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# Minnesota's New Residential Purchase Agreement Cancellation Statute

Larry M. Wertheim

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## MINNESOTA'S NEW RESIDENTIAL PURCHASE AGREEMENT CANCELLATION STATUTE

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For the first time in almost twenty years, the Minnesota legislature has altered the statutory procedures for canceling residential purchase agreements. The 2004 legislature instituted two new procedures for cancellation of residential purchase agreements, both of which will significantly change current practices.

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I. SECTION 559.21 AND *ROMAIN*A. *Romain v. Pebble Creek Partners*<sup>1</sup>

Minnesota is virtually unique in American law as having a statutory non-judicial process that provides for the quick termination of the rights of a purchaser under a contract for deed, also known as an installment land contract.<sup>2</sup> Minnesota Statutes section 559.21 provides for a process whereby, upon a default by a buyer under a contract for deed, the seller can terminate all rights of the buyer under the contract for deed without invoking the jurisdiction of a court.<sup>3</sup> The statute provides that if a default occurs that would give the seller a right to terminate the contract, the seller can serve notice, in the form prescribed by statute, on the buyer.<sup>4</sup> If the buyer fails to cure defaults within the statutorily specified time, typically sixty days after service of the notice, the contract is deemed terminated and an affidavit of such service and failure to comply constitutes prima facie evidence of the termination.<sup>5</sup>

Statutory termination under section 559.21 applies if “a default occurs in the conditions of a contract for the conveyance of real estate . . . [that gives] the seller a right to terminate it.”<sup>6</sup> In *Romain v. Pebble Creek Partners*,<sup>7</sup> the Minnesota Supreme Court was directly faced with the issue of whether section 559.21 applies to a purchase agreement.<sup>8</sup>

In *Romain*, the court first noted that it was indisputable that the statute applied to a “contract for deed.”<sup>9</sup> While noting that there is no definitive definition of a contract for deed, the court pointed out its primary characteristics: that “vendor and vendee are bound to sale and purchase by definite terms; the vendee usually

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1. 310 N.W.2d 118 (Minn. 1981).

2. Iowa is the only other state with a similar cancellation statute. See IOWA CODE ANN. §§ 656.1-6 (West 1995).

3. MINN. STAT. § 559.21 (2002).

4. *Id.* subd. 3.

5. *Id.* subd. 4(e).

6. *Id.* subd. 2a.

7. 310 N.W.2d 118 (Minn. 1981).

8. The 1978 version of section 559.21 at issue in *Romain* was phrased slightly different than the current statute and applied “[w]hen default is made in the conditions of any contract for the conveyance of real estate . . . whereby the vendor has a right to terminate the same.” *Id.* at 120.

9. *Id.*

takes possession; and *the contract works an equitable conversion*, the vendor retaining legal title and the vendee having equitable title.”<sup>10</sup> Thus, a contract for deed is primarily a financing instrument. The court in *Romain* went on to contrast a contract for deed with a purchase agreement.

[T]he distinction between contracts for deed and purchase agreements is similarly unclear. A purchase agreement (or earnest money contract) often is a preliminary contract “to bind the bargain” until the closing, at which time possession is delivered and title is passed by deed or contract for deed. The purchase agreement frequently is conditioned on certain material terms respecting title or financing being satisfied in the interim period before closing.<sup>11</sup>

A purchase agreement, in contrast to a contract for deed, is not a financing device but rather is normally of a short-term duration under which the buyer does not pay interest, take possession, or enjoy beneficial use of the property. As such, a purchase agreement is more in the nature of a holding instrument that keeps the parties bound while certain tasks, such as examining title, arranging financing, or seeking rezoning, are accomplished.

*Romain* adopted the view that statutory termination under section 559.21 applies regardless of whether the contract is a purchase agreement or a contract for deed.<sup>12</sup> The issue of the applicability of section 559.21 is not resolved by whether an instrument is labeled a contract for deed or a purchase agreement, and “is not dependent on how the parties may have manipulated the contract language.”<sup>13</sup> Under *Romain*, a contract may be statutorily cancelled if the agreement is “sufficiently certain and complete in its essential terms that ordinarily specific performance will lie.”<sup>14</sup> The inquiry is “whether a term essential to the final bargain is left open for further negotiations or is dependent on a contingency.”<sup>15</sup>

While mentioned only in passing in *Romain*, the doctrine of equitable conversion is central to understanding the case. The doctrine of equitable conversion is based on the maxim that

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10. *Id.* (emphasis added).

11. *Id.* at 121.

12. *Id.*

13. *Id.* at 122.

14. *Id.*

15. *Id.*

“[e]quity regards and treats that as done which in good conscience ought to be done.”<sup>16</sup> Because real property is unique, a purchaser under a definite, non-contingent agreement has the remedy of specific performance.<sup>17</sup> Upon payment of the specified purchase price, the purchaser is entitled to an order requiring the seller to execute and deliver a deed.<sup>18</sup> Equity principles treat that which ought to be done, that is, delivery of the deed, as being done throughout the term of the contract.<sup>19</sup> Therefore, despite the fact that the seller has not given a deed and has only entered into a contract, equity regards the purchaser as the equitable owner and the seller as the holder of mere legal title to the property.

Most importantly, under equitable conversion, the buyer has a property interest in the real estate that is the subject of the contract. As such, the buyer’s property interest constitutes both a cloud on the seller’s title and a right, upon payment of the purchase price, to entirely oust the seller of all title. Moreover, as a property interest, the buyer’s equitable interest does not simply disappear if the buyer fails to timely perform. That property interest can be extinguished by means of a deed from the seller to the buyer (or other consensual instrument signed by the buyer). Short of such an instrument, that property interest remains extant. Thus, under *Romain*, the conclusion that equitable conversion has occurred means not only that section 559.21 applies to the contract in question, but that, absent a deed (or other consensual instrument) from the buyer, until statutory termination has been effected, the buyer has a property interest that prevents the seller from selling the real estate to a third party and that will permit the buyer to acquire the seller’s interest in the real estate.

As *Romain* recognized, equitable conversion may apply to a purchase agreement as well as a contract for deed.<sup>20</sup> Thus, in the case of a definite, non-contingent purchase agreement, equitable conversion will have occurred and the buyer under the mere

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16. *Gilles v. Sprout*, 293 Minn. 53, 59, 196 N.W.2d 612, 615 (1972).

17. *Romain*, 310 N.W.2d at 122.

18. *See Schumacher v. Ihrke*, 469 N.W.2d 329, 335 (Minn. Ct. App. 1991) (upholding the trial court’s grant of specific performance, even though other remedies may be available, because real property is unique).

19. *See Gilles*, 293 Minn. at 59, 196 N.W.2d at 615.

20. *See Stiernagle v. County of Waseca*, 511 N.W.2d 4, 5 (Minn. 1994) (“[A] contract for deed works an equitable conversion of the real property conveyed.”); *Frederick v. Peoples State Bank of Madison Lake*, 385 N.W.2d 11, 13 (Minn. Ct. App. 1986) (“[E]quitable conversion occurs at the time a purchase agreement is signed.”).

purchase agreement will have a property interest—an interest which remains outstanding unless and until the buyer executes a deed (or other instrument) or the seller effectuates statutory termination under section 559.21.<sup>21</sup>

The *Romain* court went on to analyze the particular purchase agreement at issue in the case before it.<sup>22</sup> The agreement provided that the purchase price would be payable at closing by means of a promissory note given by the buyers to the sellers, the security for which was not (as is customary) the real estate being purchased, but rather other collateral satisfactory to the seller.<sup>23</sup> If an agreement regarding such other security was not made, the purchase agreement would then be null and void.<sup>24</sup> The court concluded that, given the significance of the collateral for the payment obligation, “there was an essential term left open” and “that it became null and void by reason of the parties’ not reaching agreement on security for the note; and, consequently, that notice under section 559.21 to terminate the purchasers’ interest was not needed.”<sup>25</sup> In effect, the court concluded that because the purchase agreement was not sufficiently definite to permit the buyers to procure specific performance of the agreement, equitable conversion had not occurred, the buyers did not have a property interest in the underlying real estate, and statutory termination under section 559.21 was not required to extinguish any real estate interest of the buyers.<sup>26</sup> Ironically then, while the teaching of *Romain* is that section 559.21 applies to purchase agreements and that a purchase agreement may require statutory cancellation, the actual holding of the case is that the particular purchase agreement at issue did not warrant termination.<sup>27</sup>

In addition to the situation of the failure to stipulate collateral for the unpaid purchase agreement, *Romain* noted prior cases involving purchase agreements where the termination statute did not apply and, in effect, where no statutory termination was required to extinguish a property interest in the buyer.<sup>28</sup> Thus, in the case where a title defect not due to the fault of the seller made

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21. MINN. STAT. § 559.21 (2002).

22. *Romain*, 310 N.W.2d at 119.

23. *Id.*

24. *Id.*

25. *Id.* at 122-23.

26. *Id.*

27. *See id.*

28. *Id.* at 121.

title unmarketable, the purchase agreement ended by its terms without the need for a cancellation notice.<sup>29</sup> Similarly, the *Romain* court recognized that statutory termination is not required in the case of a purchase agreement that is subject to an unsatisfied financing contingency, the failure of which voids the agreement.<sup>30</sup> That latter rule has also been followed in a post-*Romain* case.<sup>31</sup> In addition, other case law indicates that an option, until exercised, will normally not be subject to section 559.21 based on the theory that an unexercised option is not binding on both parties and hence not subject to specific performance.<sup>32</sup>

Nevertheless, the *Romain* court also pointed to prior cases which did require that definite, non-contingent purchase agreements be terminated under the statutory procedure.<sup>33</sup> These purchase agreements themselves provided that if the buyer failed to make timely payments to the seller, the contract either would be null and void or would end.<sup>34</sup> *Romain* recognized that the applicability of section 559.21 “is not dependent on how the parties may have manipulated the contract language.”<sup>35</sup> Thus, mere insertion of language that failure of a party to perform automatically nullifies or ends the contract does not avoid the applicability of the termination statute to an otherwise definite, non-contingent purchase agreement.

Recently, the Minnesota Court of Appeals has reaffirmed that

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29. *Joslyn v. Schwend*, 85 Minn. 130, 88 N.W. 410 (1901) (cited by *Romain*, 310 N.W.2d at 121). This case, which involved an actual title defect that rendered title unmarketable, should not be read to stand for the proposition that the mere existence of a contingency for title examination precludes equitable conversion. Virtually all purchase agreements contain such a contingency and such a rule would, in effect, make section 559.21 inapplicable to all purchase agreements, a conclusion rejected by *Romain*.

30. See *Romain*, 310 N.W.2d at 121 (citing *Liesch v. Abbott*, 265 Minn. 447, 456, 122 N.W.2d 578, 584 (1963) and *Chapman v. Salem Lutheran Church*, 301 Minn. 486, 487-88, 221 N.W.2d 129, 130 (1974)).

31. *Jones v. Amoco Oil Co.*, 483 N.W.2d 718, 724 (Minn. Ct. App. 1992).

