached the respondent may pay the complainant directly or set forth in writing restitution terms via payment plan. All payment plans must be voluntarily agreed to by both parties. The complainant is allowed to add the court filing fee to money owed. The Collection Mediation Service shall not collect any monies for disbursement to the complainant. If the mediation is unsuccessful either through failed negotiation, payment or non- attendance, the complainant shall be referred to the civil branch of the court system for further assistance.

(K) Civil Mediation. Cases referred to mediation shall be scheduled for mediation within thirty (30) days of referral. If necessary discovery is not completed, a case may be continued to a future mediation date with a judge's consent. If a party or

attorney objects to the referral of his or her case to mediation, that person shall proffer a written objection for consideration of the assigned judge. A referral to mediation shall be reversed only under compelling circumstances.

Parties and/or parties' representatives with authority to settle a claim, and parties' counsel shall attend the mediation. If counsel or any necessary party fails to attend or attends and does not meaningfully participate in the process, the court may order sanctions including, but not limited to, attorney fees, other costs, contempt, dismissal or default judgment.

The court mediator shall promptly notify parties and counsel of a case referral. This notification shall include the date and time of mediation and a description of the mediation process.

In accordance with Ohio Revised Code, Section 2317.023, all written and oral communications made in connection with the mediation of a case shall be treated by the court as confidential. Said communication shall not be used for any purpose, including impeachment of a witness. No mediator may be subpoenaed to testify in any legal proceeding regarding the communications made in connection with the mediation.

If an agreement is reached through the mediation process, a corresponding settlement/dismissal judgment entry shall be submitted within thirty (30) days for court approval.

If an agreement is not reached or a necessary party did not appear, the court mediator shall advise the court within twenty-four (24) hours of the scheduled mediation. No other information shall be communicated to the court. Unresolved cases will be placed on the assigned judge's docket or referred to the assignment commissioner for assignment.

**Figure 4: Ohio Association of Realtors' Earnest Money White Paper
Exhibit D & E**

Revised: April, 2002

EXHIBIT D

**IN THE FRANKLIN COUNTY MUNICIPAL COURT
SMALL CLAIMS DIVISION**

Broker (name and address) :

Plaintiff :

-vs- : Case No.

Seller (name and address):

and:

Buyer (name and address):

Defendants:

COMPLAINT

1. _____(hereinafter "Buyer") and _____(hereinafter "Seller") entered an agreement ("Purchase Agreement") dated _____ by which Buyer agreed to purchase from Seller certain real property located at _____. A copy of the Purchase Agreement is attached hereto and incorporated herein as Exhibit A.

2. In accordance with the terms of the Purchase Agreement, Buyer deposited with _____ ("Broker") the sum of _____ as an earnest money deposit.

3. Broker has deposited the earnest money in its trust account and holds the deposit for the benefit of the Defendants pursuant to the terms of the Purchase Agreement.

4. Both Defendant-Buyer and Defendant-Seller now claim a right to the earnest money, and neither will authorize Broker to pay the deposit to the other.

5. The Ohio real estate licensing law (R.C. 4735.01 et seq.) prohibits Broker from paying the earnest money deposit to either Buyer or Seller in the absence of an agreement of the parties or an order of a court specifying to which party the earnest money should be paid.

6. Since neither Buyer nor Seller will authorize Broker to pay the earnest money to the other, Broker seeks an order from the Court specifying the party to whom Broker should pay the deposit.

WHEREFORE, Plaintiff-Broker demands that the Court require Buyer and Seller to come forward and set forth the bases of their claims to the earnest money; that the Court issue an Order directing Broker to pay the earnest money to Buyer or Seller, and that Plaintiff-Broker recover its costs herein expended.

Respectfully submitted:

Plaintiff-Broker:

Address and Telephone Number

EXHIBIT E

**FRANKLIN COUNTY MUNICIPAL COURT
SMALL CLAIMS DIVISION**

Case No. M' _____ CV I _____

_____ vs _____

Plaintiff Defendant

COMPLAINT:

WHEREFORE, plaintiff demands judgment against defendant in the sum of \$ and costs and interest.

