

**Understanding  
The Residential Real Estate  
Contract**

*An Attorney's Perspective*

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#### CAVEAT

This booklet is a general discussion of the subject of contracting in the sale or purchase of residential property. It is not intended to be legal advice which is a substitute for a review of a buyer's or seller's individual situation by a qualified attorney.

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## Introduction

This booklet is written as primer for the seller or buyer of residential real estate. The subject is complex. This booklet will provide an introduction to the topics that commonly are of concern with the hope that the reader will understand what questions he should be asking and learning about in order to have a rewarding experience in the sale or purchase of real estate

## Common misconceptions

It is a common misconception that all residential real estate sales contracts are the same. That they all come from one form and are identical.

This is not true. Each real estate company may have their own version of their residential real estate sales contract. Each attorney may have his own “standard”.

Forms purchased from a stationery store or supply house or on the Internet may have been written in another state with many different provisions.

DO NOT FALL PREY TO THE BELIEF THAT ALL REAL ESTATE CONTRACT FORMS ARE THE SAME.

READ THE ONE YOU ARE USING AND UNDERSTAND WHAT IT IS SAYING, BEFORE, NOT AFTER, YOU USE IT.

It is a common misconception that one can write and successfully navigate the complexities of a

residential real estate sales contract closing without professional help.

Real estate agents have trained for a long time to learn what to do in various situations. Consultation with an attorney before signing a sales agreement can be invaluable to a buyer and seller.

### **What is a contract?**

A contract is a legally binding agreement between two or more people. This means that there are promises to pay money, transfer property or to do or not do something exchanged between the parties.

If one of the parties does not do as the agreement provides, then there is a breach. When one party breaches, then other party may recover damages flowing from that breach.

Often the agreement will provide for specific damages that the non-breaching party may recover from breaching party.

### **How is a contract created?**

#### *Offer & Acceptance*

There must be an offer to do, or not to do something which offer is

Accepted,

Rejected,

Countered (which is the same as a

rejection),  
Lapses, or  
Is withdrawn

If an offer is made but the person making it dies or becomes legally incompetent before it has been accepted, then the law deems the offer withdrawn. If the person dies or becomes legally incompetent after the offer was accepted, then the contract continues in effect. In this situation, the estate of the deceased or his personal representative will continue on with the contract, unless the contract says otherwise.

*Example#1:*

Buyer: "I offer to buy your home for \$300,000."

Seller: "I accept your offer."

*This makes a contract.*

*Example#2:*

Buyer: "I offer to buy your home for \$300,000."

Seller: "I accept your offer but I want \$350,000."

No contract. Seller rejected offer and make a counter-offer. This is a new offer from seller to buyer for buyer to accept or reject.

Suppose the buyer then says "No, I won't pay \$350,000." What happens if the seller then says "Ok, I now accept your offer at

\$300,000.” Unless the buyer agrees to that, the counter by seller with \$350,000 rejected the buyer’s offer leaving there nothing but the seller’s new offer to accept or reject. The buyer could accept the seller’s offer at \$300,000 or reject it saying “I’m no longer interested in the property – goodbye”

This is why, in negotiations, when a counter is made to an offer, there is always a risk that the person making the original offer may change his mind and walk away from the deal once their offer was rejected with a counter-offer.

The communication of the offer and acceptance can become important in establishing a contract. This may require discussion with your attorney or agent for a better understanding. Simply put, if the offer is withdrawn before the acceptance of that offer was communicated, then, there is no contract. Sometimes, the timing of these events becomes critical. The use of fax transmittals and the date and time banners printed on them is often critical in such a situation.

In real estate transactions there also must be something of value transferred between the parties. This is called consideration. Thus, a promise to make a gift is not an enforceable contract, but a promise to do or not do something is consideration that will support a contract.

### ***Parties legally competent***

This can become complex. Simply put, if a court has declared someone incompetent, any contract they sign is void. If a court has not declared them incompetent, then the contract they sign may be good if a court believes that they were able to understand the nature of the contract they were entering or it would be unfair to void the contract because of the effect it would have on the other contracting party.

### ***Lawful purpose***

This requirement is simple. A contract for an illegal purpose is not enforceable in the courts. It is void.

## **When must contract be written?**

Virginia has a statute of frauds that applies to certain types of contracts. A contract for the sale of real estate is one of those contracts.

This law requires that in order to enforce a contract for the purchase of real estate, the person against whom enforcement is sought must have signed, in some fashion, the contract or a writing that memorializes it sufficient to convince a judge that the claim of an oral agreement is not fraudulent.

### ***Example:***

Landlord and tenant talk by phone. They agree that landlord will sell the house to tenant at a price of \$200,000. This is an oral contract. If the

landlord changes his mind later, the tenant will not be successful in suing to enforce the contract unless (1) the landlord agrees to the enforcement of the contract; (2) the landlord signed something confirming the contract and its terms (even a separate letter would work) or (3) the parties partly performed the contract.