32. See *Rooney v. Dayton-Hudson Corp.*, 310 Minn. 256, 267-68, 246 N.W.2d 170, 176 (1976); see also *In re Hilltop Dev. v. Miller Hill Manor Co.*, 342 N.W.2d 344, 348 (Minn. 1984) (holding that if the option has been exercised, a contract is created and the cancellation statute applies). But see *M.L. Gordon Sash & Door Co. v. Mormann*, 271 N.W.2d 436, 441 (Minn. 1978) (holding, albeit not in the context of a cancellation, that in equity an unmistakable option granted a purchaser a “property interest” so as to defeat an intervening judgment creditor).

33. *Ballard v. Friedman*, 151 Minn. 493, 187 N.W. 518 (1922); *Finnes v. Selover, Bates & Co.*, 102 Minn. 334, 113 N.W. 883 (1907).

34. *Romain*, 310 N.W.2d at 121-22.

35. *Id.* at 122.

“[r]eal estate purchase agreements are unique because they are subject to the provisions of” section 559.21.<sup>36</sup> In another recent case, the court of appeals concluded that because a purchase agreement was definite and not subject to contingencies, the buyer would be entitled to the notice and cure rights under section 559.21 in the event of the buyer’s default—notwithstanding the fact that the purchase agreement provided that the agreement would be “null and void and of no consequence to either party” if the buyer failed to perform.<sup>37</sup>

### B. Romain’s *Rationale*

As an initial matter, one might question the very reasoning of *Romain*’s initial conclusion, that is, why should any purchase agreement ever be subject to statutory cancellation? Although *Romain* analyzes the statutory framework of section 559.21, the court does not delve into the underlying policy or rationales. The justification for its conclusions is not as clear as one might initially suspect.

There is little question that a buyer under a contract for deed, who has typically gone into possession, who has attained significant equity in the property through the down payment, and possibly installment payments, to the seller, but who has defaulted in installment payments (or the final balloon payment), should be entitled to a statutorily imposed cure period and should not lose his or her equity without notice and a right of cure. It is not so clear, however, why a buyer under a purchase agreement, who has not gone into possession, who has normally made only a nominal payment of earnest money, who has invested no real equity in the property, but who has failed to show up at closing, should likewise be entitled to a statutorily-imposed cure period. There are typically far greater equities in favor of the contract for deed buyer.

In addition, the impact of applying section 559.21 to a purchase agreement seller may, in fact, be far more onerous than applying section 559.21 to a contract for deed seller. In the situation of a contract for deed seller, the statutory notice and cure period<sup>38</sup> will normally only delay the seller’s receipt of promised

36. *Edina Dev. Corp. v. Hurtle*, 670 N.W.2d 592, 597 (Minn. Ct. App. 2003).

37. *TNT Props., Ltd. v. Tri-Star Developers LLC*, 677 N.W.2d 94, 103-04 (Minn. Ct. App. 2004).

38. MINN. STAT. § 559.21, subd. 2(a) (2002). “[N]otice must state that the contract will terminate sixty days, or a shorter period allowed in subdivision 4,



installment payments or, if the contract is terminated, the seller may receive a windfall. In applying section 559.21 to a purchase agreement, however, the statutory notice and cure period<sup>39</sup> will leave the seller (whose primary purpose was to conclusively dispose of the property) in limbo and frustrated in his ability to remarket the property to another buyer; if the purchase agreement is terminated, the seller will only recover the typically nominal earnest money.

This situation can be exacerbated by a companion statute to section 559.21, section 559.211, which allows a court, upon motion of a buyer in connection with a civil action against the seller, to extend the cure period indefinitely by means of a temporary restraining order or a temporary injunction.<sup>40</sup> Furthermore, even if the temporary injunction against the termination is ultimately lifted because the buyer's action is found to be without merit, the injunction statute provides that the contract does not terminate for fifteen days after the temporary injunction or restraining order is lifted.<sup>41</sup>

Thus, in effect, a buyer under a purchase agreement meeting the *Romain* test has an automatic right to extend the closing date until a minimum thirty-day period after the seller serves the statutory notice and such period can be extended thereafter indefinitely by court order (and, in all cases, for a minimum of fifteen more days after a temporary injunction or order is lifted).<sup>42</sup> Since all the buyer risks by running out the statutory cure period is the loss of earnest money, which often may be an amount as little as \$500, it may appear an unfair bargain to force a seller to keep the property off the market pending completion of the termination proceeding. In effect, under *Romain*, by risking only what may be a nominal amount of earnest money, a defaulting buyer can "buy" at least thirty days and perhaps much longer for the purpose of keeping the property tied up and attempting to eventually close.

In defense of *Romain*, however, it can be seen as a modest attempt to avoid unfair forfeitures by purchase agreement buyers of both their earnest money, and more importantly, the right to buy

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after the service of the notice" unless the purchaser is able to cure the defaults prior to the termination date. *Id.*

39. *Id.*

40. See MINN. STAT. § 559.211 (2002).

41. *Id.* subd. 1.

42. *Edina Dev. Corp.*, 670 N.W.2d at 597 (citing MINN. STAT. §§ 559.21 subds. (2)(a), (4)(a); 559.211, subd. 1).

intrinsically unique real estate. It reflects a policy judgment that while there may be abuses, it is a reasonable compromise of the competing interests and the importance of making sure that Minnesota buyers are protected.

Even if one concludes that applying section 559.21 to purchase agreements makes sense as a matter of public policy, one might question the specific test for applying section 559.21 to the purchase agreement under *Romain*—basing the applicability of section 559.21 to the existence of a definite and non-contingent purchase agreement.<sup>43</sup> As to a definite purchase agreement where all material terms are agreed upon, the test that the purchase agreement in *Romain* failed,<sup>44</sup> it makes sense that if a purchase agreement is not definite with respect to all major terms, a court could not grant specific performance to the buyer. In that case, equitable conversion has not occurred, the buyer does not have a property interest, and there is nothing “there” upon which one could require that the statute act so as to extinguish a property interest in the buyer.

More questionable is a purchase agreement containing a contingency to the buyer's performance or an unexercised option, both of which, under *Romain*, do not require application of the statute.<sup>45</sup> In those cases it is true that a seller would not be entitled to specific performance against the buyer. In the case of the contingent purchase agreement, the buyer's obligations are contingent on satisfying a particular condition. Similarly, in the case of an unexercised option, the buyer has no obligations whatsoever until the option is exercised. However, in the case of both the contingent purchase agreement and the unexercised option, the buyer could usually unilaterally place him or herself in the position of being entitled to specific performance against the seller by simply waiving the contingency, in the case of a contingent purchase agreement, or by tendering notice of exercise of the option, in the case of an option agreement. In other words, in both cases the seller lacks the remedy of specific performance, while the buyer, as a practical and customary matter, can avail him or herself of that remedy.

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43. *Romain v. Pebble Creek Partners*, 310 N.W.2d 118, 122 (Minn. 1981). “[T]he agreement must be sufficiently certain and complete in its essential terms that ordinarily specific performance will lie.” *Id.*

44. *See id.* at 122-23.

45. *Id.* at 121.

One must then ask why the absence of mutuality of the remedy of specific performance precludes the applicability of the statute when the purpose of applying the requirement of statutory termination is to reflect the buyer's right to specific performance under the doctrine of equitable conversion. Perhaps the answer is that what is "good for the goose is good for the gander." Buyers should not have the protection of the termination statute if they are not also at risk for a claim of specific performance by the seller if they fail to perform.<sup>46</sup>

Regardless of the policy issues, in 1985, as part of a general rewrite of the cancellation statute, the legislature essentially codified the *Romain* case and the applicability of section 559.21 to purchase agreements.<sup>47</sup> In an amendment to section 559.21, the legislature recognized both the difference between purchase agreements and contracts for deed and the *Romain* rule for determining the applicability of the statute to purchase agreements.<sup>48</sup> In particular, the legislature modified the cancellation statute to provide that earnest money contracts, purchase agreements, and exercised options "that are subject to" section 559.21 may be terminated with a thirty-day notice (unless by their terms they provide for a longer termination period), rather than with the customary sixty-day notice applicable to traditional contracts for deed.<sup>49</sup> Application of a minimum thirty-day notice period to earnest money contracts, purchase agreements, and exercised options reflects the lesser equities applicable to a defaulting purchase agreement buyer, as contrasted with a defaulting contract for deed buyer. More importantly, for the issues presented here, the statute's reference to purchase agreements (or earnest money contracts or exercised

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46. Also, in the case of a contingent purchase agreement, a buyer is typically not risking the earnest money while the contingency is outstanding. Therefore, it might be reasoned that until a buyer's earnest money is at risk of forfeiture, that is, until the contingency is satisfied (or waived), a buyer has not "paid" for the right to require statutory termination.

47. See MINN. STAT. § 559.21, subd. 4(a) (2002).

48. *Id.*

49. *Id.* The reference to "exercised" options is a recognition that while an unexercised option is not subject to the statute, an exercised option may be. *In re Hilltop Dev. Miller Hill Manor Co.*, 342 N.W.2d 344, 348 (Minn. 1984). The post-*Romain* legislation also revised the statutorily required notice in section 559.21, subdivision 3, to refer to "your contract for the purchase of your property," in lieu of the prior reference to "your contract for deed." MINN. STAT. § 559.21, subd. 4(a). The earlier verbiage was relied upon by the sellers in *Romain* for their argument that the statute did not apply to purchase agreements. *Romain*, 310 N.W.2d at 121.

options) “that are subject to” the termination statute was an unmistakable recognition that the *Romain* rule makes only definite, non-contingent purchase agreements subject to section 559.21.<sup>50</sup> Furthermore, the caveat was needed so as to avoid any implication that the legislature intended to either abandon the *Romain* rule or to make the statute applicable to all purchase agreements.

### C. Problems with Romain

The primary problem with the *Romain* test is that it lacks certainty. It may not be easy to determine whether a particular purchase agreement meets the *Romain* requirements of definiteness and non-contingency. The court itself recognized this when it concluded that the decision leaves “some uncertainty in the application of section 559.21, which the prudent counselor will have to take into account.”<sup>51</sup> This is particularly a problem where the question is the existence of an unsatisfied contingency. Without statutory termination there always remains the risk that the buyer will satisfy an outstanding contingency, such as financing or rezoning, and will then acquire an equitable interest that must be statutorily terminated. In fact, unless the purchase agreement specifically requires that the buyer provide written notice (or evidence) that the particular contingency has been satisfied, a seller may not even be aware of whether or not the contingency has been met. Moreover, most contingencies, such as financing, inspection, and land use approvals, can be waived by the buyer; a waived contingency is no longer a contingency that will prevent the application of the termination statute.

A buyer under a contingent purchase agreement who is unable to timely close may voluntarily waive all contingencies (other than title). The effect of waiving all contingencies will be to make section 559.21 applicable to the defaulted purchase agreement and trigger a need for the seller to serve the thirty-day cancellation notice, which will assure the buyer an additional minimum thirty days to close after seller serves the statutory notice of termination. Thus, even if the purchase agreement was originally not subject to section 559.21 due to a contingency, and even if the event (such as financing or rezoning) that is the subject of the contingency has not occurred, a buyer might unilaterally transform the purchase

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50. See MINN. STAT. § 559.21, subd. 4(a).