**STATE OF OHIO AFFIDAVIT OF COMPLAINANT'S CLAIM
COUNTY OF FRANKLIN ss.**

_____, being first duly sworn, says on oath that (s)he is (check one) _____ the plaintiff _____ the attorney for the plaintiff _____ the officer or salaried employee of the plaintiff corporation in the above entitled cause; that said cause is for the payment of money only; that the nature of plaintiff's demand is as stated in the complaint; that plaintiff has filed less than 24 cases in the Small Claims Division in this calendar year; and that to the undersigned's best knowledge, the defendant is not now in the military service of the United States.

Subscribed and sworn to before me this

_____ day of _____, 20 ____

Signed _____

Telephone Number _____

_____ Attorney Computer Code

___ Deputy Bailiff ___ Notary Public

Source: ¹ Ohio Association of Realtors' Earnest Money – White Paper, Revised: April 2002
(http://www.ohiorealtors.org/legal/white_papers/wp_earnest_money.html) visited October 20, 2006
Exhibit D and E

SAMPLE SMALL CLAIMS INTERPLEADER COMPLAINT FROM
OKLAHOMA REAL ESTATE COMMISSION

APPENDIX I

SAMPLE INTERPLEADER FILING FORM

IN THE DISTRICT COURT, COUNTY OF _____, STATE OF
OKLAHOMA

Plaintiff,

Address

Phone

SMALL CLAIMS NO. _____

-VS-

Defendant

Defendant

AFFIDAVIT
STATE OF OKLAHOMA
SS:

COUNTY OF _____)

_____. being duly sworn, deposes and says: THAT,
_____, the defendant resides at
_____. in the above named county, and that the mailing address of
the defendant is _____.

THAT, _____, the defendant resides at
_____, in the above named county, and the mailing address
of the defendant is _____.

THAT the Plaintiff has custody or possession of money in the amount of or value of
\$ _____ held pursuant to the following:

THAT the defendants claim or may claim to be entitled to such money. THAT the plaintiff
deposits herewith into the court \$ _____ which equals the amount of such money to
be invested in accordance with the order of the court and that the plaintiff will abide with the
judgment of the court as to the final disposition thereof.

Plaintiff

SAMPLES FROM OKLAHOMA REAL ESTATE COMMISSION

Interpleader filing form

Subscribed and sworn to before me this _____ day of _____, 20____.
_____, Court Clerk

My Commission Expires:

BY: _____
Deputy, Judge or Notary

ORDER

THE people of the State of Oklahoma, to the within named defendants: YOU are hereby directed to appear and answer the foregoing claim and to have with you all books, papers and witnesses needed by you to establish your claim to such money. THIS matter shall be heard that the _____ **County Courthouse**, _____, _____, **Oklahoma, at the hour of _____ o'clock of the _____ day of _____, 20____**, or at the same time and place seven (7) days after service hereof, whichever is latter. And you are further notified that in case you do not appear Judgment will be given against you as follows: DETERMINING or foreclosing your claim to the above-described money as well as the disposition there, AND in addition for costs of the action, including attorney fees where provided by law and including the costs of service of the order.

DATED this _____ day of _____, 20____.
_____, Court Clerk

JUDGES NAME _____

JUDGES ROOM NUMBER _____

BY: _____

Deputy

Source: <http://www.ok.gov/OREC/Publications/index.html> - visited December 20, 2006

Figure 5: Correspondence Regarding Unclaimed Fund Law

10/03/2006 11:57 FAX 814 241 2848

OHIO ASSN. OF REALTORS

004/007



200 EAST
TOWN STREET

COLUMBUS, OHIO
43215-4648

TELEPHONE
614.228.8675

FAX
614.228.2601

GEORGE W.
SMITH
PRESIDENT

DONALD W.
FREELS, RCE, CAE
EXECUTIVE
VICE PRESIDENT

e-mail: info@ohiorealtors.org
http://www.ohiorealtors.org



August 11, 2000

David L. Moore, Superintendent
Division of Unclaimed Funds
Ohio Department of Commerce
77 S. High St., 20th Floor
Columbus, OH 43266-0545

Dear Mr. Moore:

I serve as legal counsel for the Ohio Association of REALTORS, a trade association that counts over 30,000 real estate brokers and salespersons as members.

I have received your agency's "Annual Report of Unclaimed Funds 2000", which is very informative. Of course of particular interest is the October 31, 2000 deadline for businesses to remit unclaimed funds to your agency that are overdue without incurring penalties and interest. The purpose of my letter is to seek clarification regarding the application of the unclaimed funds laws to the trust accounts that brokers must maintain.