For this reason, amendments to a real estate sales contract must be signed or initialed also in order to avoid the statute of frauds problem.

### **Initials, when necessary?**

The statute of frauds does not require initials on every page or every change from the printed form. Having all parties initial each page and each handwritten change to the contract form is a good idea. It prevents one of the parties adding a page or changes to the contract form without the other person's knowledge and consent.

In some real estate contracts, there are so many changes that the parties cannot keep track of them. The initials are really helpful in this case.

### **How to modify a contract.**

The amendment should be made directly on the contract document or, if it is too long, on a separate piece of paper that clearly identifies it as an amendment to the contract. If, during negotiations, you decide to amend the standard language in the form for financing contingency, it is recommended, that you cross out all

portions that will no longer be part of the contract. This avoids confusion.

*For example*, if you want the contract to not have a financing contingency, then simply write “this contract is not contingent on financing.” And strike out all other language in the contract that you do not want to apply – and then initial the changes, or sign the amendment.

Some people do not cross out paragraphs that have no application, but simply leave the blanks in the paragraph blank or write “na” in them. Sometimes, the forms have lines for initials to the left of the paragraphs and they simply leave those blank – believing that the paragraph is somehow no longer a part of the contract. A judge may not agree with that. It is a bad practice.

It is recommended that in order to eliminate the language from being considered a part of the contract, use an “x” or “z” through the entire paragraph or cross out the lines, one at a time. There will be no ambiguity about this action.

### **Proper parties to contract**

All owners of real estate should sign the contract of sale. If a husband puts his name only on a sales agreement when the property is owned by both he and his wife, then the buyer cannot force the wife to transfer the property in the absence of her written agreement.

Can a person sign a contract to sell property that

he does not own? Yes. In such a situation, the buyer cannot get specific performance from the seller if he was not able to get title to the property in time, but the seller will be liable damages arising from his breach of the contract.

If the contract identifies both the husband and wife as sellers, but only the husband has signed the document, there is no contract. If both names are written, then both of them or their authorized agent must sign in order for the contract to be enforceable.

### **Who can sign**

What if a party is out of town, who can sign and is a power of attorney required?

The law permits a person who is authorized to act as an agent for the other to sign their name. A husband, if authorized, can sign for his wife and *vice versa*. The real estate agent can also be authorized to act for the parties. In this regard, it is important that the authorization be written so that no one later has a change of heart and claims that the person who signed did not have the authority to sign.

How would such a signature look?

*MS. JANE JONES*

*BY JOHN JONES, AGENT*

### **Electronic signatures OK?**

Yes. Virginia treats electronic signatures and writings the same as if written on paper. The

only problem with electronic signatures is establishing something like an emailed signature as really coming from the person who you thought was the sender.

With a fax, you can have an electronic version of an actual signature or initial. With an email, it is not so simple, so additional steps are needed to authenticate or confirm that the email is from the person whose name appears on it. I suggest a confirming fax or even a telephone confirmation with a witness on the line.

If you know that you are going to be using emails, arrange for a special code or word that will be used as that person's "signature" on the email. People in the sale of goods in and out of the government use authentication codes in lieu of signatures.

## **Caveat Emptor – AS IS sale**

### ***Home Inspection Contingency.***

Virginia has the *caveat emptor* rule – that is “let the buyer beware.”

The seller is not required under law to tell the buyer about the property. The seller is permitted to choose between disclosing specific defects in the property to the buyer or “disclaiming” such disclosure and selling the property in AS IS condition. There is a form that is required in residential situations for this.

A sale “AS IS” means that the buyer must

discover the defects in the property for himself before closing.

Buyers may propose a home inspection contingency in order to avoid the dangers of discovering a defect after closing. Such a contingency, depending on its terms, may give the buyer the right to get out of the contract if the seller will not fix a property defect that the buyer's home inspector has found and which is not acceptable to buyer.

Some buyer's submit contracts without a home inspection contingency, but reserve the right to inspect the property "for buyer's information only." This permits the buyer to know about a defect in the property before closing but will not give the buyer the right to cancel the contract because of it. (*SEE DISCUSSION BELOW OF HOME INSPECTION*)

In standard contract forms generated by various REALTOR® associations there may be a paragraph in which the seller warrants that the equipment, appliances, plumbing, heating and air conditioning in the house will be in working condition at closing. This paragraph may be the buyer's only protection against certain defects, but it will not include the roof leaking or the basement flooding.

For these reasons, a complete understanding of what your contract is providing becomes very important and should be an item that is carefully considered before signing.

This provision is usually contained in the paragraph that sets forth what “walk-through” rights the buyer may have on or shortly before the closing in order to inspect the property and identify problems that may need correction by seller. You need to understand the wording of this paragraph in your contract. It is usually not a contingency through which a buyer can walk away from the contract. It may only give the buyer a right to sue the seller for the cost of correction after closing if the seller refuses to make the correction.