51. *Romain*, 310 N.W.2d at 123.

agreement into an agreement that is subject to (and requires) statutory termination.<sup>52</sup>

The risk of ignoring (or incorrectly applying) *Romain* can be devastating to a seller. In the situation of a “busted” transaction, a seller might elect (either out of ignorance or out of a mistaken belief that the purchase agreement did not meet the *Romain* test) not to serve the section 559.21 notice of termination. Believing that the first purchase agreement is no longer effective, the seller may then enter into a second purchase agreement that is not subject to cancellation of the first purchase agreement. If, however, the believed-to-be-dead first purchase agreement rises up (by means of an action for specific performance by the first buyer), the result is that the seller will be caught between the proverbial rock and a hard place. The seller cannot close on either the first or the second purchase agreements. The filing of a *lis pendens* by the first purchaser will create a cloud on title that prevents closing on the sale to the second purchaser. Likewise, if the seller seeks to close with the first purchaser, that closing will be unsuccessful since the seller will have to disclose under the customary seller’s affidavit that the seller has entered into a second purchase agreement. The end result will likely be that both the first purchaser and the second purchaser will successfully sue the seller for selling the same property twice.

Therefore, as a matter of prudence, if there is any uncertainty regarding the application of *Romain* to a particular purchase agreement, in the absence of a quitclaim deed or other consensual termination from the buyer on a “busted” sale, a well-advised seller will use statutory termination. Service of the section 559.21 notice will give a tardy, and perhaps undeserving buyer an additional thirty days to close.<sup>53</sup> Nevertheless, the risks of ignoring or

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52. The buyer’s waiver of the contingency will normally result in the buyer’s earnest money being retained by the seller in the event that the buyer does not close after service of the statutory notice of termination. In effect, the buyer will have risked the otherwise refundable earnest money as the price of getting the additional thirty days to close. That is often small comfort to a seller more concerned about remarketing the property than retaining what is often a small earnest money deposit.

53. One might consider adding a proviso to the notice of cancellation that the notice is being given without prejudice to the seller’s right to claim that no notice is required. However, the Minnesota Supreme Court, in *Murray v. Nickerson*, held that the seller could not have it both ways and that the seller giving the statutory notice was sufficient for the court to conclude that the parties treated the agreement as more than an option. 90 Minn. 197, 202-03, 95 N.W. 898, 900

incorrectly applying *Romain* are such that the benefits of certainty outweigh the costs of unnecessarily providing the statutory notice.

Aside from general concerns about uncertainty in the application of section 559.21 to purchase agreements, particular concerns have been expressed regarding the applicability of section 559.21 to residential purchase agreements. Despite the shortened cure period allowed for purchase agreements, many residential brokers have believed that the statutory scheme did not adequately address the problems all too often experienced in “busted” residential real estate transactions. Transactions typically fail either because the seller or the buyer would choose to back out and thereby breach the agreement, or a contingency, typically for financing or inspection, would not be timely fulfilled. In most situations, the seller and buyer would simply sign a cancellation agreement (as typically required by the form purchase agreement) that directs to whom the broker was to deliver the earnest money.

However, brokers reported that too often either or both the parties would refuse to sign the cancellation agreement. As a result, in the case of buyer recalcitrance, (a) the seller would face the uncertainty of whether, due to contingencies, a section 559.21 termination was even required and how to secure the earnest money, or (b) if it was determined that statutory termination was required or desirable, the seller would face at least a thirty-day delay in waiting out the cure period before receiving the earnest money and putting the house back on the market.

Also, section 559.21 is only a remedy available to sellers and does not assist a buyer in the case of seller recalcitrance. If either the seller defaulted or the purchase agreement failed by reason of a contingency and the seller was unwilling to refund the earnest money to the buyer, a buyer had no extra-judicial remedy to determine that the purchase agreement was terminated and that the buyer was entitled to the earnest money. Thus, in the case of seller recalcitrance, a buyer was invariably required to go to court to seek judicial relief (often over a relatively small sum of money).

Furthermore, section 559.21 is only available in the case of default (and only the buyer's default at that) and no procedure is available where a purchase agreement fails by reason of an unfulfilled condition. If, for example, a buyer's financing condition is not timely fulfilled, a seller could not immediately

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(1903).

commence a section 559.21 proceeding, but rather, could only serve a statutory notice when the buyer actually went into default.

Finally, in the case of either seller or buyer recalcitrance, absent a section 559.21 termination or a court order, brokers holding the earnest money had no mechanism upon which they could rely to determine to whom the money should go. Without going through the thirty-plus day section 559.21 procedure (or if section 559.21 was believed inapplicable), a broker holding earnest money would face potential liability by disbursing the earnest money to the wrong party or would simply have to hold the money until the parties went to court.

## II. NEW CANCELLATION LEGISLATION

As a result of those concerns, the Minnesota legislature responded and adopted, as alternatives to termination under section 559.21, two new cancellation procedures for residential purchase agreements: cancellation with right to cure and declaratory cancellation.<sup>54</sup> These new procedures apply only to purchase agreements for residential real property entered into on or after August 1, 2004.<sup>55</sup> Residential real property is defined as “real property, including vacant land, occupied by, or intended to

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54. 2004 Minn. Laws ch. 203, art. I, §§ 9-10. For ease of reference, citations to the new legislation will refer to Minnesota Statutes section 559.217 (2004) to which the new legislation is to be codified. As discussed *infra*, the new section’s title, “Declaratory Cancellation of Purchase Agreement,” is something of a misnomer in that section 559.217 provides for two new means of cancelling a purchase agreement, only one of which deals with declaratory cancellation. MINN. STAT. § 559.217, subd. 4 (2004). The other, cancellation with right to cure, does not purport to declare or confirm a contract already cancelled, but, like section 559.21, provides a mechanism to cancel a purchase agreement that has not been purportedly cancelled. *Id.* subd. 3. Also, as a matter of nomenclature, although section 559.21 uses the words “terminate” and “termination,” section 559.217 uses the terms “cancel” and “cancellation.” *Compare* MINN. STAT. § 559.21 *with* MINN. STAT. § 559.217, subd. 1(b). In addition, section 559.217 refers to “suspension” of the cancellation process, rather than enjoining or restraining the cancellation. *Compare* MINN. STAT. § 559.211 (2002) *with* MINN. STAT. § 559.217.

55. Like the language authorizing a shortened thirty-day period for termination under section 559.21, subdivision 4(a), the new legislation applies to an “earnest money contract, purchase agreement, or exercised option” and goes on to define a “purchase agreement” as any one of those instruments. MINN. STAT. § 559.217, subd. 1(b). Because section 559.217 uses the same terminology that section 559.21 uses to distinguish such holding instruments from the other instruments subject to section 559.21, that is, contracts for deed, it is clear that section 559.217 does not apply to contracts for deed. There is, however, no strict statutory definition of what is or is not a contract for deed.

be occupied by, one to four families as their residence.”<sup>56</sup> There are no dollar limits on the purchase agreements subject to the new legislation; it covers all residential purchase agreements.<sup>57</sup>

A. *Cancellation With Right to Cure*

Of the two, the cancellation with right to cure procedure is more similar to section 559.21.<sup>58</sup> It may be used 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.<sup>59</sup> Under that procedure, a party may serve a fifteen-day notice on the other party and any third party holding the earnest money.<sup>60</sup> The contract is then cancelled if the party upon whom notice is served does not, within fifteen days of service, either (a) comply with the conditions in default and complete the unfulfilled conditions, including, if applicable, completion of the purchase or sale or (b) secure a court order suspending the cancellation.<sup>61</sup>

B. *Declaratory Cancellation*

The second procedure, declaratory cancellation, may be used where a default has occurred or an unfulfilled condition exists after the date specified for fulfillment under a residential purchase agreement, which does “by the terms of the purchase agreement” cancel the purchase agreement.<sup>62</sup> Under that procedure, a party may serve a fifteen-day notice on the other party and any third party holding the earnest money, and the contract is cancelled if the party upon whom notice is served does not, within the fifteen

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56. MINN. STAT. § 559.217, subd. 1(c). If the seller resides on the property, it would presumably qualify as residential even if the buyer did not intend to occupy it as residential. *See id.* If not already residential, however, it is presumably the intent of the buyer, not the seller, that matters. Thus, property not occupied as residential by a seller would be deemed “residential” as long as the buyer intended to occupy the property as residential. Query: What if the buyer under the purchase agreement is buying vacant land to construct a residence to be sold to a subsequent owner-occupant? What if the buyer is a developer or speculator who will sell to that builder?

57. MINN. STAT. § 559.217, subd. 1(c).

58. *Id.* subd. 3.

59. *Id.* subd. 3(a).

60. *Id.* subd. 3(b)-(c).

61. *Id.*

62. *Id.* subd. 4(a). With respect to use of declaratory cancellation in the case of a default, rather than an unfulfilled condition, *see infra* Part III.



days, secure a court order suspending the cancellation.<sup>63</sup> In contrast to cancellation with right to cure (and termination under section 559.21), under declaratory cancellation, which merely seeks to confirm a cancellation after-the-fact, there is no right to cure the default or to satisfy the unfulfilled contingency.

*C. Comparison to Section 559.21*

In many respects, the new cancellation procedures are virtually identical to those of section 559.21. For both cancellation with right to cure and declaratory cancellation, service on the other party must be made in the same manner as section 559.21,<sup>64</sup> and the statutorily specified forms of notice are similar, although not identical, to the section 559.21 notice form.<sup>65</sup> In addition, like section 559.21 terminations, cancellation under the two new procedures cancels the contract, making it void and of no further force or effect.<sup>66</sup> Also, as under Minnesota Statutes section 559.213, an affidavit reciting the cancellation and the failure to respond is prima facie evidence of the facts stated therein.<sup>67</sup> Finally, injunctive relief under Minnesota Statutes section 559.211 may be obtained by the party served.<sup>68</sup> Such action may be commenced by service on

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63. *Id.* subds. 4(b)-(c).

64. *Id.* subds. 3(b), 4(b) (requiring that notice under both cancellation with right to cure and declaratory cancellation must be served in the manner provided in section 559.21, subdivisions 4(a) and (b)).

65. *Compare* MINN. STAT. § 559.21, subd. 3 (2002) *with* MINN. STAT. § 559.217, subd. 5. Although cancellation with right to cure under section 559.217, subdivision 3(a)(3), requires that the notice state the purchase agreement will be cancelled unless the party served “complies with the conditions in default and completes the unfulfilled conditions,” the corresponding cancellation with right to cure notice under section 559.217, subdivision 5(a), only references the buyer having “fully complied with all of your obligations under the purchase agreement” and does not reference completing the unfulfilled conditions. MINN. STAT. § 559.217, subds. 3, 5.

66. *Compare* MINN. STAT. § 559.21, subd. 4(d) *with* MINN. STAT. § 559.217, subds. 3(c), 4(c).

67. *Compare* MINN. STAT. § 559.213 *with* MINN. STAT. § 559.217, subds. 7(a)-(c).

