

## **Legal Hotline Q & A**

### **From Get the Facts 04/17/18**

**QUESTION:** In two recent transactions, the listing agent has asked for a rescission (Form 51) when I would use a termination notice. The first scenario, the buyer had not received the CCRs and bylaws for a condo sale within the PSA timeframe. Time was running out and the buyer didn't want to buy the property. The listing agent insisted the buyer sign Form 51. The other transaction is still in the inspection time period. I told the listing agent what the buyers are going to ask for once they receive the inspection report. The listing agent said the sellers will not go for that and to send in a rescission form. The buyers don't want to rely on the listing agent's opinion of what the seller will do so we're sending in a Form 35R asking for the same thing I told the listing agent verbally. Since this has come up twice, I'm wondering when a rescission Form 51 is the appropriate form to use.

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**ANSWER:** There is almost no occasion, in typical, residential real estate sales, for which use of a Form 51 is appropriate. In fact, the only "normal" transaction facts requiring use of a Form 51 that come to mind include a transaction where the buyer properly ends the agreement based on the Lead Based Paint statute. That federal law says that the buyer has the right to "rescind" the transaction. There is not a statewide form dedicated solely to "rescinding" the PSA based on the Lead Based Paint Act as there is with the Seller Disclosure Act (see Form 90A). As a result, if buyer intends to "rescind" the PSA based on buyer's federal Lead Based Paint law right to do so, buyer will have to use Form 51. Otherwise, every right given to buyer to end a transaction, based on language in the statewide forms, gives buyer the right to "terminate" a PSA.

A buyer "terminates" a PSA by using a form that is either dedicated to that purpose, such as Form 35R, Form 90I (Financing Unavailable), Form 90R (Resale Certificate Unavailable) or any of the other forms in the Form 90 series ... including Form 90, which is a blank termination notice. Form 90 can be used to create a termination notice for situations where a party has the right to terminate but a specific termination notice has

not been created (such as seller's termination based on Form 22AD(Additional Down Payment)).

Because EM is typically held by an escrow company, the escrow company will require both parties to sign instructions regarding disbursement of the EM and the proper form to use for that is Form 50. Summarizing, unless the buyer is "rescinding" based on the Seller Disclosure Act (use Form 90A) or based on the federal Lead Based Paint Act (use Form 51), then there is no situation typically arising under use of the statewide forms where parties would properly use a Form 51 to "rescind" a PSA rather than using the proper Notice of Termination accompanied by a Form 50 (EM Disbursement Instructions).

Listing brokers, particularly, are doing their clients a disservice by demanding use of the wrong form (Form 51) in this situation. For parties to "rescind" a PSA requires the consent of both parties and seller will not be able to return the property to the active market if buyer and seller are trying to gain agreement on a Form 51 but are fighting over who gets the EM. However, if a buyer has a right to terminate the PSA and does terminate the PSA using a termination notice, then seller can put the house back on the market even while buyer and seller fight over who may own the EM.

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