

Minnesota Residential Real Estate Purchase Agreements; Statutory Cancellation of Residential Real Property Purchase Agreements

In addition to the statutory procedure for terminating a buyer's rights in a purchase agreement pursuant to Minnesota Statutes, Section 559.21 - which is only available to sellers - Minnesota Statutes, Section 559.217 makes available to either buyers or sellers two mechanisms for the cancellation of *purchase agreements* with respect to *residential real property*:

1. A cancellation with the *right to cure* - pursuant to Minnesota Statutes, Section 559.217, Subd. 3,

and
2. A "*Declaratory Cancellation*" - pursuant to Minnesota Statutes, Section 559.217, Subd. 4.

Definition - Purchase Agreement

Pursuant to Minnesota Statutes, Section 559.217, Subd. 1, the term "*purchase agreement*", means an:

- earnest money contract,
- purchase agreement, or
- exercised option,

whether or not the instrument is subject to M.S. Section 559.21.

Definition - Residential Real Property

Pursuant to Minnesota Statutes, Section 559.217, Subd. 1, the term "*residential real property*", means real property, **including vacant land**:

- occupied by, or intended to be occupied by,
- in the aggregate, **one to four families** as their residence.

Application

Pursuant to Minnesota Statutes, Section 559.217, Subd. 2, either the buyer, or the seller, may cancel a *purchase agreement* for *residential real property* pursuant to Minnesota Statutes, Section 559.217.

(i) One Party Cancellation

If the procedures identified in Minnesota Statutes, Section 559.217 are followed in a timely manner by either the buyer or the seller, but not by both:

- ◆ the **purchase agreement will be deemed canceled** upon expiration of the 15 day notice period,
and
- ◆ the **earnest money will belong to the party initiating the cancellation** - regardless of any purchase agreement provision to the contrary,

unless the party upon whom the notice was served - within the 15 day notice period:

1. **Complies with** the conditions in default;
2. **Completes any** unfulfilled condition;
3. **Serves a *counter cancellation notice*** upon the other party pursuant to Minnesota Statutes, Section 559.217; or
4. **Obtains a court order** suspending the cancellation.

Nevertheless, under federal law, it's possible that the seller may not be allowed to retain the Earnest Money when the buyer applied for, but was unable to obtain, FHA or VA mortgage financing.

(ii) Two Party Cancellation

If both the buyer and the seller serve in a timely manner a ***cancellation notice*** pursuant to Minnesota Statutes, Section 559.217:

- ◆ **the purchase agreement will be deemed to be canceled** as of the date on which the later cancellation notice is served upon the other party,
- ◆ but **the earnest money will not be awarded to either party.**

In that event:

- ◆ either party may subsequently petition the court for an award of the earnest money,
and
- ◆ the court shall make a determination as to which party is entitled to the earnest money, without giving any regard to the party which first initiated any cancellation proceeding.

In making such determination, the court is allowed to consider the terms of the canceled purchase agreement in making its determination.

The court's order regarding the disposition of the earnest money may be required because a real estate broker cannot release the earnest money to a buyer, or a seller, without receiving either:

- ♦ a **court order** directing the disposition of the earnest money,
- ♦ an **Affidavit of Cancellation** pursuant to Minnesota Statutes, Section 559.217, Subd 7(b),
or
- ♦ the **written agreement** of the parties.

However, obtaining a court order may involve a considerable expense, including the payment of court filing fees, motion fees, and attorney fees.

Therefore, achieving a negotiated settlement with the other party regarding the earnest money may be advisable.

Cancellation of Purchase Agreement - With the Right to Cure

Minnesota Statutes, Section 559.217, Subd. 3, identifies the procedure which may be followed by either party if:

- ♦ a **default occurs**,
or
- ♦ **an unfulfilled condition exists** after the date specified for fulfillment of such condition in the terms of a purchase agreement for the conveyance of *residential real property*, **which does not by its terms cancel the agreement**.

In other words, if there is either:

- ♦ a **default** - which is capable of being cured,
or
- ♦ **an unfulfilled condition** - which can be satisfied,

by the second party, **the first party can serve a notice upon:**

- ♦ **the second party**,
and
- ♦ **any third party holding the earnest money**,

declaring a *conditional cancellation* of the purchase agreement.

(i) Conditional Cancellation Notice

Under this procedure, the *conditional cancellation notice* must:

- ◆ specify by legal description the *residential real property* involved,
and
- ◆ identify the purchase agreement by:
 - the date and names of the parties,
and by
 - the unfulfilled condition or default.