68. The statute authorizing issuance of an injunction staying a notice of termination, Minnesota Statutes section 559.211, subdivision 1, which was not amended by the 2004 legislation, provides that a court has authority to enjoin or restrain proceedings to effectuate a termination of a contract for the conveyance of real estate “notwithstanding the service or publication pursuant to the provisions of section 559.21 of a notice of termination of the contract” and does not mention section 559.217. MINN. STAT. § 559.211, subd. 1 (2002). The absence of any reference to section 559.217 in the injunction statute should probably not

the attorney for the party serving the cancellation.<sup>69</sup>

However, the new cancellation procedures vary from section 559.21 in important respects. Obviously, the fifteen-day period is half the typical thirty-day period under a section 559.21 purchase agreement termination.<sup>70</sup> Also, in a provision not found in the injunction statute applicable to section 559.21 terminations, if an injunctive action to suspend the cancellation under either of these new proceedings is brought, the court “shall” award filing fees, service costs, and attorneys’ fees to the prevailing party in an amount not to exceed \$3,000.<sup>71</sup> In addition, upon completion of a cancellation under the new procedures, earnest money expressly becomes the property of the party initiating the cancellation and a broker is expressly authorized to release the money to that party upon receipt of an affidavit regarding the completed cancellation proceeding.<sup>72</sup> Furthermore, unlike section 559.21, which is only available in the event of a default, the new procedures are also available when there is merely a failure to timely satisfy a condition.<sup>73</sup> Finally, and perhaps most significantly, unlike section 559.21, which is only available to a seller, the new cancellation procedures may be used (and notice initiated) by either a buyer or a seller.<sup>74</sup>

#### D. Counter-Cancellations

Due to this final variation, allowing for initiation of

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be read as precluding the application of the injunction statute to section 559.217 proceedings because (a) section 559.211 applies to any “contract for the conveyance of real estate;” (b) section 559.217, subdivision 6, which authorizes an award of attorneys fees and costs in connection with any proceeding “to suspend the cancellation of a purchase agreement” under section 559.217, clearly envisions that a proceeding under section 559.217 may be suspended or enjoined in the manner provided in section 559.211; and (c) section 559.217, subdivision 8, authorizes service of process on the attorney initiating the cancellation in connection with an action to “restrain the cancellation.” See MINN. STAT. §§ 559.21, .211, subd. 1, .217. It is noteworthy that, even if section 559.211 applies to a section 559.217 proceeding, section 559.211 seems to contemplate an injunction sought by a buyer against the seller, but does not appear to contemplate an action by a seller to enjoin a cancellation by a buyer under section 559.217 (which has no counterpart under section 559.21). See MINN. STAT. § 559.211.

69. Compare MINN. STAT. § 559.21, subd. 8 with MINN. STAT. § 559.217, subd. 8.

70. MINN. STAT. § 559.217, subds. 3-4.

71. *Id.* subd. 6.

72. *Id.* subd. 7(d).

73. *Id.* subds. 3(a), 4(a).

74. *Id.* subd. 2.

cancellation by either a seller or a buyer, the legislation of necessity addresses the situation where both parties initiate cancellation by serving the other with notice, that is, dueling cancellations.<sup>75</sup> Thus, when one party is served with a notice of cancellation under either procedure, if the served party serves a counter-cancellation within the time period allowed by the first cancellation, the effect of the second service is to automatically and immediately cancel the purchase agreement.<sup>76</sup> In such event, the broker holding the earnest money has no authority to disburse the proceeds and the issue of who is entitled to the earnest money must be decided in a judicial action.<sup>77</sup>

In such a proceeding following a counter-cancellation, the court is authorized to make a determination without regard to which party first initiated a cancellation proceeding.<sup>78</sup> In addition, the court is granted express authority to “consider the terms of the cancelled purchase agreement in making its determination.”<sup>79</sup> This last provision is significant given the longstanding rule in Minnesota that statutory cancellation of a contract removes any claim that a buyer otherwise might assert to recover payments made under the contract and that the parties are, in effect, placed in the position as if the contract had never existed in the first place.<sup>80</sup> Despite the fact that counter-cancellation will have the effect of cancelling the purchase agreement, the legislation specifically overrides this prior case law that would have precluded the court

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75. The initial proposed legislation did not address the situation where a second party serves a section 559.217 notice after the first party does so. H.F. 2439, 83rd Leg. Sess. (Minn. 2004); S.F. 2379, 83rd Leg. Sess. (Minn. 2004). Application of the rule that the party who initiates and completes a cancellation is entitled to the earnest money to the situation of competing cancellation proceedings by both the seller and the buyer would, however, inevitably place conflicting obligations on the holder of the earnest money to tender the earnest money to both parties. The bill was subsequently amended to address competing cancellations and provide for special rules in such a case. See S. Journal, 83rd Leg. Sess., at 3052-53 (Minn. Mar. 25, 2004) (adopting amendments to S.F. 2379).

76. MINN. STAT. § 559.217, subd. 2. An affidavit regarding the service of the two cancellations is prima facie evidence of the cancellation of the purchase agreement. *Id.* subd. 7(e).

77. *Id.* subd. 2.

78. *Id.*

79. *Id.*

80. See, e.g., *Miller v. Snedeker*, 257 Minn. 204, 218, 101 N.W.2d 213, 224 (1960); *Nelson Real Estate Agency v. Seeman*, 147 Minn. 354, 355, 180 N.W. 227, 228 (1920); *Olson v. N. Pac. Ry. Co.*, 126 Minn. 229, 233-34, 148 N.W. 67, 69 (1914); *Nowicki v. Benson Prop.*, 402 N.W.2d 205, 208 (Minn. Ct. App. 1987) (holding that breach of contract claim is not allowed after statutory cancellation).

from considering the terms of the cancelled purchase agreement in making its determination of who is entitled to the earnest money.

### III. *ROMAIN* AND THE NEW LEGISLATION

The distinction in the two new procedures between a purchase agreement which does or does not cancel “by its terms” is not, on its face, the same as the *Romain* test under section 559.21. Under *Romain*, the issue is whether the agreement is definite and non-contingent, and if so, statutory termination under section 559.21 is required notwithstanding the fact that the contract purports to automatically terminate by its own terms upon the buyer’s default.<sup>81</sup>

It should be noted at the outset that the new legislation does provide for cancellation procedures for purchase agreements which would clearly not meet the *Romain* test, that is, would not require statutory termination under section 559.21.<sup>82</sup> Declaratory cancellation will typically apply where, due to failure to satisfy a condition, such as financing or inspection, the agreement is automatically cancelled “by the terms of the purchase agreement.”<sup>83</sup> Such a contingent agreement would not meet the *Romain* test and, due to the absence of any default, could not be terminated under section 559.21 by a seller. Declaratory cancellation would, however, allow either a seller or a buyer to initiate a proceeding to confirm such cancellation and, upon completion, have a means of evidencing such cancellation and the right to the earnest money.<sup>84</sup>

In addition, cancellation with right to cure also applies to a purchase agreement which has failed due to failure of a condition but does not “by its terms” automatically cancel.<sup>85</sup> Such a contingent purchase agreement would also not meet the *Romain* test requiring statutory termination and, due to the absence of any default, would not be terminable by the seller under section 559.21.<sup>86</sup> Such a contract can now, however, be cancelled by either the seller or the buyer under the new cancellation with right to cure procedure.<sup>87</sup> Use of cancellation with right to cure for a

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81. See *Romain v. Pebble Creek Partners*, 310 N.W.2d 118, 122-23 (Minn. 1981).

82. MINN. STAT. § 559.217, subd. 4(a).

83. *Id.*

84. *Id.*

85. *Id.* subd. 3(a).

86. See MINN. STAT. § 559.21, subd. 4(a) (2002).

87. MINN. STAT. § 559.217, subd. 3(a).

contingent purchase agreement is likely to arise in situations where there is a contingency, but, usually due to poor drafting, the parties have failed to set out the consequences of the failure to fulfill (or waive) that contingency—that the agreement is to become null and void.<sup>88</sup> Thus, with respect to both cancellation with right to cure and declaratory cancellation, the new legislation provides for cancellation procedures for a purchase agreement that not only would not need to be cancelled under *Romain*, but, in fact, could not be cancelled under section 559.21 due to the absence of a default.

In addition to dealing with non-*Romain* purchase agreements, the new legislation purports to permit declaratory cancellation, that is, confirmation of cancellation without a right to cure, if a default occurs “which *by the terms of the purchase agreement* cancels the purchase agreement.”<sup>89</sup> Does the new legislation validate declaratory cancellation, without an opportunity to cure after notice, of a definite, non-contingent purchase agreement, despite the fact that under *Romain*, notice and an opportunity to cure under section 559.21 would be required? In other words, can an ipso facto clause declaring that a purchase agreement becomes null and void automatically upon a default by the buyer (or seller) be enforced as written?

The new legislation would arguably appear to recognize the declaratory cancellation of a residential purchase agreement by means of an ipso facto clause which provides that on default (presumably by the buyer), the purchase agreement is automatically null and void. The new legislation does not reference the *Romain* test of definiteness and absence of contingencies. Moreover, its express distinction between purchase agreements which do or do not cancel by their terms is arguably inconsistent with the teaching of *Romain* that section 559.21 “is not dependent on how the parties may have manipulated the contract language.”<sup>90</sup> Furthermore, *Romain* is, strictly speaking, an interpretation of, or gloss on, section 559.21, not a pronouncement of the pure common law. As such, its continued applicability is

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88. Careful evaluation in such situation should be made of the need to do a cancellation with right to cure, however, since in contrast to declaratory cancellation, the former procedure will permit the served party a fifteen-day period to satisfy the condition after the date specified for fulfillment.

89. MINN. STAT. § 559.217, subd. 4(a) (emphasis added).

90. *Romain v. Pebble Creek Partners*, 310 N.W.2d 118, 122 (Minn. 1981).

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entirely within the control of the legislature and the legislature could, if it wished, overrule or limit *Romain*. Under that theory, the new legislation, in effect, has declared *Romain* inapplicable and permits *ipso facto* termination clauses for default in definite, non-contingent, residential purchase agreements confirmed by a declaratory cancellation.

Nevertheless, there are strong indications that the new legislation did *not* intend to change the teachings of *Romain* and permit the declaratory cancellation of definite, non-contingent residential purchase agreements immediately upon a default without notice and opportunity to cure. First, the existing termination statute, section 559.21, subdivision 4(a), including its prohibition on any waiver of the notice required by section 559.21, was amended by the 2004 law to read as follows:

The notice required by the section must be given notwithstanding any provisions in the contract to the contrary, except that earnest money contracts, purchase agreements, and exercised options *that are subject to this section* may . . . be terminated on 30 days' notice, or *may be cancelled under section 559.217*.<sup>91</sup>

As previously noted, the reference to contracts "that are subject to this section" is the language previously adopted by the legislature to reflect and incorporate the *Romain* test.<sup>92</sup> The continued use of that phrase with reference to purchase agreements that "may be cancelled under section 559.217"<sup>93</sup> indicates that the adoption of section 559.217 was not intended to repeal or nullify *Romain*.