### **Identification of the property**

Proper identification of the property being sold is very important. If a judge cannot figure out what property it is, the contract is no good. Sometimes a street address alone is sufficient where the property is specific parcels with specific addresses. With a large parcel with an address of a rural route number, that address will not be sufficient.

Identify the approximate number of acres and tax map reference, along with the property description that came in the seller’s deed or simply reference the deed in the contract.

If the sale is of unimproved land only, then the law will assume that it is “by the acre” unless the contract says otherwise. This means that if the survey of the property shows that the acreage listed in the contract was wrong, then the price will be adjusted to reflect what the actual

situation is – up or down.

If the parties do not want the price to change even if the actual acreage proves to be different than as stated in the contract, then the contract must clearly say so.

### **Appliances & improvements conveying**

The contract should carefully identify what non-real property items will convey. Examples of this would be: Curtains; Drapes; Valances; Other window treatments; Washer/dryer; Window air conditioners; Light fixtures. Sometimes a beautiful light fixture is being taken by the seller, but the contract did not say so. This is often the source of a fight.

Sometimes, it is easier to simply say “all appliances, light fixtures and window treatments remain except the following”... and then list the ones the seller is taking at closing.

### **Earnest money deposit**

There is no law that requires that a buyer post an earnest money deposit, but practice has developed by which a seller wants a buyer to have some of his money at risk to show his good faith.

The question of how much the deposit should be is a matter of local practice and what the parties feel is appropriate. This is not a legal decision.

If the deposit is paid by check, remember that it has not been paid until the check clears. Require its clearance before the contract becomes final.

If the deposit is large and is being held in a third person's escrow account, then provide for the disposition of any interest that may be accruing on it. Some accounts do not pay interest but your contract can require that it goes into an interest bearing account.

Standard forms generate by members of the National Association of REALTORS® and their local associations usually provide for the keeping of the deposit as liquidated damages in the event of buyer's breach. It gives the seller the choice to exercise his other legal and equitable remedies or keep the money as liquidated damages. This is a good provision that should be used.

Also, these form provisions often provide for the payment of the real estate agent's commission by splitting the deposit between the seller and agent in the event it has been forfeited. SEE THE DISCUSSION OF *DAMAGES & LIQUIDATED DAMAGES* LATER ON IN THIS BOOKLET AND ALSO *REAL ESTATE COMMISSIONS*.

## **Contingencies – what are they?**

A contingency is an agreed to excuse for a party's non-performance of the contract. It is a condition written into the contract which allows a party to withdraw without being in breach.

### ***Financing Contingency***

The financing contingency is the most often used contingency in a residential real estate sales contract. It is also the greatest source of problems where buyers do not go to settlement because they could not get financing.

*Example: “This contract is contingent upon the buyer obtaining financing which is satisfactory to buyer.”*

Usually, the standard form contracts put a number of requirements on the buyer as to when they must apply, notification to seller when there is a problem with the loan, and give the seller the right to cancel the contract or offer the buyer his own financing. A careful reading of these provisions is particularly important.

Care must be taken here because the buyer is injecting his personal variables into the transaction, which, if not all met, the seller may find himself believing all is well, move out of his current home, buy or put a contract on a new home, but find, at the last minute, that the old home sale is not closing.

In one popular version of a Northern Virginia Association of REALTORS® form contract, there is a paragraph that provides for the buyer to provide a “lender’s letter” to the seller within a specified number of days. (*SEE THE DISCUSSION OF LENDER’S LETTER BELOW*) Some believe that if a zero is put into the number of days, that the contract is no longer contingent on financing. A

careful read of that paragraph must be made.

If the Northern Virginia Association of REALTORS® contract form is used that defines a lender's letter in the contract, then the form has a blank to write the number of days within which the lender's letter to be provided. If the lender's letter is not provided by the date specified, then the contingency "continues" unless the seller gives a certain notice to buyer to come up with proof of financing within 3-days of the notice or the seller has the right to cancel the contract. If the seller does not exercise this right, then the contingency continues, so that the buyer may in fact have a financing contingency. Some believe that by writing "-0-" in the space for the number of days to provide the lender's letter, that the contract is not contingent. If the contract is not contingent on financing, check the box that says that the contract is not contingent or write it into the contract "this contract is not contingent on financing." That will help avoid this problem.

A contract should contain provisions by which the seller or his agent can obtain status information (if not financial details) from the buyer's lender so that the seller can know what the current situation is.

What if the buyer does not timely apply for financing? Time lines for applying should be included in the contract and a method to learn about this step. The typical default provision may define this to be a default in the contract.

What if the buyer has been turned down for financing? How does the seller learn about this timely? The typical default provision may define this to be a default in the contract or end of the financing contingency.

What were the expectations for the cost of financing? If the buyer's expectation is to get a loan at 6.0% then that should be included as a provision in the financing contingency, so that if the rates go up to a point where buyer can no longer afford the loan, the contract will let him out. If the contract provides that the loan will be at then prevailing rates, then the buyer cannot escape with this contingency because of a change in the interest rates.