In addition, the *conditional cancellation notice* must state that:

- ◆ the purchase agreement will be canceled 15 days after service of the notice upon the other party to the purchase agreement,
- ◆ unless prior to the cancellation date, the party upon whom the notice is served either:
 - complies with the condition in default,
or
 - completes the unfulfilled condition(s) - including, if necessary, completion of the purchase or sale of the residential real property according to the terms of the purchase agreement.

The actual form of the notice required is identified in the statute, and should be followed verbatim.

(ii) Service of the Conditional Cancellation Notice

The *notice of conditional cancellation* must be served upon the required parties in the same manner as:

- ◆ a *notice of termination of a contract-for-deed* pursuant to M.S. 559.21,
or
- ◆ a *summons* in District Court,

which usually requires personal service upon the required parties.

On occasion, if the parties to be served cannot be located, *service by publication* of the notice may be necessary.

The statutory notice requirement cannot be waived by any provision of the purchase agreement to the contrary.

(iii) Legal Effect of Service

Once notice has been provided to all of the required parties in the manner specified by statute, the purchase agreement will be canceled unless:

- ◆ **within 15 days after** service of the notice upon the other party to the purchase agreement,
- ◆ the party upon whom the notice was served:
 - **fully complies with** the condition(s) in default,
 - **completes the unfulfilled condition(s),**
 - **initiates a counter cancellation** pursuant to M.S. 559.217,or
 - secures from a court an **order suspending the cancellation.**

However, obtaining a court order may involve a considerable expense, including the payment of court filing fees, motion fees, and attorney fees.

Therefore, negotiating a settlement agreement with the other party regarding the earnest money may be advisable.

Cancellation of Purchase Agreement - No Right to Cure

Minnesota Statutes, Section 559.217, Subd. 4, identifies the procedure to be followed by either party if:

- ◆ a default occurs,
- or
- ◆ an unfulfilled condition exists after the date specified for fulfillment of such condition in the terms of a purchase agreement for the conveyance of ***residential real property***, which by the terms of the purchase agreement cancels the purchase agreement.

(i) Confirmation of Cancellation Notice

The statute identifies the following procedural requirements:

If **an unfulfilled condition** exists after the date specified for fulfillment of the condition in the terms of:

- a purchase agreement for the conveyance of ***residential real property***,
- which **by the terms of the purchase agreement cancels the purchase agreement,**

either the purchaser or the seller may **confirm the cancellation** by serving upon:

- **the other party** to the purchase agreement,
- and
- **any third party** that is holding earnest money under the purchase agreement,

a notice:

- (1) specifying the *residential real property* that is the subject of the purchase agreement, including the legal description;
 - (2) specifying the **purchase agreement** by:
 - date and names of parties,
and
 - the unfulfilled condition;
- and
- (3) stating that the purchase agreement **has been canceled**.

The actual form of notice which is required is identified in the statute, and should be followed verbatim.

(ii) Service of the Confirmation of Cancellation Notice

The *confirmation of cancellation* notice must be served upon the required parties in the same manner as:

- ♦ a *notice of termination of a contract-for-deed* pursuant to M.S. 559.21,
or
- ♦ a *summons* in District Court,

which usually requires personal service upon the required parties.

On occasion, if the parties to be served cannot be located, **service by publication** of the notice may be necessary.

The statutory notice requirement cannot be waived by any provision of the purchase agreement to the contrary.

(iii) Legal Effect of Service

Once notice has been provided to all of the required parties in the manner specified by statute, the *cancellation of the purchase agreement* will be confirmed unless:

- ♦ **within 15 days after** the service of the notice upon the other party to the purchase agreement,
- ♦ **the party upon whom the notice was served either:**

- initiates a counter-cancellation proceeding against the other party pursuant to M.S. Section 559.217, Subd. 3 or M.S. Section 559.217, Subd. 4;

or

- secures from a court an **order suspending the cancellation.**

However, obtaining a court order may involve a considerable expense, including the payment of court filing fees, motion fees, and attorney fees.

Therefore, either:

- ♦ achieving a negotiated settlement agreement with the other party regarding the earnest money,

or

- ♦ initiating a ***counter-cancellation***,

may be advisable.

In addition, the availability of the remedy identified in Minnesota Statutes, Section 559.217, Subd. 4 has perhaps been limited by a 2011 Minnesota Court of Appeals decision.

Therefore, consultation with a Minnesota attorney is suggested before attempting to utilize the provisions of Minnesota Statutes, Section 559.217, Subd. 4.