As you are probably aware most real estate purchase contracts involve an earnest money deposit that is paid by the buyer. If these funds are paid to the real estate broker, he/she must deposit them in the brokerage trust account. In most instances such real estate transactions close without incident and the earnest money is disbursed at closing pursuant to the terms of the purchase contract.

Occasionally, however, situations arise where the real estate transaction does not close. In these instances the Ohio Division of Real Estate has taken the position that the broker must obtain the consent from both the buyer and seller before any earnest money can be disbursed by the broker to either party. In the event the parties cannot reach an agreement, the only other way the Division of Real Estate will permit disbursement by the broker is pursuant to a court order. Unfortunately in many of these cases neither the buyer or seller will initiate such legal proceedings and the broker, not wanting to incur the expense of doing so himself, is left holding this earnest money for several years.

A question asked by brokers in this situation is whether the earnest money can be turned over to the Division of Unclaimed Funds. It was my understanding that your agency did not consider such funds to be "unclaimed"; rather these were disputed funds over which legal entitlement was being claimed by two adverse parties. As such, I always understood they would not be accepted by the Division of Unclaimed Funds.

With this background and having reviewed your new manual, I am seeking clarification on the following questions so that I can properly advise our Association's members:

1. Are all licensed real estate brokerages "holders" by virtue of accepting earnest money and other funds in a fiduciary capacity?
2. Are all licensed real estate brokerages required to file an Annual Report of Unclaimed Funds even if no funds are reportable?
3. When would earnest and other funds a broker is holding become "dormant"?
4. Will the Division of Unclaimed Funds accept disputed earnest money deposits to which both buyer and seller claim entitlement, and if so at what point?

Your response to these questions regarding a broker's obligations under Ohio's unclaimed funds provision is greatly appreciated.

Sincerely,



Margaret J. Ritenour
Vice President Legal Services

MJR/cse

cc: Lynne Hengle, Superintendent, ODR
Lorie Garland, Asst. VP Legal Services OAR
Don Freels, Executive Vice President OAR
George Smith, President, OAR
Terry Hankner, President-elect, OAR
Steve Brown, Treasurer, OAR



Ohio Department of Commerce

Division of Unclaimed Funds
77 South High Street • 20th Floor
Columbus, OH 43266-0545
(614) 466-4433 FAX (614) 752-5078
www.com.state.oh.us

Bob Taft
Governor

Gary C. Suhadolnik
Director

September 8, 2000

Margaret J. Ritenour
Vice President – Legal Services
Ohio Association of Realtors
200 East Town Street
Columbus, Ohio 43215-4648

Dear Ms. Ritenour:

I am in receipt of your August 11, 2000 letter, regarding possible unclaimed funds held by licensed real estate brokers. Funds held by licensed real estate brokers are covered in the Ohio Unclaimed Funds Law, and may ultimately be considered unclaimed and reportable **only** if the requirements of Chapter 169 of the Ohio Revised Code have been met. The specific funds referenced in your letter, being the subject of a legal dispute between the buyer and seller, are **neither** unclaimed nor reportable.

A licensed real estate broker who accept funds in a fiduciary capacity is considered a holder pursuant to R.C. 169.01(D)(1), which defines a holder, in part, as “any person that has possession, custody, or control of moneys, rights to moneys, or other intangible property, or that is indebted to another...” Further, the funds in question are specifically addressed in the Ohio Unclaimed Funds Law. R.C. 169.02(M)(2) provides that, “Any escrow funds, security deposits, or other moneys that are received by a licensed broker in a fiduciary capacity...” are unclaimed after being held or owed by the licensed broker for two (2) years. Further, even assuming the funds in question were not specified in the statute, R.C. 169.02(P) is a catch-all/omnibus clause which provides that, “All moneys, rights to moneys, and other intangible property not otherwise constituted as unclaimed funds by this section...” are reportable after having remained unclaimed for three (3) years from having become payable or distributable.