Also, the allowance of cancellation under section 559.217 is deemed another alternative to the sixty-day termination under section 559.21, just like the shortened thirty-day notice period for purchase agreements terminated under section 559.21. Under that view, just as the *Romain* rule and the prohibition of contractual waiver of notice and cure rights are to be applied in the case of definite, non-contingent purchase agreements terminated under section 559.21, *Romain* and the prohibition of contractual waiver of notice and cure rights are to be applied to cancellation of definite, non-contingent residential purchase agreements under section 559.217.

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91. 2004 Minn. Laws ch. 203, § 9 (emphasis added).

92. *See id.*

93. *Id.*

Second, “purchase agreements” under section 559.217 are defined as those instruments “that could be cancelled under” section 559.21, providing a further basis to conclude that the new legislation did not intend to reject the *Romain* rule as it applied to cancellations under section 559.217.<sup>94</sup>

Third, if the new legislation intended to make *Romain* inapplicable to the new procedures, it does not seem that it would have distinguished, as *Romain* does, between purchase agreements in which notice and right to cure are required, for which cancellation with right to cure must be used, and those purchase agreements in which no right to cure is required and for which declaratory cancellation can be used.<sup>95</sup> In fact, as discussed more fully *infra*, the distinction between purchase agreements which do cancel by their own terms and purchase agreements which do not cancel by their own terms is largely only explicable with reference to *Romain*.<sup>96</sup> Purchase agreements which do cancel by their own terms do so because *Romain* does not require otherwise.<sup>97</sup> Purchase agreements which do not cancel by their own terms, however, do not cancel not because the contract terms state they do not cancel, but because of the extra-contractual, legal doctrine known as *Romain*.<sup>98</sup> *Romain* dictates that such definite, non-contingent purchase agreements cannot cancel upon default without resort to the statutory cancellation procedure.<sup>99</sup> Since the very distinction between purchase agreements that must be cancelled with a right to cure and purchase agreements for which declaratory cancellation applies is itself largely premised on the ongoing existence of the *Romain* doctrine, it makes little sense that the new legislation would intend to overrule *Romain*.

Fourth, the conclusion that the legislature has rejected *Romain* would have serious implications for the ancient doctrine of equitable conversion.<sup>100</sup> Under the doctrine of equitable

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94. MINN. STAT. §§ 559.21, subd. 4(a) (2002), 559.217, subd. 1(b). Those limitations cannot, however, be read too literally since, as noted *supra*, contingent purchase agreements failing by reason of unfulfilled promises are *not* subject to section 559.21 and could *not* be cancelled under section 559.21, but can be the subject of both declaratory cancellation and cancellation with right to cure.

95. See MINN. STAT. § 559.217, subs. 3, 4.

96. See *infra* notes 112-115 and accompanying text.

97. See *Romain v. Pebble Creek Partners*, 310 N.W.2d 118, 122-23 (Minn. 1981).

98. See *id.*

99. See *id.*

100. See *supra* notes 16-21 and accompanying text.

conversion, a buyer under a definite, non-contingent purchase agreement will have acquired a property interest. If declaratory cancellation is read as recognizing confirmation of the cancellation by means of an *ipso facto* default clause, without notice and right to cure, in the case of a definite, non-contingent purchase agreement, the equitable conversion doctrine has been eviscerated beyond recognition.

Fifth, as the Minnesota Supreme Court has recognized, the predecessor to section 559.21 was adopted a hundred years ago in “[r]eaction against the common-law rule permitting forfeiture without notice” and to “ameliorate the harsh rule of the common law.”<sup>101</sup> It would make little sense to read the new legislation as reinstating the harsh situation under the common law that section 559.21 was adopted to ameliorate over a hundred years ago.

Finally, because *Romain* clearly still applies to non-residential purchase agreements which still must be terminated under section 559.21, it makes little sense that the legislature intended that buyers under definite, non-contingent residential purchase agreements have less protection than the typically more sophisticated buyers (including developers) under similar non-residential purchase agreements.

Based upon this analysis, while the matter is not free from doubt, it appears that *Romain* remains applicable to the new legislation and declaratory cancellation only provides a means of confirming a cancellation which, under *Romain*, has otherwise taken effect. In other words, the new legislation should be read to provide that only in the case of contingent or indefinite purchase agreements should *ipso facto* cancellations (based upon default or otherwise) be recognized under declaratory cancellation. Conversely, declaratory cancellation does not validate cancellation without an opportunity to cure a definite, non-contingent purchase agreement, even if the contract purports, by its own express terms, to provide for immediate, automatic cancellation upon a default. As a result, under this view of the new legislation, only cancellation with right to cure can be used upon a default to cancel a definite, non-contingent residential purchase agreement. These conclusions should apply to cancellation by a buyer, as well as a seller, of a definite, non-contingent purchase agreement,

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101. *Jandric v. Skahen*, 235 Minn. 256, 260, 50 N.W.2d 625, 628 (1951) (quoting *Graceville State Bank v. Hofschild*, 166 Minn. 58, 62, 206 N.W. 948, 949 (1926)).



notwithstanding any automatic default clause.

#### IV. CANCELLATION “BY ITS TERMS” BASED UPON AN UNFULFILLED CONDITION

As previously outlined, section 559.217 should be read, consistent with *Romain*, to provide that a definite, non-contingent purchase agreement does not cancel “by its terms” upon a default and, in such a case, cancellation with right to cure is required. There is, however, a separate, albeit related, issue regarding the application of declaratory cancellation in the case of unfulfilled conditions. Specifically, what does it mean for a contingent purchase agreement to be cancelled “by its terms”?

As previously noted, the difference between declaratory cancellation and cancellation with right to cure in the context of an unfulfilled condition is that the former applies if the existence of the unfulfilled condition cancels the purchase agreement “by the terms of the purchase agreement”<sup>102</sup> and the latter applies if the existence of the unfulfilled condition “does not by its terms” cancel the purchase agreement.<sup>103</sup> The legislation itself does not provide any real guidance on what provisions in a purchase agreement qualify the purchase agreement for declaratory cancellation.

One purchase agreement would appear to clearly qualify for declaratory cancellation had it been subject to the new statute—that is the purchase agreement involved in *Romain*.<sup>104</sup> That purchase agreement provided that if the parties were unable to agree upon collateral for the buyer’s obligation satisfactory to the seller, the purchase agreement would be null and void.<sup>105</sup> Since the parties were unable to agree on that collateral, the purchase agreement became null and void “by the terms of the purchase agreement.”<sup>106</sup> As a result, had the contract in *Romain* involved residential property and been entered into after August 1, 2004, either seller or buyer could have commenced a declaratory cancellation proceeding under section 559.217 to confirm that the agreement had, in fact, been cancelled. Beyond that case, however, it is less clear the reach of declaratory cancellation.

Purchase agreements frequently provide that a party has the

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102. MINN. STAT. § 559.217, subd. 4(a).

103. *Id.* subd. 3(a).

104. *See Romain*, 310 N.W.2d at 119.

105. *Id.*

106. *Id.*

right or option to cancel (or declare a cancellation of) the purchase agreement upon some event, for example, failure to procure financing or failure to evidence good title. Upon exercise of that right or option by that party, the purchase agreement is cancelled (or null and void). One might argue that because the “terms” of such purchase agreement purport to provide that the purchase agreement is “cancelled,” such a purchase agreement cancels “by its terms” and hence, qualifies for declaratory cancellation. The problem with that approach is twofold.

First, if the test of whether a purchase agreement does or does not cancel “by its terms” is whether the purchase agreement is cancelable, that is, the seller or the buyer has the right to cancel (or declare the purchase agreement cancelled or declare the purchase agreement null and void), virtually all purchase agreement conditions will satisfy that test. Only a purchase agreement containing the most poorly drafted contingency provision will not cancel “by its terms”—one which does not indicate that upon the happening (or non-happening) of such contingency, one or both of the parties has the right to cancel the purchase agreement. Thus, if grant of a right to cancel means that a purchase agreement cancels “by the terms of the purchase agreement,” few purchase agreements will not qualify.

Second, the statutory language for declaratory cancellation refers to the situation where an “unfulfilled condition exists . . . in the terms of a purchase agreement . . . which by the terms of the purchase agreement cancels the purchase agreement.”<sup>107</sup> Although the word “which” follows “purchase agreement,” the reference is to the fact that an “unfulfilled condition exists.”<sup>108</sup> In other words, it is the existence of the unfulfilled condition that is causing the cancellation of the purchase agreement.<sup>109</sup> If it is the mere existence of the unfulfilled condition that must cause the cancellation of the purchase agreement, then it is hard to say that a purchase agreement which gives the buyer or seller the right or option to terminate the purchase agreement qualifies for

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107. MINN. STAT. § 559.217, subd. 4(a). The counterpart language for a cancellation with right to cure similarly refers to the situation where an “unfulfilled condition exists . . . in the terms of a purchase agreement . . . which does not by its terms cancel the purchase agreement.” *Id.* subd. 3(a).

108. *Id.*

109. Also, it would not make linguistic sense to say that it is the purchase agreement “which by the terms of the purchase agreement cancels the purchase agreement.”

declaratory cancellation. The reference to cancellation “by its terms” or “by the terms of the purchase agreement” suggests that it must be the terms of the purchase agreement themselves that effectuate the cancellation and not any action or election of the seller or buyer.<sup>110</sup>

In that view, it is the existence of the unfulfilled condition, not the election of the party to cancel (or declare a cancellation), that causes the purchase agreement to cancel by its own terms. Thus, under this interpretation, it is only a condition that automatically, *ipso facto*, causes the termination of the purchase agreement that meets the declaratory cancellation test. Under that construction, only if the unfulfilled condition automatically cancels the purchase agreement, without the need for any action or election by the seller or buyer, will the purchase agreement qualify for declaratory cancellation.<sup>111</sup>

The real problem is that the whole distinction between purchase agreements which do or do not cancel by their own terms is that such a distinction is not one familiar to modern Minnesota real estate law with one notable exception. The substantive rights of the parties have generally not been affected by whether the “terms” of a purchase agreement do or do not provide that the purchase agreement cancels or is terminated “by its terms” upon a default or an unfulfilled condition. As noted *supra*, the distinction between purchase agreements which do or do not terminate by their “terms” is not a function of the precise language in the purchase agreements and whether or not they expressly state that upon a default or upon the non-occurrence of a particular condition, the purchase agreement will cancel, terminate, or become null and void.<sup>112</sup> Rather, in Minnesota the distinction is really only a function of the applicability of an extra-contractual legal doctrine, *Romain*.<sup>113</sup> *Romain* provides that, regardless of

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110. It is noteworthy that all the purchase agreements in the cases cited in *Romain*, both those involving defaults to which section 559.21 was held to apply and those involving contingencies to which section 559.21 was held not to apply, all contained automatic, *ipso facto* termination provisions. *Romain*, 310 N.W.2d at 121-22.

111. If only an automatic, *ipso facto* cancellation qualifies for declaratory cancellation, then a clause which provided for automatic cancellation, but with a provision that such cancellation may be avoided or waived by the election of one of the parties, would not appear to qualify because it is functionally equivalent to a right to cancel (or declare a cancellation) upon the contingency.