The contract will often have a provision whereby the seller contributes an agreed to sum towards financing costs. In this manner, the contract price stays high so that additional funding will be available to buyer, but the buyer will not have to pay all of the costs of this higher financing. This is referred to as a "seller's contribution."

### ***Appraisal contingency***

Often, lenders want their loan to be at least 80% of the property's appraised value (using the lender's own appraisers). That percent can change in accordance with the requirements of the lender, and it is usually not within the contract of the buyer or the seller.

The appraisal of the property by a lender at

below the contract price will have no effect on the contract and the buyer's duty to close unless the parties have written something in the contract that deals with this situation.

Another contingency may be found in standard contracts that if the property does not appraise for the sales price, then the seller will agree to reduce the sales price accordingly or the buyer may elect to cancel the contract.

This contingency is important for the buyer so that if the contract is not contingent on financing, the buyer will not lose his financing because the property is not worth enough to satisfy the lender as to the amount it will lend on the deal.

A buyer should want to keep the appraisal contingency in the contract if he is expecting a bank or other public lender to come up with the loan based on the appraised value of the property – and also its physical condition. Sometimes, if there are too many repairs to be made, the lenders may not want to use the property to secure its loan.

## **Lender's Letter**

The wording "lenders letter" is another source of confusion in residential real estate contracts. It is often confused with a "pre-approval letter".

At the outset, a buyer will often obtain a letter from the mortgage broker (not the lender) that the borrower looks like they will qualify and

often has language by which a further study of their credit will have to be satisfactory, appraisal of the property and credit. This is the pre-approval letter. This document does not provide the seller with any significant financial information about the buyer. Its purpose is to give the seller an assessment, by an independent source, of the buyer's ability to get the money to buy the property. It creates the impression that the money has already been arranged for. Often, this is not the case.

Another problem here is that these letters are often obtained by the buyer's agent before a particular property has been identified in order to show prospective sellers that the buyer is qualified at a specified dollar amount of available financing. They often do not have the interest rates, discount fees, lender's fees and other costs associated with the loan identified and agreed to. This means that when the mortgage company loan committee conducts its review, the buyer may find that the cost of the loan is too expensive for them and back out or their credit, after a more thorough review by the lender, is not acceptable to the lender.

The newer NVAR form contract defines a "lender letter" as a firm commitment from the lender – not a pre-approval letter. An introductory letter from a loan broker that the buyer looks like he may qualify, is NOT A COMMITMENT to make a loan unless it contains an UNCONDITIONAL promise to lend the money.

After a thorough study of the borrower's credit and finances has been undertaken along with an appraisal of the property the lender may agree to make the loan. The lender will then issue a "commitment". A commitment is an enforceable contract by which the borrower can sue the lender if it later refuses to make the loan without good cause.

### **Short-sale contingency**

A "short-sale" is a sale in which the seller is selling his home for a sum that is below the amount needed to pay off the mortgages on the property.

The lender is not obligated to accept less than the full pay-off of the mortgage balance when the property is sold. The buyer has no right to require that the lender accept less than the full amount that is due.

The buyer cannot get clear title unless all of the lender's liens on the property are released.

Such a sale needs the lender to give its agreement to release the mortgage with a payment of less than the full payoff that is due.

Some lenders require the seller to sign an acknowledgement that the part of the mortgage that will remain unpaid after the sale will be repaid by the seller separately and that the lender is not releasing the sellers from that liability. Sometimes, they do release the sellers, but those situations are unique and do not occur often.

The lenders, in these agreements, may limit or prohibit a seller's contribution to the closing, and may limit the amount of sales commission that may be paid and place other limitations.

If there is a second mortgage on the property, the lender on that second mortgage must also agree to release that lien too in order to clear title to the buyer.

There may be times when the lender is given the signed contract, with the short-sale contingency, and then hold it for a while, and then refuse to sign it and proceed with foreclosure on their defaulted mortgage.

## **Resale of Condos, coops, and HOA**

Condominiums and cooperatives are created with the filing a declaration which establishes the rights of the parties who buy units and how the management of this collection of individual unit owners (in condos) and proprietary leases (in a coop) will be conducted.

### ***Disclosure packets***

There is a requirement imposed on a condo unit owner or a proprietary lessee who is reselling his unit. Specific language must be included in the contract and, by way of an overview, it requires that the seller provide to the buyer a disclosure packet from the management of the condo or cooperative which contains specific information mandated by code. This information will help

the buyer understand what he is going to be subject to and what expenses he can reasonably expect to share.

At the time this booklet is written, the seller is required to pay for this and the code limits that cost of the packet to the seller is \$100.00.

A few illustrations would be:

Pet provisions or restrictions;

Right to lease unit or restrictions on that right;

Parking issues;

Carpeting and padding requirements;

Right or duty to put hardwood floors down;

Liability for damage to units below an owner caused by the owner's leaking toilet, broken pipes, etc.;

Expected new capital improvements such as new roof, new balconies, new parking lot, new landscaping with the cost of it passed on as a special assessment;

Other significant issues before the association which the code requires to be disclosed.