However, although funds held by a licensed real estate broker are addressed in the statute, the funds are not reportable unless they are truly unclaimed. Specifically, if the holder has documentation that the owner has taken any of the actions set forth in R.C. 169.01(B)(1) during the statutory dormancy period, the funds are not unclaimed. These actions include, but are not limited to, the owner corresponding with the holder, transacting business with the holder, or otherwise indicating an interest in or knowledge of the funds. Therefore, if the real estate broker has documentation that either the buyer or seller, in this particular situation, has contacted the real estate broker regarding the funds, expressed an interest in the funds, inquired into obtaining the funds, or taken any other similar action, the funds are not unclaimed and the statutory dormancy period begins to run anew with each owner – buyer or seller – initiated activity or contact. If the funds are subject to a legal dispute between the buyer and seller, either of whom has taken any action in regard to the funds, or if any formal legal action has been threatened or commenced, the funds are not unclaimed. Only if there has been no activity in regard to the funds for the statutory dormancy period may the funds even possibly be considered unclaimed and reportable, and only then after the performance of due diligence. The real estate broker in this situation must first perform due diligence in regard to the funds before possibly reporting and remitting said funds to the Division.

FINANCIAL INSTITUTIONS	INDUSTRIAL COMPLIANCE	LABOR & WORKER SAFETY	LIQUOR CONTROL
REAL ESTATE & PROFESSIONAL LICENSING	SECURITIES	STATE FIRE MARSHAL	UNCLAIMED FUNDS

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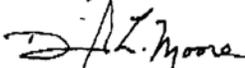
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Margaret J. Ritenour

Pursuant to R.C. 169.03(D), the holder, the real estate broker, shall send a due diligence notice to both owners of the funds – the buyer and seller via first class mail. Said notice must include the nature and amount of the funds and notify the buyer and seller that the funds will be reported as unclaimed unless the buyer or seller informs the holder of a continued interest in the funds within the specified time frame. The holder shall provide both the buyer and seller with a self-addressed, stamped envelope in which to return an acknowledgment. Please refer to R.C. 169.03(D) for additional information regarding due diligence. For the performance of the due diligence requirement, the holder may utilize the OUF-8 form found in the Annual Report of Unclaimed Funds 2000, Forms, Instructions & Information booklet. This form may also be obtained from the Division's website – www.com.state.oh.us – which contains the holder packet, a courtesy copy of which is enclosed. Once the holder has sent the required notice, if either the buyer or seller acknowledges the funds by signing and returning the notice provided by the holder, said funds are not reportable as unclaimed and the dormancy period starts to run again. Only if neither the buyer nor seller signs and returns the notice acknowledging the funds, pursuant to R.C. 169.03(D), are the funds considered unclaimed and, hence, reportable. Please remember that due diligence does not even become an issue unless there has been no activity in regard to the funds for the statutory dormancy period, as explained above. The holder shall maintain information regarding the performance of due diligence for possible verification, as well as maintain any acknowledgment by the buyer or seller, for five (5) years or until completion of an examination by the Division. Further, please note that if a holder subsequently reports such funds, they must be reported as a joint "and" account in the names of both the buyer and seller. You have stated that the Division of Real Estate will not allow disbursement of the funds by the broker without the consent of both the buyer and seller. Therefore, the reporting of said funds to the Division of Unclaimed Funds must clearly identify the funds as a joint "and" account. Funds remitted which do not clearly identify the nature of the funds, as well as both the buyer and seller, will not be accepted.

You also questioned whether all licensed real estate brokers are required to file an annual unclaimed funds report even if there are no reportable funds. All holders subject to Chapter 169 are to file an annual unclaimed funds report regardless of whether there are funds actually being reported. A report filed in this situation is called a "None" report and the holder is to insert the word, "None" in the space provided for the aggregate unclaimed funds total. The holder is also to provide the applicable dates for the report, which is also to be certified by the holder or an officer of the holder organization.

To reiterate, only funds which are truly unclaimed, having been held by the real estate broker for the statutory two (2) year dormancy period, during which there has been no activity or contact regarding the funds, and after the performance of due diligence, resulting in neither the buyer nor seller signing and returning an acknowledgment of the funds, can the funds be reported and remitted to the Division. A real estate broker is not to report and remit any funds unless the specific requirements set forth above and in the Ohio Unclaimed Funds Law have been met. I hope that I have sufficiently addressed your concerns. Should you have additional questions, you may reach me; Kim Cole, Legal Counsel; or James Dowley, Compliance Supervisor; at 614-466-4433.

Sincerely,



David L. Moore
Superintendent

Enclosure