112. See *supra* notes 96-99 and accompanying text.

113. *Romain*, 310 N.W.2d 118.

whether the particular “terms” of a purchase agreement purport to automatically cancel the purchase agreement upon a default, a definite, non-contingent purchase agreement will *not* cancel “by its terms” but will require cancellation pursuant to the statutory cancellation procedure.<sup>114</sup> In other words, whether a purchase agreement cancels “by its terms” is not dependent on the terms of the purchase agreement and what it says about cancellation, but the application of the *Romain* doctrine to the purchase agreement as a whole.<sup>115</sup>

By drawing the distinction based upon the applicability of an extra-contractual doctrine, section 559.217 paradoxically applies an analysis of a purchase agreement based upon the effect that another statute, section 559.21, would have on a particular purchase agreement, despite the fact that section 559.217 is an alternative to section 559.21 and the particular purchase agreement is not being terminated under section 559.21. This conceptual difficulty is further complicated by the fact that both cancellation with right to cure and declaratory cancellation under section 559.217 are available in the case of cancellation by reason of an unfulfilled condition. The new legislation draws the distinction between purchase agreements which do or do not cancel by their own “terms” as a result of an unfulfilled condition.<sup>116</sup> Yet the *Romain* doctrine has absolutely no applicability to contingent purchase agreements and so it is hard to see how *Romain* can provide any guidance on that score.

Thus, the whole distinction between purchase agreements which do or do not cancel by their own “terms” may be theoretically suspect. On the one hand, it is hard to place much weight on the distinction of whether a purchase agreement automatically does or does not cancel without an election by one of the parties. Whether the cancellation is automatic or whether a party must elect to cancel would not appear to justify disparate treatment under section 559.217. On the other hand, the *Romain* doctrine provides no traction in analyzing the distinction between self-cancelling and non-self-cancelling agreements in the context of unfulfilled conditions.

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114. *Id.*

115. In *Romain*, the court, in discussing the contingent purchase agreement in *Joslyn v. Schwend*, 85 Minn. 130, 88 N.W. 410 (1901), noted that in that case the purchase agreement ended “by its terms.” *Romain*, 310 N.W.2d at 121.

116. MINN. STAT. § 559.217 (2004).

The recently revised residential purchase agreement form adopted by the Minnesota Association of Realtors provides some instruction on this point.<sup>117</sup> The realtors' form is very commonly used in Minnesota residential transactions and almost always used where a broker is involved.<sup>118</sup> The purchase agreement form attempts to address the issue of when declaratory cancellation may be used. The default provision, revised to reflect section 559.217, provides as follows:

[I]f either Buyer or Seller defaults in any of the agreements hereunder or there exists an unfulfilled condition after the date specified for fulfillment, either party may cancel this Purchase Agreement under MN Statute 559.217, Subd. 3. Whenever it is provided herein that the Purchase Agreement *is cancelled*, said language shall be deemed a provision authorizing a Declaratory Cancellation under MN Statute 559.217, Subd. 4.<sup>119</sup>

Thus, this form indicates that the parties are to use cancellation with right to cure in any case where there is a default or unfulfilled condition, but declaratory cancellation can be used only where the agreement provides that the agreement "is cancelled."<sup>120</sup>

From this language one might speculate that this form purchase agreement draws a distinction between situations where cancellation is at the option of one of the parties, in which case cancellation with right to cure must be used, and situations where upon the happening or non-happening of an event, cancellation occurs automatically without any election or option of the parties ("is cancelled"), in which case declaratory cancellation may be used. In fact, a number of provisions in this form purchase agreement provide that, upon the non-fulfillment of a condition, the purchase agreement "is cancelled" automatically, without either party exercising any option or election. Thus, if the condition is not timely fulfilled, the form provides that the purchase agreement "is cancelled" without any requirement that either party exercise any election or option.<sup>121</sup> This requirement is found in the provision dealing with cancellation of a previously written purchase agreement (with a third party buyer),<sup>122</sup> under the Contingency

117. See MILLER/DAVIS Co., FORM 1519A: PURCHASE AGREEMENT (2004).

118. *Id.*

119. *Id.* at lines 116-119 (emphasis added).

120. *See id.*

121. *See infra* notes 122-125 and accompanying text.

122. See MILLER/DAVIS Co., FORM 1519A: PURCHASE AGREEMENT (2004), lines

Addendum dealing with buyer's sale of his existing residence,<sup>123</sup> in one of the formulations of the Financing Addendum,<sup>124</sup> and in one of the provisions dealing with the buyer's inspection contingency.<sup>125</sup>

However, a second group of provisions in the purchase agreement form, dealing with conditions, provides that non-fulfillment of a condition of the purchase agreement does not result in cancellation of the purchase agreement unless and until one of the parties elects to cancel.<sup>126</sup> Yet, even though the purported cancellation is not automatic, the form still recites that the purchase agreement is cancelled.<sup>127</sup> Thus, in the provision dealing with post-agreement special assessments,<sup>128</sup> in the provision dealing with the inability of the seller to provide marketable title,<sup>129</sup> in the provision addressing a casualty loss,<sup>130</sup> in another formulation of the financing contingency,<sup>131</sup> and in another provision dealing with the buyer's inspection contingency,<sup>132</sup> non-fulfillment of the

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32-35. If cancellation of the prior purchase agreement with a third party is not obtained by the specified date, the subject purchase agreement "is cancelled." *Id.*

123. See MILLER/DAVIS Co., FORM 1519N: CONTINGENCY ADDENDUM (2004), lines 12-13, 17-18. If the buyer fails to enter into a purchase agreement for an existing residence by a specified date (or provide satisfactory evidence to the seller of the buyer's ability to close the purchase without the sale of the buyer's property), the subject purchase agreement "is cancelled." *Id.*

124. MILLER/DAVIS Co., FORM 1519B: FINANCING ADDENDUM CONVENTIONAL OR PRIVATELY INSURED CONVENTIONAL MORTGAGE (2004), line 16. If the buyer cannot secure a financing commitment, the purchase agreement "is cancelled." *Id.*

125. MILLER/DAVIS Co., FORM 1519INSP: INSPECTION CONTINGENCY ADDENDUM (2004), lines 32-34. If, after conducting an inspection, the buyer notifies the seller of defects and the parties have not agreed on who will do or pay for repairs, the purchase agreement "is cancelled without further notice required." *Id.*

126. See *infra* notes 128-132 and accompanying text.

127. See *infra* notes 128-132 and accompanying text.

128. MILLER/DAVIS Co., FORM 1519A: PURCHASE AGREEMENT (2004), lines 58-62. If a notice of special assessment is received after entering into the purchase agreement, either party "may" declare the purchase agreement cancelled, in which case the purchase agreement "is cancelled." *Id.*

129. *Id.* at lines 82-84. If the seller cannot provide marketable title, either party "may" declare the purchase agreement cancelled by notice, in which case the purchase agreement "is cancelled." *Id.*

130. *Id.* at lines 102-104. If there is a casualty destroying or substantially damaging the property, the purchase agreement, "is cancelled, at Buyer's option." *Id.*

131. MILLER/DAVIS Co., FORM 1519B: FINANCING ADDENDUM CONVENTIONAL OR PRIVATELY INSURED CONVENTIONAL MORTGAGE (2004), lines 21-25, 32-36. If the buyer fails to provide evidence of financing by a specified date or if the agreement does not close for any reason relating to financing, the seller "may, at Seller's option" declare the purchase agreement cancelled, in which case the purchase agreement "is cancelled." *Id.*

132. MILLER/DAVIS Co., FORM 1519INSP: INSPECTION CONTINGENCY ADDENDUM

condition does not automatically result in any consequences. Rather, upon the election or option by one of the parties (along with notice to the other party) following the non-fulfillment of the condition, the form provides that the purchase agreement is cancelled.<sup>133</sup> By using the code words “is cancelled,” the realtor’s form contemplates the use of declaratory cancellation even though cancellation only results from the option or election of one of the parties.

The theory of the realtor’s purchase agreement form appears to be that as long as the purchase agreement expressly states that in a particular circumstance the agreement “is cancelled,” then it is cancelled “by the terms of the purchase agreement” within the meaning of section 559.217, subdivision 4, so as to qualify for declaratory cancellation.<sup>134</sup> This seems a questionable theory since, under this approach, one could, contrary to *Romain*, draft a clause which provides that upon any default the purchase agreement “is cancelled” so as to permit declaratory cancellation of a non-contingent purchase agreement without any cure period.<sup>135</sup> Moreover, this self-defining approach elevates form (use of the code words “is cancelled”) over substance (the legal analysis of whether the agreement, in fact, cancels “by the terms of the purchase agreement”). In fact, it is tautological since, according to this approach, an agreement cancels “by the terms of the purchase agreement” under a particular circumstance if the agreement states that it is cancelling by the terms of the purchase agreement (by use of the code words “is cancelled”).<sup>136</sup> Nevertheless, given the conceptual difficulty of ever articulating the theoretical prerequisites for declaratory cancellation under the statute, there is a reasonable likelihood that a court would accept the approach of the realtor’s form and permit declaratory cancellation where the

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(2004), lines 43-45. Notwithstanding any other provision, the buyer may cancel the purchase agreement within a specified time after the inspection by notice, in which case the purchase agreement “is cancelled.” *Id.*

133. See *supra* notes 126-132 and accompanying text.

134. See MINN. STAT. § 559.217, subd. 4 (2004).

135. The default section of the realtor’s form only authorizes termination under section 559.21 or cancellation under section 559.217, subdivision 3, upon a default and does not authorize declaratory cancellation upon a default. MILLER/DAVIS Co., FORM 1519A: PURCHASE AGREEMENT (2004), lines 115-118.

136. Put another way, this theory contends that one of the “terms” of the purchase agreement is the cancellation of the purchase agreement upon a particular occurrence or non-occurrence, and therefore, the purchase agreement, itself, cancels “by its terms.”

form purchase agreement provides that the agreement cancels “by its terms.”

## V. ALTERNATIVES TO THE NEW LEGISLATION

### A. Section 559.21 and Residential Purchase Agreements

The two new procedures are alternatives to section 559.21 so that termination under section 559.21 of a residential purchase agreement is still available, albeit only for a disgruntled seller.<sup>137</sup> Section 559.21 obviously has certain drawbacks for a seller in comparison to the new procedures: it has a minimum thirty-day cure period and cannot be used in the event of a mere failure of a condition; it can only be based upon buyer default.<sup>138</sup> Section 559.21 does provide for a payment of the seller’s attorneys’ fees as a condition to the buyer’s cure, but the amount is limited and can only be claimed if the buyer has been in default for at least thirty days prior to the service of the notice,<sup>139</sup> a delay in the ability to commence a statutory termination is a delay that most purchase agreement sellers are unwilling to endure.

The provisions of section 559.217 dealing with the effect of a counter-cancellation are not applicable to a section 559.21 notice, and, therefore, the legislation does not authorize or envision a counter-cancellation to a section 559.21 notice. Nevertheless, while it is not clear, it appears that a buyer served with a section 559.21 notice can, within the thirty-day section 559.21 notice period, serve and effectuate a fifteen-day section 559.217 initial cancellation, despite the pendency of the section 559.21 notice. In *Liebsch v. Abbott*,<sup>140</sup> the Minnesota Supreme Court held that a section 559.21 cancellation was ineffective as against a buyer who had previously rescinded the contract (by written notice to the seller).<sup>141</sup>

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137. See MINN. STAT. § 559.21, subd. 4(a) (2002). The newly-revised residential purchase agreement promulgated by the Minnesota Association of Realtors specifically recognizes that a seller can still use section 559.21 upon a buyer’s default. MILLER/DAVIS CO., FORM 1519A: PURCHASE AGREEMENT (2004), lines 115-116.