Picture the situation where a condo buyer closes only to learn that he now must pay a \$1,500 special assessment.

A buyer in a condo, coop or home owners' association should always talk to the management to learn what is being considered by way of major expenses, changes and the like. This could prove to be to be invaluable; especially if no Board of Director's action has taken place that must be disclosed in the packet.

### ***Right to cancel***

These disclosure laws, in overview, permit the buyer to examine the disclosure packet and if he does not like any aspect of the association's requirements to live there, cancel the sale.

Some sellers have the disclosure packet ready when a contract comes in so that the buyer only has 3-days to cancel (5-days in coops).

### ***Waiver of right to cancel***

Some sellers have the buyer waive the right to cancel, but in a property owner's association which are not for condos and not for coops, this right **cannot be waived**.

### ***Delivery Problem***

The date of the delivery of this packet is often critical in determining if the buyer has the right to cancel the contract and get their deposit returned.

In this regard, the delivery address should be

considered when writing the contract. This address could be meaningful in deciding who gets the disclosure packet.

If the buyer's agent is to receive the documents, when does the right of rescission period begin? When the agent gets the documents or when the agent delivers them to the buyers.

This issue often becomes a source of dispute when the buyer or the seller later decides to exit the contract.

## **Damages & liquidated damages, remedies**

“Damage” is a legal term. In the context of contract disputes, it means that sum which will restore the victim of the breach to the condition they would have been in had the contract been performed.

### *Emotional damages*

There are no damages for emotional damages, no pain or suffering and no distress. There are no punitive damages.

### *Attorney's fees*

There are no attorney's fees to the victim unless the contract or a statute provides for the award of attorney's fees. The standard forms often seen contain a provision for the award of attorney's fees to the prevailing party. This is a very important provision and one should be careful to have it included in one's contract.

### *Contract measure of damages*

If a seller owns a house and land worth \$300,000 and the buyer breaches a sales contract to buy it for \$300,000, the seller, after the breach still has property worth \$300,000. Therefore there is no damage except for out of pocket expenses such as title reports, surveys, termites, etc. There is no emotional or pain and suffering component.

If the contract price was for \$350,000 but the property was worth only \$300,000, then the seller lost \$50,000 plus his out of pocket.

The reverse is true for the buyer too. The failure to reduce realty to money is not considered to be damage.

### *Lost pay, time, inconvenience*

There is no right to lost pay, lost time, inconvenience or other damages unless the contract clearly provides for them. If a seller is quitting his job, moving into a motel, then the contract should mention this as an item of damage in case the buyer breaches. If unique damages which normally would not be allowed were “contemplated by the parties”, then they can be recovered. How do you prove that? You need to have some writing that shows that these damages were “within the contemplation of the parties as damages.”

### *Deposit as liquidated damages*

Many form contracts provide that if the buyer is in breach, that the seller may elect to either keep the deposit as liquidated damages or take other legal action against the buyer for actual damages or for specific performance. The language would read, “Such other legal or equitable relief as seller may deem appropriate” or the like.

“Liquidated damages” is a term that means stipulated damages in lieu of actual damages. You cannot elect both liquidated damages and actual. You must choose. This is more technical than it looks, and this booklet does not go into the technicalities of liquidated damages.

### **Buyer’s breach, remedies**

When the buyer fails to close or has prematurely withdrawn from the contract, there may be a breach if buyer’s conduct is not excused by the contract or law.

If buyer timely cancels after seeing the condo, cooperative’s, or home owners association disclosure packet, then there is no default and the deposit is to be returned.

The same would be true if there were a financing contingency and the buyer was not able to obtain financing and he acted in accordance with the requirements of the contract; or if there were a major defect in title; or if the seller was in material breach of the contract; or if the home inspection contingency allowed him to cancel.

Measuring the effect of a buyer's termination may require the assistance of an attorney to analyze your contract, the facts and the effects of these in your case.

Hopefully seller has learned something about the buyer's financial ability to close on the purchase of seller's property before signing the contract.

### **Seller's breach, remedies**

If the seller refuses to sell the property to the buyer in accordance with the contract, the buyer's remedies are to sue for money damages or to sue for specific performance.

It is discretionary with the court as to whether the court will order specific performance.

### **Real estate commissions**

The seller who has a listing with a real estate agent will pay the commission in accordance with that listing agreement. The contract will identify the agent and any buyer's agents who are sharing in the commission.

Where there are no real estate agents involved, the contract should say so in order to avoid surprise claims later on.

A buyer may also have an agent who is entitled to be paid. Such an agreement does not bind the seller to pay, but if the seller's real estate agent uses the multiple listing service and promises to pay a buyer's agent fee, then the buyer's agent will share in the listing agent's commission.

