

Dealing with the Bolting Buyer: The Mechanics of Minnesota's Residential Purchase Agreement Cancellation Statute

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Imagine yourself as a condominium developer in today's real estate market. When you planned your project two years ago, the market was doing fine and your expected return on the project was sizeable. Your sales team quickly signed up pre-sales for 90% or more of the proposed units. Things were looking good for your long term success.

Flash forward to the present: your once profitable project is fighting to stay alive in a severe market downturn. To make matters worse, construction delays beyond your control have resulted in delayed completion dates, postponed closings and increased holding costs. In other words, things could not appear to get much worse.

Then, you are served with something called a "notice of cancellation" from a potential buyer. Soon, other buyers follow suit. Apparently, some of the folks who were your pre-sales no longer believe that a condominium is a good investment and they attempt to get out of their purchase agreements. They use the construction delays, and any other imaginable reason under the sun, to get out of their purchase agreements whilst retaining their earnest money.

So what is a "notice of cancellation?" In an attempt to standardize and simplify the process of canceling a residential purchase agreement, the Minnesota legislature enacted Minn. Stat. § 559.217. At its core, this statute provides both buyers and sellers with a simple procedure for canceling agreements and distributing earnest money where a breach has occurred prior to closing.

The statute specifies two parallel procedures which must be followed by a party who believes the other party has committed a breach. The choice of which procedure to choose depends upon the nature of the breach.

Where a default has occurred, or an unfulfilled condition exists, after the date specified for fulfillment under a residential purchase agreement, which "does not by its terms" cancel the purchase agreement, the non-breaching party must proceed under the "cancellation with right to cure" provisions contained in Minn. Stat. § 559.217, subd. 3. Under that procedure, a party must serve a fifteen-day notice (with very specific language) on the other party, and any third party holding the earnest money. Minn. Stat. § 559.217, subd. 3(a). The contract is then canceled if the party alleged to have breached does not, within fifteen days of

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service, either 1) comply with the conditions in default and complete the unfulfilled conditions, or 2) secure a court order suspending the cancellation. *Id.*

The second procedure called for under the statute is applicable in cases of so-called "declaratory cancellation." Minn. Stat. § 559.217, subd. 4. This procedure is applicable where a default has occurred, or an unfulfilled condition exists, after the date for fulfillment under a residential purchase agreement which *does*, "by the terms of the purchase agreement," cancel the purchase agreement.* Minn. Stat. § 559.217, subd. 4(a). If such is the case, the canceling party must serve a fifteen-day notice on the other party, and any third party holding the earnest money. *Id.* If the breaching party does not, within the fifteen days, secure a court order

suspending the cancellation, the purchase agreement is cancelled. *Id.*

The difference between these two procedures is that a party served with notice under subdivision 3 has a right to cure along with a right to obtain a court order halting the cancellation within fifteen days, while a party served with notice under subdivision 4 has only the right to obtain a court order. In essence, the declaratory cancellation process is the method which the statute specifies must be used to confirm a cancellation after the fact.

What are the seller's options once served with a statutory notice of cancellation?

Doing nothing is the worst option, because if seller does nothing to stop the cancellation, upon the expiration of fifteen days from the seller being

served the notice, the purchase agreement is deemed canceled and all earnest money must be refunded to the buyer.

A seller who has been served with a notice of cancellation essentially has two options. First, the seller can commence a district court action against the buyer for breach of contract, and if the parties' purchase agreement permits, request that the court order the buyer to close the sale. Alternatively, if the seller would be satisfied with retaining the buyer's earnest money, the seller can serve a "counter-cancellation" and leave the decision as to who gets the earnest money to a court. ■

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* The distinction between a default which does or does not "by its terms" cancel the purchase agreement is taken from the Minnesota Supreme Court's decision in *Romain v. Pebble Creek Partners*, 310 N.W.2d 118 (Minn. 1981).