138. See MINN. STAT. § 559.21. As a result, if there is a failure of a condition and the seller wishes to use section 559.21, the seller must wait until the buyer fails to come to the closing before declaring a default and initiating a section 559.21 termination. See *id.*

139. *Id.* subd. 2a(5).

140. 265 Minn. 447, 122 N.W.2d 578 (1963).

141. *Id.* at 452-54, 582-83.



Therefore, if the buyer's fifteen-day section 559.217 notice runs and is effectuated prior to the running of the seller's thirty-day section 559.21 notice, the seller's section 559.21 notice will be a nullity (without the buyer needing to obtain an injunction) because, prior to the running of the thirty-day period under the seller's section 559.21 notice, the buyer will have already cancelled the purchase agreement. As the Minnesota Supreme Court has noted, "Once rescinded, the contract [is] at an end and [can] not be cancelled by statutory or any other kind of notice."<sup>142</sup>

What can the seller who has already initiated the section 559.21 procedure do? Immediately after service of the buyer's section 559.217 notice, the seller might first withdraw the section 559.21 notice.<sup>143</sup> Thereafter, the seller could serve a section 559.217 notice so as to counter the buyer's section 559.217 notice, which would have the effect of defeating the buyer's section 559.217 proceeding (while still terminating the contract).<sup>144</sup> Such a technique might prevent a seller who has served a section 559.21 notice from being pre-empted by a buyer's later section 559.217 notice. Given the longer notice period under section 559.21, however, it is probably inadvisable for a seller under a residential purchase agreement to use section 559.21. The safest course for a seller faced with a defaulting buyer would be to serve the shorter section 559.217 notice in the first place.<sup>145</sup>

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142. *Blosick v. Warmbold*, 151 Minn. 264, 268, 187 N.W. 136, 137 (1922), *quoted in* *Liebsch v. Abbott*, 265 Minn. at 456, 122 N.W.2d at 584-85.

143. *Kosbau v. Dress*, 400 N.W.2d 106, 109-10 (Minn. Ct. App. 1987) (holding that a seller can withdraw notice of cancellation during pendency of the cure period).

144. Although the statute does not address the issue, it would appear that service of a section 559.217 fifteen-day notice by a seller during the pendency of the seller's section 559.21 thirty-day notice would not be effective and would, in fact, invalidate both notices on the grounds that that the buyer would be unduly confused as to his or her allowed cure period. Under the theory that an understatement of the permitted time in the notice presumably dispirits a purchaser, the Minnesota Supreme Court has held that a notice indicating a thirty-day time period was invalid where ninety days was required. *Tarpy v. Nowicki*, 286 Minn. 257, 263, 175 N.W.2d 443, 448 (1970). Service of a fifteen-day notice during the pendency of a previously served thirty-day notice is likely to unfairly confuse a buyer and cause both notices to be ineffective.

145. Of course, in the case of a non-residential purchase agreement (not subject to the new legislation), section 559.21 is the only available remedy (albeit for sellers only) and considerations of a counter-cancellation by the buyer are not relevant.

*B. No Proceeding*

In addition to a section 559.21 procedure, there is the alternative of not using any of the statutory proceedings. Declaratory cancellation is a safe harbor (and a means of capturing the earnest money), but, the new legislation does not appear to change prior law regarding when a purchase agreement terminates by its own terms without the need to provide the other party with notice and cure rights. Therefore, in such a situation, neither a seller nor a buyer is required to initiate a confirmatory declaratory cancellation. Rather, in the case of a residential purchase agreement where, due to lack of definiteness or contingencies, it is clear that it does not meet the *Romain* test and need not be terminated under section 559.21, a party may still simply rely on the language in the residential purchase agreement cancelling the transaction without using the declaratory cancellation procedure.<sup>146</sup> Of course, such party will not be able to rely on the imprinter of prima facie cancellation provided by declaratory cancellation, but such a benefit may not be worth the cost and time involved in serving the fifteen-day notice and the risk of triggering an action for an injunction commenced by the served party.

## VI. TRAP FOR THE BUYER

There is a trap for the unwary buyer where a seller uses either of the two cancellation procedures based upon an unfulfilled condition. Most residential purchase agreements provide, by their terms, that if the agreement is cancelled by reason of an unfulfilled condition, the earnest money is to be refunded to the buyer. However, the baseline rule under the new legislation is that upon a completed cancellation proceeding, the earnest money is the property of the party initiating the cancellation and the broker is to deliver the money to that initiator.<sup>147</sup> Thus, where the seller

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146. As noted *supra*, the form promulgated by the Minnesota Association of Realtors states that whenever the purchase agreement provides that, as a result of a failed condition, the purchase agreement "is cancelled," it is to be "deemed a provision authorizing" declaratory cancellation under section 559.217. MILLER/DAVIS CO., FORM 1519A: PURCHASE AGREEMENT (2004), lines 118-119. To the extent that language is read as requiring (as opposed to simply permitting) declaratory cancellation in the case of an unfulfilled condition, use of this form will eliminate the alternative of relying solely on the language of the purchase agreement and refraining from using any statutory proceeding.

147. See MINN. STAT. § 559.217, subd. 7(d) (2004); see also *supra* note 72 and

commences either of the new cancellation proceedings based upon failure of a condition, unless the buyer enjoins the cancellation or serves a counter-cancellation notice (which would make the baseline earnest money rule ineffective), the seller will receive and be entitled to the earnest money upon completion of the cancellation, despite the clear language in the purchase agreement to the contrary.<sup>148</sup> Since the purchase agreement will have been cancelled and of no force and effect, the buyer will not have any judicial recourse against the seller<sup>149</sup> and the seller will receive a windfall.

As a practical matter, when a transaction collapses due unequivocally to an unfulfilled condition of a buyer, sellers are generally willing to negotiate a cancellation agreement with, and refund the earnest money to, the buyer in order to remarket the house. The refusal by the buyer in such circumstances would ordinarily be without justification so that a subsequent seller-cancellation and forfeiture of the earnest money might not be unjust, especially since the buyer could defeat the forfeiture by a counter-cancellation. However, under various circumstances, buyers may have good reasons not to sign a cancellation agreement.

For example, if the purchase agreement is conditioned on the seller's purchase of another home, and the seller claims that the condition has failed, but the buyer justifiably claims that the condition has been satisfied or waived, a buyer would be justified in not signing a cancellation agreement. Similarly, the purchase agreement may be conditioned on the buyer's sale of its existing residence or satisfactory evidence of the buyer's financial ability to consummate the purchase without the sale of the existing residence. If the seller unjustifiably claims that buyer's evidence is unsatisfactory, the buyer would be within his right (and well-advised) not to sign a cancellation agreement. In both of those cases, however, the seller may choose to serve a declaratory cancellation notice on the buyer based upon the allegedly unfulfilled condition. The buyer would be well-advised not to serve

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accompanying text.

148. See *supra* Part II.D.

149. See *supra* Part II.D. Unlike counter-cancellations, where a court has authority to "consider the terms of the cancelled purchase agreement in making its determination," as provided in section 559.217, subdivision 2, under this hypothetical, a court has no authority to consider a claim by an aggrieved buyer for earnest money payments made under the now-cancelled contract.

on the seller a counter-cancellation (even one based on the seller's default, rather than failure of a condition), because, as discussed *infra*, service of the counter-cancellation would automatically terminate the purchase agreement and constitute an abandonment of the buyer's claim for specific performance against the seller.<sup>150</sup> As a result, if the seller was to serve the declaratory cancellation notice, unless the buyer was to procure an injunction, by operation of the statute the seller will receive the earnest money, contrary to the express provision in the purchase agreement that if the purchase agreement is terminated by reason of the unfulfilled condition, the earnest money is to be refunded to the buyer.

Even in the situation where it is uncontested by the parties that the purchase agreement has failed by reason of an unfulfilled condition, it is possible that a sharp-practicing seller might seize upon the failure of any condition to immediately commence a declaratory cancellation proceeding of the purchase agreement. In all of these situations, unless the buyer seeks an injunction (or, in the last case, commences a counter-cancellation), an unjust outcome, albeit inherent in the statutory scheme, will result.

There may be a similar trap for the seller in the situation (somewhat unusual in the residential context) where the purchase agreement provides that if the transaction does not close due to the failure of a condition, the earnest money is non-refundable to the buyer as compensation to the seller for taking the property off the market. In such a case, if the condition is not fulfilled and the buyer initiates and completes a section 559.217 cancellation based upon the unfulfilled condition, by operation of the statute the purchase agreement will be conclusively cancelled and, despite the parties' agreement to the contrary, the earnest money will be refunded to the buyer. In fact, in the situation where the purchase agreement provides for the seller's retention of earnest money when the purchase agreement fails by reason of an unfulfilled condition, the statute may give the buyer an incentive not to sign a consensual termination. Unlike the seller who normally has the incentive of remarketing the property, the buyer will have little to gain from a termination agreement which, as the seller will justifiably insist, provides for forfeiture of the earnest money to the seller in accordance with the terms of the purchase agreement. Rather, with nothing much to lose, the buyer may be willing to at

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150. See *infra* Part VII.

least initiate a section 559.217 cancellation proceeding based upon the failed condition, which (absent an injunction or a seller counter-cancellation) will reap an undeserved windfall for the buyer.

These buyer-traps and seller-traps expose a problem in the underlying theory of section 559.217. The statute presumes that the party initiating a cancellation proceeding is the wronged party to whom the earnest money belongs. This theory makes sense in the context of a default where the non-defaulting party (either the seller or the buyer) initiates a section 559.217 cancellation proceeding upon the defaulting party and, upon completion of such uncontested (and uncountered) proceeding, the earnest money should be awarded to such non-defaulting party. That, in fact, is consistent with the long-settled Minnesota case law to the effect that upon a seller's completion of a section 559.21 termination proceeding based upon a buyer's default, all payments made by the buyer are forfeited to the seller, regardless of any contrary claims by the buyer.<sup>151</sup>

In the situation of a failure of the purchase agreement due to an unfulfilled condition, however, section 559.217 does not rely on the wronged party to initiate a cancellation proceeding, but rather allows either the seller or the buyer to prosecute a cancellation proceeding regardless of to whom the express terms of the purchase agreement would award the earnest money. Since neither seller nor buyer is really a wrongdoer in the situation of a failed condition, it may be merely happenstance that section 559.217 awards the earnest money in accordance with the expectations of the parties, as reflected by the terms of the purchase agreement, or frustrates those settled expectations. This, of course, is not a problem under section 559.21 since that statute is expressly limited to situations of buyer default and does not permit service of a termination notice merely based upon a failed condition.<sup>152</sup> While a seller or buyer who would otherwise intend to commence a cancellation proceeding under section 559.217 in order to achieve a disposition of the earnest money contrary to the provisions of the purchase agreement may be somewhat deterred from doing so by reason of the possibility of counter-cancellation or the *in terrorem* effect of a mandatory award of attorneys' fees if an

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151. See *supra* note 80 and accompanying text.