## **Pre & post-occupancy agreements**

If the seller is going to stay in the property after closing, then the buyer must agree. This is referred to as a post-occupancy agreement. It should include the dates of the occupancy, the amount of deposit being held at closing to secure the buyer's from any damage that may result from the seller's occupancy (just like any tenant) as well as provide for whatever money is being paid as rent for the occupancy. After all, the buyer is now paying a mortgage while not being able to live in the property. Other terms about maintenance, condition of the property and its appliances and equipment, etc. should be included.

Where the buyer is being allowed to move into the home before he goes to closing a pre-occupancy agreement exists. This situation is more treacherous for the seller. If there are contingencies in the contract or any rights to cancel, then the seller may have put a tenant into the property who may later have to be removed through court action because he did not purchase the property.

There is no SELF HELP available to the seller for a buyer lawfully occupying their dwelling. To remove the buyer, the seller must use the courts to get a judgment for possession and to have the sheriff then evict the buyer.

## **Sale of home contingency**

Often a buyer already owns a home with a mortgage. The lender for the new home will require that the old home be sold unless the buyer has the financial strength to carry both mortgages at the same time – usually they do not.

Standard form contracts often contain a provision by which the buyer either promises the seller that he does not have to sell his home in order to qualify for financing or tells the seller that he must sell his existing home.

If the buyer must sell his existing home, then the seller looks at the current market to determine the likelihood of that happening in a timely manner at an adequate price and whether the seller is willing to wait on that.

If the buyer lies to the seller about the situation and says that he does not have to sell his home, then a misrepresentation has been made to the seller. This is a fraud. If the real estate agent knows of this false statement, the real estate agent may have liability for not disclosing the truth.

The problem surfaces when the lender refuses to make the new home loan because the old home has yet to be sold. Then the buyer fails to close and claims the financing contingency as his excuse to get his deposit back. The seller has now been delayed and damaged and is very upset.

## **Home inspection**

Sellers do not want to make statements about the house but let the buyer make his own discoveries about it.

Thus, a buyer may be given the right to thoroughly examine the property and make his own assessment of its condition. This is the home inspection contingency. It is usually limited to a specified number of days.

A buyer should be mindful that Virginia has recently required licensing of home inspectors and has a board to help monitor these inspectors.

The contract forms usually used by home inspectors limit their liability to returning the fee or to a dollar limit in the event they miss something during the inspection.

A buyer who sees a large crack in a wall, a basement or in floors, a slopping floor or structure, for example, should not just depend on what the home inspector says, but engage a specialist, such as a structural engineer, for example, to review the situation before closing.

## **Survey**

A survey is usually required, not by the buyer or seller, but the lender. The lender's sole concern is whether the building is properly located within the boundaries of the lot and that there are no impediments to clear title and use should the lender have to foreclose and take the

property back. This is referred to as a house location survey.

A buyer who wants to know where his boundaries are and be able to rely upon this information, must arrange with the survey company to have stakes put into the ground. For this he will usually have to pay an additional sum.

Often the buyers and sellers do not see the survey until closing. Then, they do not know how to read it.

The survey should be obtained and examined in advance of closing. It may show encroachments onto seller's property by a neighbor or an encroachment by the seller on the neighbor's property. Moreover, it may show the location of a drainage or utility or road easement that will interfere with the intended use of the property by buyer.

### **Fraud, concealment, misrepresentation**

If a seller or his agent tells the buyer that the roof is brand new and it is not, then the seller has falsely represented a present condition or fact with the intent to mislead the buyer. If the buyer is misled and relies upon the deception to sign the contract to his damage, an action for fraud in inducement may exist against the deceiver. The seller and/or his agent may be liable not only for damages, and if the fraud was malicious, punitive damages, but the buyer can rescind the contract.

What if the representation was accidental, by negligence of the seller and not maliciously done. This is still an actionable fraud in the inducement, referred to as constructive fraud or misrepresentation. In this situation, the contract can still be rescinded and the seller and/or agent would be liable for damages, but without malice, there would be no punitive damages awarded.

A seller is not liable for fraud if the agent said it, unless the seller knew the agent said it and did not correct it. The seller's agent will not be liable for the seller's misrepresentation, unless the agent knew the seller said it and did not correct it.

## **Duty of seller's agent**

The agent for the seller has duties to the seller and only a few towards the buyer.

### ***Duties to seller***

The duties of an agent for the seller to the seller (his client) are to:

Perform in accordance with the terms of the brokerage relationship;

Promote the interests of the seller by:

Conducting marketing activities on behalf of the seller in accordance with the brokerage agreement. In so doing, the licensee shall seek a sale the price and terms agreed upon in the brokerage

relationship or at a price and terms acceptable to the seller; however, the licensee shall not be obligated to seek additional offers to purchase the property while the property is subject to a contract of sale, unless agreed to as part of the brokerage relationship or as the contract of sale so provides;

Assisting in the drafting and negotiating of offers and counteroffers, amendments, and addenda to the real estate contract and in establishing strategies for accomplishing the seller's objectives;

Receiving and presenting in a timely manner written offers and counteroffers to and from the seller and purchasers, even when the property is already subject to a contract of sale; and

Providing reasonable assistance to the seller to satisfy the seller's contract obligations and to facilitate settlement of the purchase contract.