Suspension of Cancellation of a Purchase Agreement

Pursuant to Minnesota Statutes, Section 559.217, Subd. 1, the term “*suspend*”, means:

- ♦ to temporarily or permanently restrain or enjoin a cancellation proceeding under Minnesota Statutes, Section 559.217, Subd. 3 or 4,
- ♦ pursuant to the provisions of Minnesota Statutes, Section 559.211.

(i) Proceeding under M.S. 559.211

Minnesota Statutes, Section 559.217, Subd. 6, provides that:

A seller or a purchaser upon whom the notice is served

- ♦ *may commence a proceeding under section 559.211 to obtain a court order to suspend the cancellation of a purchase agreement under this section,*

and

- ♦ *in the proceeding the court may award court filing fees, attorney fees, and costs of service actually expended **to the prevailing party in an amount not to exceed \$3,000.***

Therefore, while obtaining a court order suspending the cancellation of a purchase agreement may involve a considerable expense, if successful, the party requesting the order may receive reimbursement of up to \$3,000 in expenses.

However, if a party is not successful in obtaining a court order suspending a cancellation, such party may have to pay up to \$3,000 in costs and attorney fees to the other party.

(ii) Payment of Costs to the Prevailing Party

Therefore, if a party:

- elects a *declaratory cancellation* remedy pursuant to Minnesota Statutes, Section 559.217, Subd. 4,
- when a *cancellation with a right to cure* pursuant to Minnesota Statutes, Section 559.217, Subd. 3 would have been required,

the party initiating the *declaratory cancellation* action risks:

- facing an injunction by the court to stop the cancellation proceeding initiated pursuant to Minnesota Statutes, Section 559.217, Subd. 4,
 - being required to pursue a cancellation with a right to cure pursuant to Minnesota Statutes, Section 559.217, Subd. 3,
- and
- being required to pay up to \$3,000 in costs and attorney fees to the other party.

Therefore, *declaratory cancellations* should be pursued only when there is certainty that the purchase agreement by its terms has been canceled without a right to cure.

Effect of Cancellation of a Purchase Agreement

Pursuant to Minnesota Statutes, Section 559.217, Subd. 7(a):

After

a cancellation under subdivision 3

or

a confirmation of cancellation under subdivision 4,

- *the purchase agreement is void and of no further force or effect,*
- *and,*
- *except as provided in subdivision 2 [court order awarding the earnest money], any earnest money held under the purchase agreement*
 - *must be distributed to,*

- *and*
- *become the sole property of,*

the party completing the cancellation of the purchase agreement.

Therefore, notwithstanding the provisions of any purchase agreement to the contrary, the earnest money may be distributed to the party completing the cancellation procedure - in the absence of a court order to the contrary.

Affidavit of Cancellation of a Purchase Agreement

Pursuant to Minnesota Statutes, Section 559.217, Subd. 7(b):

When a cancellation under this section has been completed, the party who served the notice, or that party's attorney, may execute an affidavit stating

- *that the party caused a notice of cancellation to be served upon the other party,*
- *that the other party*
 - *neither complied with the actions required in the notice, if applicable,*
 - *nor obtained a court order suspending the cancellation,*
- and*
- *that the property is residential real property.*

The *Affidavit of Cancellation* may be used to support any claim to the earnest money.

Evidentiary Value of an Affidavit of Cancellation

Pursuant to Minnesota Statutes, Section 559.217, Subd. 7(c):

A copy of the affidavit of cancellation, when attached to a copy of the notice, is prima facie evidence of the facts therein stated.

Therefore, the facts recited in an *Affidavit of Cancellation* are presumed to be true, unless contradicted by other evidence.

Release of Earnest Money

Pursuant to Minnesota Statutes, Section 559.217, Subd. 7(d):

Except as provided in subdivision 2 [court order awarding the earnest money], the affidavit of cancellation, when delivered to a third party holding earnest money under the purchase agreement,

is a sufficient basis for that person to release the earnest money to the party initiating the cancellation.

Therefore a **residential real property** broker may release earnest money to a party submitting an **Affidavit of Cancellation** - in the absence of a court order to the contrary.

Affidavit of Competing Cancellations

Pursuant to Minnesota Statutes, Section 559.217, Subd. 7(e):

If either a seller or purchaser

- *commences a cancellation proceeding under this section*
- and*
- *before completion of the first proceeding*
- ***the other party initiates a cancellation proceeding under this section,***

either party or that party's attorney may execute an affidavit

- *stating that **both parties** caused the notice of cancellation to be served upon the other party*
- and*
- *further specifying **the date the second notice of cancellation** was served upon the other party.*

*A copy of the affidavit of cancellation,
when attached to copies of both notices of cancellation,
is prima facie evidence of*

- ***the cancellation of the purchase agreement***
- and of*
- ***the effective date of the cancellation of the purchase agreement.***

Therefore, an **Affidavit of Competing Cancellation** is presumed to establish that the purchase agreement has been canceled, as of a certain date, unless contradicted by other evidence.