152. See MINN. STAT. § 559.21 (2002).

injunction is sought,<sup>153</sup> the potential for wrongful windfalls is unavoidable.

There is one possible caveat to this matter. Financing contingency addendums for FHA and VA mortgages provide that if the subject property does not appraise for a minimum amount, the purchase agreement is automatically null and void and all earnest money must be refunded to the buyer. Federal regulations with regard to VA-insured mortgages require that all purchase agreements to be financed by a VA mortgage contain a provision that reads substantially as follows:

[N]otwithstanding any other provisions of this contract, the purchaser shall not incur any penalty by forfeiture of earnest money or otherwise or be obligated to complete the purchase of the property described herein, if the contract purchase price or cost exceeds [the VA-approved appraisal of] the reasonable value of the property.<sup>154</sup>

Similarly, the federal housing requirements with regard to FHA-insured mortgages require the following clause in all purchase agreements to be financed by an FHA mortgage:

[N]otwithstanding any other provisions of this contract, the purchaser shall not be obligated to complete the purchase of the property described herein or to incur any penalty by forfeiture of earnest money deposits or otherwise, unless the purchaser has been given [an appraisal of at least a specified amount].<sup>155</sup>

If the conditions addressed in this clause are triggered, that is, the appraisal is too low, and a seller serves a notice, under either cancellation with right to cure or declaratory cancellation, and the allowed time period expires without action of the buyer, section 559.217 dictates that the earnest money is the property of, and is to

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153. MINN. STAT. § 559.217, subd. 6 (2004). It would appear that a court, in the exercise of its equitable powers, should enjoin or restrain a section 559.217 cancellation based upon an unfulfilled condition where the effect of the statutory proceeding, if not enjoined or restrained, would be to award the earnest money contrary to the terms of the purchase agreement. In such a situation, the party seeking the injunction is likely to be deemed the "prevailing party" so as to be entitled to a mandatory award of attorneys' fees and costs under section 559.217, subdivision 6. Faced with the risk of such result, a party initiating the cancellation proceeding may decide to withdraw the cancellation notice once an injunction hearing has been scheduled.

154. 38 C.F.R. § 36.4303(k)(4) (2004).

155. See U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, MORTGAGE CREDIT ANALYSIS FOR MORTGAGE INSURANCE ON ONE TO FOUR FAMILY PROPERTIES, Handbook 4155.1, rev. 5 §§ 3-4 (Oct. 2003).

be tendered to, the seller.<sup>156</sup> However, federal law, in this case, will likely pre-empt contrary state law and require that the earnest money be the property of, and be tendered to, the buyer.

#### VII. COUNTER-CANCELLATION

As previously noted *supra*, while statutory termination by a buyer is not authorized under section 559.21, the potential of counter-cancellation under section 559.217 commenced by the party first served with a section 559.217 notice is an unavoidable result of the mutuality of the new remedies.<sup>157</sup> Such a counter-cancellation must be initiated by the served party prior to completion of the first cancellation and such second service does have the irrevocable effect of immediately cancelling the purchase agreement.<sup>158</sup> While a party served with a section 559.217 notice might seek an injunction under section 559.211, a counter-cancellation is far cheaper and easier to effectuate. Preparation and service of a counter-cancellation notice requires far less legal effort and cost as compared to securing a temporary restraining order or a temporary injunction. Furthermore, the counter-cancellation, like an injunction, has the effect of frustrating the initial party's efforts to procure a quick and easy means of securing the earnest money and requires the parties to seek judicial resolution of that issue. Finally, unlike an effort to seek a temporary restraining order or a temporary injunction, which may or may not be successful, counter-cancellation always has the effect of frustrating the effort to procure the earnest money (of course, at the expense of surrendering any defense to cancellation of the purchase agreement).

If a seller or a buyer initiates a proceeding under section 559.217, whether it be cancellation with right to cure or declaratory cancellation, under what circumstances can the served party initiate a counter-cancellation?<sup>159</sup> An examination of the various counter-

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156. See MINN. STAT. § 559.217.

157. See *supra* Part II.D.

158. See MINN. STAT. § 559.217, subds. 2, 7(e).

159. While the choice between cancellation with right to cure and declaratory cancellation will depend on the situation, as long as some procedure is available to both the party who is the potential initiator of a procedure and to the party who potentially commences a counter-cancellation, it matters not which particular procedure is used because any counter-cancellation will trigger the counter-cancellation rules under the new legislation. See MINN. STAT. § 559.217, subds. 2, 7(e).

cancellation scenarios is instructive. While a purchase agreement transaction might fail for a myriad of reasons, essentially all those reasons can be classified as one of three categories: (1) buyer default, that is the buyer failed to close without justification (“Buyer Default”); (2) seller default, that is, the seller failed to close without justification (“Seller Default”); and (3) failure of a condition for the benefit of buyer, such as financing, inspection, land-use approvals, or failure of a condition for the benefit of the seller, such as purchase or sale of replacement property (“Contingency”).

It is important to note in this regard that unless the served party resorts to injunctive relief under section 559.211,<sup>160</sup> the contentions of the party commencing the section 559.217 procedure will not be judicially tested. Therefore, judicial affirmation is not required as a pre-condition for either an initial cancellation procedure or for a counter-cancellation.

A seller may initiate a proceeding by reason of claims of Buyer Default or Contingency. In response, the buyer could commence a counter-cancellation based upon a claim of Seller Default. In addition, the buyer could also respond to a seller cancellation notice based upon Buyer Default or Contingency by a counter-cancellation based upon that same (or another) Contingency. In fact, as discussed *supra*, where a seller has initially commenced a proceeding based upon Contingency, a counter-cancellation by the buyer typically will be necessary to prevent the earnest money from being forfeited to the seller in contravention of the terms of the purchase agreement.<sup>161</sup> Therefore, where a seller initiates a cancellation based upon Contingency, a buyer is normally justified in commencing a counter-cancellation based upon that Contingency under the theory that the earnest money should not become the property of the seller, but rather should be refunded to the buyer.

A buyer may initiate a section 559.217 proceeding by reason of either claims of Seller Default or Contingency.<sup>162</sup> In response, the seller could commence a counter-cancellation based upon a claim of Buyer Default. It is more questionable whether such a seller could commence a counter-cancellation based solely upon a claim of Contingency. The statute does not, on its face, preclude a counter-cancellation by a seller based upon Contingency in

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160. MINN. STAT. § 559.211 (2002).

161. *See supra* Part II.D.

162. *See* MINN. STAT. § 559.217.



response to a prior proceeding commenced by the buyer based upon the same Contingency (or even Seller Default).<sup>163</sup> If the purchase agreement has been terminated by its own terms as a result of the Contingency, the legislation permits declaratory cancellation and nothing in the new legislation restricts either party from initiating such proceeding (or commencing such proceeding to counter the notice from the other party).<sup>164</sup> However, as previously noted, most residential purchase agreements provide that upon failure of the Contingency, the earnest money is to be refunded to the buyer. A counter-cancellation by a seller, based solely upon Contingency in response to an initial cancellation by the buyer based upon Contingency (or Seller Default), has the sole purpose and effect of denying an immediate refund of the buyer's earnest money. As such, while a counter-cancellation by the seller may not be expressly precluded by the new legislation, it is clearly contrary to its spirit.

Of course, if the served party does not dispute termination of the purchase agreement and tender of the earnest money to the initiator of the notice, no counter-cancellation notice can or should be served. If, however, as outlined above, a seller or a buyer has initiated either of the cancellation proceedings and the served party has colorable grounds to contest the initiator's entitlement to the earnest money (claiming either that the initiator was actually the one in default or, in the case of the buyer, that there was a failure of condition), there is little reason for the served party to forebear serving a counter-cancellation notice. Service of a counter-cancellation notice, like service of an initial cancellation notice, will likely require the services of an attorney. However, as previously noted, the cost of the counter-cancellation notice is far less than the cost of commencing a judicial proceeding and seeking an injunction which, even if successful, will often accomplish nothing more than is accomplished by a counter-cancellation—preserving the opportunity of the served party to litigate entitlement to the earnest money.

The only exception to the benefit of serving a counter-cancellation is where the served party, typically a buyer, desires the remedy (or at least desires to preserve the potential remedy) of specific performance. In that case, a counter-cancellation would

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163. *See id.*

164. *See id.*

automatically cancel the purchase agreement and make specific performance unavailable. In that case, a buyer must instead seek and procure an injunction against cancellation.

Except in the situation where a party is willing to bear the time, expense, and uncertainty of litigating a claim for specific performance (or at least desires to preserve the potential of that remedy), counter-cancellation is thus in the interest of the served party. As long as there is a colorable basis for a counter-cancellation, it is likely that well-advised parties to residential purchase agreements will seize such opportunities and trigger a stalemate. Moreover, since the reason that the one party will initiate a statutory cancellation proceeding in the first instance will almost invariably be due to a dispute between the parties that precludes a voluntary cancellation of the purchase agreement, a section 559.217 cancellation notice will often be followed by a section 559.217 counter-cancellation notice like night following day.

This analysis presumes that both the seller and buyer are informed regarding their legal rights and options. Where the served party is not aware of the remedy and effect of counter-cancellation<sup>165</sup> or does not seek legal counsel, then, of course, the served party will not commence a counter-cancellation and the initial cancellation will become effective. Also, in some cases a party may refuse to sign a voluntary cancellation agreement not based upon any recognizable legal theory, but simply out of anger or frustration due to the failure of the transaction. In that situation, if that party is served with a section 559.217 notice, the served party is less likely to commence a counter-cancellation and the new legislation will have the beneficial effect of resolving the impasse.

### VIII. CONCLUSION

The new legislation for cancellation of residential purchase agreements represents an effort to provide an expedited method of allowing sellers and buyers to resolve standoffs between the parties with the broker in the middle holding the earnest money. It has the advantages over section 559.21 of speed, a remedy for the

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165. While the statutory notices advise the party served of the availability of an injunction, they do not advise the party of the possibility of serving a counter-cancellation. *Id.* subd. 5.

buyer, and a means of confirming the cancellation based upon a failed condition.

The underlying purpose of the new legislation is to provide a more efficient means of resolving seller-buyer standoffs. One possible cost of this efficiency is the risk of bestowing windfalls on sellers in the form of earnest money that the purchase agreement required to be returned to the buyer. Moreover, given the likely use of counter-cancellation notices, its unintended consequence, however, may simply be to require the parties to escalate their standoff by means of an exchange of formal, lawyer-drafted statutory notices. These notices will release the parties from their obligations to consummate the purchase and sale transaction and will allow the seller to quickly remarket the property. But with respect to what is often the more important matter of resolving the entitlement to the earnest money, the parties will likely be left in exactly the same position they would have been in without the legislation. Given that result, one might question whether the entire scheme under the new section 559.217 is an improvement over the one-sided, but more determinative, prior procedure under section 559.21.