Maintain confidentiality of all personal and financial information received from the client during the brokerage relationship and any other information that the client requests during the brokerage relationship be maintained confidential, unless otherwise provided by law or the seller consents in writing to the release of such information;

Exercise ordinary care;

Account in a timely manner for all money and property received by the licensee in which the seller has or may have an interest;

Disclose to the seller material facts related to the property or concerning the transaction of which the licensee has actual knowledge; and

Comply with all requirements of this article, all applicable fair housing statutes and regulations, and all other applicable statutes and regulations which are not in conflict with this article.

***Duties owed by seller's agent to prospective buyer***

The duty of the seller's agent to the buyer (who is not his client) is limited to telling the prospective buyer about any material physical defects in the property actually known to the agent, and to treat the buyer honestly. The agent cannot knowingly give buyer false information. The term "physical condition of the property" refers to the physical condition of the land and any improvements thereon, and does not include: (i) matters outside the boundaries of the land or relating to adjacent or other properties in proximity thereto, (ii) matters relating to governmental land use regulations, and (iii) matters relating to highways or public streets.

*Remember, the seller does not have any duty to make any disclosures to buyer.*

## Duty of buyer's agent

### *Duties to buyer*

A real estate agent for the buyer has duties to the buyer. They are:

Promote the interests of the buyer by:

Seeking a property of a type acceptable to the buyer and at a price and on terms acceptable to the buyer; however, the licensee is not obligated to seek other properties for the buyer while the buyer is a party to a contract to purchase property unless agreed to as part of the brokerage relationship;

Assist in the drafting and negotiating of offers and counteroffers, amendments, and addenda to the real estate contract and in establishing strategies for accomplishing the buyer's objectives;

Receiving and presenting in a timely manner all written offers or counteroffers to and from the buyer and seller, even when the buyer is already a party to a contract to purchase property; and

Provide reasonable assistance to the buyer to satisfy the buyer's contract obligations and to facilitate settlement of the purchase contract.

Maintain confidentiality of all personal and financial information received from the client during the brokerage relationship and any other information that the client requests during the brokerage relationship be maintained confidential unless otherwise provided by law or the buyer consents in writing to the release of such information;

Exercise ordinary care;

Account in a timely manner for all money and property received by the licensee in which the buyer has or may have an interest;

Disclose to the buyer material facts related to the property or concerning the transaction of which the licensee has actual knowledge; and

Comply with all requirements of this article, all applicable fair housing statutes and regulations, and all other applicable statutes and regulations which are not in conflict with this article.

### ***Duties to sellers***

A buyer's agent must treat all prospective sellers honestly and not knowingly give them false information.

In the case of a residential transaction, a licensee engaged by a buyer must disclose to a seller whether or not the buyer intends to occupy the property as a principal residence.

It's alright for a buyer's agent to give the seller ministerial assistance without breaching any duty to the buyer.

## **Dual agents**

Dual agency exists where one agent serves two or more conflicting clients at the same time, such as representing the buyer and the seller at the same time in the same matter.

Dual agency is permitted under law if all parties agree to the dual agency in writing. The law permits a dual agent to designate one sales person in their office to represent the buyer and one to represent the seller. This "designated agent" is also permitted where the parties have consented in writing to this relationship. It is very common where a large real estate firm is involved.

## **Attorney fees**

Under Virginia law, attorney's fees will not be awarded to a party to a case unless the contract provides for the award of these fees or there is a statute that provides. An example of such a statute would be fair housing.

Real estate contracts must have an attorney fee provision in order for there to be recovery for them.

## Settlement agent selection

All contracts involving the purchase of real estate containing not more than four residential dwelling units must include in bold face, ten-point type the following language:

**Choice of Settlement Agent: You have the right to select a settlement agent to handle the closing of this transaction. The settlement agent's role in closing your transaction involves the coordination of numerous administrative and clerical functions relating to the collection of documents and the collection and disbursement of funds required to carry out the terms of the contract between the parties. If part of the purchase price is financed, your lender will instruct the settlement agent as to the signing and recording of loan documents and the disbursement of loan proceeds. No settlement agent can provide legal advice to any party to the transaction except a settlement agent who is engaged in the private practice of law in Virginia and who has been retained or engaged by a party to the transaction for the purpose of providing legal services to that party.**

**Escrow, closing and settlement service guidelines: The Virginia State Bar issues guidelines to help settlement agents avoid and prevent the unauthorized practice of law in connection with furnishing escrow, settlement or closing services. As a party to a real estate**

**transaction, you are entitled to receive a copy of these guidelines from your settlement agent, upon request, in accordance with the provisions of the Consumer Real Estate Settlement Protection Act.**

### **Title insurance issues**

Virginia code requires that a title agent, usually the settlement company, obtain from the purchaser a written statement that he has been notified by the settlement agent that the purchaser may wish to obtain owner's title insurance coverage including affirmative mechanics' lien coverage, if available, and of the general nature of such coverage, and that the purchaser does or does not desire such coverage.

