

## RESIDENTIAL REAL ESTATE ON PAUSE – C.A.R. ISSUES A NEW ADDENDUM IN RESPONSE TO COVID-19



Statewide and local Stay-at-Home/Shelter-In-Place orders impact nearly every aspect of our daily lives and the economy – including the real estate industry. The once hot, forever climbing California residential real estate market is suddenly on pause. The California Association of Realtors has issued a new addendum to deal with the COVID-19 pandemic.

One of the most tangible and unique things you can buy or sell is now off limits – no more open houses, home tours, or inspections.\*\* Technology is trying to fill the gap, but there are bigger issues causing transactions to stall or get cancelled altogether:

- Can I still afford this home?
- Is the home still worth the purchase price I agreed to?
- Do I still qualify for a mortgage?
- If I sell my house, how can I move somewhere else?
- How can we sign the documents required to close escrow?
- If the deal cancels, what happens to the buyer's deposit?

*\*\* As of March 28, residential real estate is considered an “essential business” if other state and local protocols are followed, including proper social distancing.*

To address these and other important questions, the California Association of Realtors recently issued a new addendum for use in residential real estate transactions – the “Coronavirus Addendum/Amendment” – found **here** .

The Addendum is well-intentioned, but if used, it fundamentally changes the widely-used Residential Purchase Agreement (RPA) – in particular, the ability to and consequences of cancelling the deal.

Under the RPA, the seller has a certain amount of time to deliver information about the property, and the buyer has a certain amount of time to conduct inspections, secure financing, and remove all contingencies. Once the buyer removes contingencies, the deal is set – the buyer is deemed to have completed all investigation to its satisfaction and agreed to complete the transaction.

Importantly, under the RPA the buyer’s deposit becomes a form of liquidated damages owed to the seller if the buyer breaches the contract without good cause. Cancelling the deal at the last minute because of “cold feet” is a good example of this.

Currently, the RPA does not list today’s circumstances as good cause to cancel the deal. And because the RPA does not contain a force majeure clause, there is no agreed-upon list of circumstances that are unforeseeable and outside the parties’ control such that the contract cannot be performed.

The Addendum builds in today’s circumstances as good cause to postpone close of escrow, and is seemingly presented as an extension addendum. However, the Addendum actually is a substantial material change that allows either party to cancel the deal with no questions asked. This is much more than a pause or even a right to cancel due to force majeure type events; rather, the Addendum provides an unconditional right to cancel in the future, even if the parties were otherwise ready to close the deal before the Coronavirus hit.

The Addendum’s first term – which is not optional – provides that after the agreed-upon postponement period (typically 30 days), either party may cancel the deal and the buyer’s deposit shall be returned to the buyer, minus fees and costs incurred.

*Before using the Addendum, buyers and sellers should ask themselves:*

- Can I afford to be stuck in this deal for another 30 days? The parties might be better served moving on immediately.
- Is it inevitable that the deal will get cancelled after 30 days, due to loss of income, pricing changes, or other reasons? If so, there might not be a good reason to “kick the can” down the road.
- What is the cost of allowing no questions asked cancellation? For the seller, it is the loss of the deposit as liquidated damages. For the buyer, it might be the opportunity to purchase a dream home at the right price (if the market suddenly rebounds).

The Addendum also has optional additional terms that allow the parties to cancel the deal and return the buyer’s deposit if the buyer is unable to fund the purchase loan or close escrow “due to the buyer’s

loss of income from COVID-19 related issues,” or to cancel the deal outright. The Addendum does not specifically define “COVID-19 related issues,” leaving it open-ended and subject to dispute.

Selecting either of the Addendum’s optional terms, however, creates a potential conflict with the first non-optional term because then the parties have both agreed to postpone the close of escrow but, at the same time, either agreed to cancel the deal due to COVID-19 related issues or cancel the deal immediately.

Finally, the Addendum does not address lender consent, escrow consent, or other third parties’ agreements to waive or reduce fees, bills, commissions, and related claims.

If the parties use the Addendum, they should also confirm in writing their agreement to instruct escrow to cancel and return any deposit consistent with the Addendum. They should also have an agreement as to who is responsible for any consequential expenses, such as vendor payments (e.g. home inspection).

The parties should also be mindful of broker commission claims and lender fees since the Addendum does not address who is responsible for such payments. Ideally, the parties will confirm in advance with third parties that such fees will not be paid, and claims for such fees will be waived, if the transaction is cancelled pursuant to the Addendum.

Buyers and sellers should carefully read and fully understand the Addendum before using it because it potentially does a lot more than just put a pending deal on pause. Thoughtful consultation with realtors and counsel is also strongly advised, so the parties’ true intentions can be unambiguously written into the deal.

*For any questions or additional information regarding the new Addendum, please do not hesitate to contact our Real Estate team below.*



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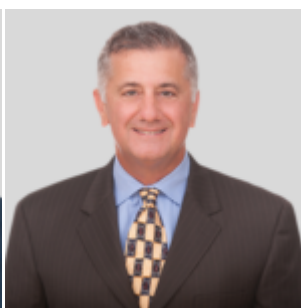


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