Minnesota Real Property Purchase Agreements

While Minnesota “**fill in the blank**” real property purchase agreement forms are routinely completed by licensed Minnesota real estate brokers and salespersons on behalf of their clients - it may be advisable in your situation to either:

- ◆ have a Minnesota real property purchase agreement **prepared by a licensed attorney,**
- OR

- ◆ **have a licensed attorney review** any Minnesota real property purchase agreement prepared by a real estate broker or salesperson - before it is signed by the parties.

The vast majority of Minnesota real property transactions are completed using a real property purchase agreement prepared by a Minnesota real estate broker or salesperson.

Most of the time, the transaction closes, and things work out just fine.

However, there is much that can go wrong with Minnesota real property purchase agreements, and mistakes can be difficult to correct.

Minnesota attorneys may prepare a real property purchase agreement in a different manner than a purchase agreement which was prepared by a Minnesota real estate broker or salesperson, in order to better serve the client.

Minnesota real estate brokers provide a valuable public service, but they have an interest in protecting the broker from liability in the transaction, and the Association's standard documents may reflect such interests.

Some of the larger Minnesota real estate brokers may even have an interest in promoting the services provided by related title insurance companies.

On occasion, the interests of a Minnesota real estate broker may not be completely consistent with the interests of its clients.

However, even if a Minnesota real estate broker is acting consistent with the interests of its clients, unless a Minnesota real estate broker or salesperson is also licensed as a Minnesota attorney, they are not permitted to give legal advice.

Unauthorized Practice of Law

Minnesota real estate brokers and salespersons are limited in the advice that they can provide to their clients, since M.S. Section 481.02, Subd. 1 provides in part as follows:

481.02 UNAUTHORIZED PRACTICE OF LAW.

Subdivision 1. Prohibitions.

It shall be unlawful for any person or association of persons, except members of the bar of Minnesota admitted and licensed to practice as attorneys at law, . . . by word, sign, letter, or advertisement, to hold out as competent or qualified to give legal advice or counsel, or to prepare legal documents, or as being engaged in advising or counseling in law or acting as attorney or counselor at law, or in furnishing to others the services of a lawyer or lawyers, or, for a fee or any consideration, to give legal advice or counsel, perform for or furnish to another legal services, . . . , or, for a fee or any consideration,

*to prepare for another person, . . . any other legal document, **except as provided in subdivision 3.***

M.S. Section 481.02, Subd. 3a carves out a limited exception for Minnesota real estate brokers and salespersons, by providing as follows:

Real estate closing services.

*Nothing in this section shall be construed to prevent a real estate broker, a real estate salesperson, or a real estate closing agent, as defined in section 82.55, **from drawing or assisting in drawing papers incident to the sale, trade, lease, or loan of property, or from charging for drawing or assisting in drawing them, except as hereafter provided by the Supreme Court.***

M.S. Section 82.81, Subd. 11 also prohibits Minnesota real estate brokers and salespersons from discouraging the use of Minnesota attorneys, by providing as follows:

Prohibition against discouraging use of attorney.

Licensees shall not discourage prospective parties to a real estate transaction from seeking the services of an attorney.

Conclusion

The laws regarding the cancellation of Minnesota purchase agreements are complicated, and the available procedures are not well-suited to do-it-yourselfers.

While Minnesota real estate brokers and salespersons provide a valuable service to the public, they are not allowed to provide legal advice in regard to such matters unless they are also licensed as attorneys, as providing such advice may constitute the unauthorized practice of law on their part.

Please contact Minnesota Attorney Gary C. Dahle for assistance:

- ◆ with the preparation or interpretation of any Minnesota Real Property Purchase Agreement,
- or
- ◆ upon any default in the terms of a Minnesota real property purchase agreements, or any unfulfilled condition in such purchase agreement, which may allow for a statutory cancellation of the purchase agreement, or other negotiated settlement.

If you have an e-mail account, and a good Internet connection, Attorney Gary C. Dahle can assist you in any Minnesota County.

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Legal Disclaimer

Information provided herein is only for general informational and educational purposes. The laws regarding Minnesota real property purchase agreements involve many complex legal issues. **If you have a specific legal problem about which you are seeking advice, either consult with your own attorney or retain an attorney of your choice.**

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