The notification should include language that the value of subsequent improvements to the property may not be covered.

The result of this is the decision of the buyer to obtain title insurance, and if so, what coverage to get. Cost is often an important factor.

From an attorney's point of view, title insurance that insures the buyer's equity, and not just the lender's portion, is extremely valuable. The benefit of having the title company pay for an attorney to defend any possible legal claim to title is well worth the small price that is paid for the premium. If there is a defect in title, the company will pay the buyer back his lost equity. If an insurance rider to cover growth in the

equity is available and purchased, it could prove to be invaluable.

The mechanic's lien coverage protects the property from an unpaid contractor surfacing after closing and claiming a lien against the property.

### **Lead based paint disclosures**

Federal law requires that a residential real estate sales contract for the sale of a home known as "target housing", that is a house built before 1978, give the buyer notice that it may contain lead-based paint and give the buyer a 10-day right of inspection along with an EPA information pamphlet explaining lead-based and buyer's rights. This pamphlet can be obtained through EPA and is titled *Protect Your Family From Lead in Your Home*. This disclosure is required whether the home is sold with or without a real estate agent. There are a few exemptions: Housing for the elderly or people with disabilities; zero bedroom dwelling unless a child is expected to live in it.

Sellers as well as the real estate agents are responsible for ensuring compliance with this federal disclosure law. For this reason the seller is burdened to disclose lead based paint hazards to the real estate agent also.

The disclosure must be signed by the seller and buyer and given to the buyer all information known to the seller about lead-based paint in the

house or any prior studies about it or corrective action taken.

The 10-day inspection right allows the buyer to cancel the contract after the inspection. This right can be waived in writing.

Also, the requirement for the lead-based disclosure can be waived in writing too.

The failure of the seller to comply with these disclosures does not adversely affect the contract. It remains in effect. The failure exposes the seller to civil penalties from EPA, which can be significant.

If the seller complies with these disclosure requirements and the house is otherwise in compliance with Virginia's building code, the seller will be exempt from liability for personal injury to any subsequent occupant. This is a very important exemption that should be obtained.

Forms and information for this can be found at the EPA web site on the Internet.

## **Radon and other environmental disclosures**

Radon and other environmental gases and materials are usually left to the buyer to locate as part of their home inspection.

A provision for the use of radon testing equipment and the like is usually left the buyer to manage.

There is a known physical environmental condition, such as a buried underground

abandoned oil storage tank, the seller will find that they are better off fully disclosing this condition. If a buried tank was improperly abandoned leaving oil in the soil or in the basement walls, then a claim of concealment and fraud in the inducement may result with possible liability for its correction being placed on the seller.

The contract should deal with these issues to avoid a problem down the road. Often the contract will simply provide that the seller does not know of any environmental hazard and leaves the search for and testing of such hazards to the buyer. Where something is known, then its disclosure in the contract avoids future claims and liability.

## **Fair housing issues**

Real estate agents are bound to comply with federal, state and local fair housing laws. These laws prohibit discrimination in housing against protected classes. The federal protected classes are

Race

Color

Religion

National origin

Sex

Familial status

## Handicap

Virginia adds to this group

## Elderliness

Local governments add their own protected classes, for example, in Fairfax, Arlington, and Alexandria the protected class of marital status.

A seller may be exempt from the application of these laws with their large civil penalties, damages and attorney fee claims, in certain circumstances.

If a seller owns 3 or less “homes” then he may be exempt so long as he is not license as a real estate licensee (active or inactive) and so long as there is real estate agent being used by seller in the transaction and so long as the advertisement by seller is free from discriminatory language. Another common exemption is where the seller lives in one unit of a four unit residential building and these other conditions just mentioned apply.

Fair housing also requires certain reasonable accommodations in dwellings to accommodate a person’s handicap. This requirement, however, will not usually be seen in a sale unless there is going to be a rental or pre-occupancy agreement involved.

A seller would be wise to avoid violating these laws. The laws can be confusing. If in doubt, seek legal counsel right away or confer with the local human rights office in your county or at the

state or federal level. The government officials will help you avoid liability if your transaction leaves you in doubt as to the correct path to take.

### **Mechanic's lien disclosure language**

The following notice is to be included in any contract for the sale of residential property.

*“Virginia law permits persons who have performed labor or furnished materials for the construction, removal, repair or improvement of any building or structure to file a lien against the property. This lien may be filed at any time after the work is commenced or the material is furnished, but not later than the earlier of (i) 90 days from the last day of the month in which the lien or last performed work or furnished materials or (ii) 90 days from the time the construction, removal, repair or improvement is terminated.*

*AN EFFECTIVE LIEN FOR WORK PERFORMED PRIOR TO THE DATE OF SETTLEMENT MAY BE FILED AFTER SETTLEMENT. LEGAL COUNSEL SHOULD BE CONSULTED.”*

### **Time is of the essence?**

“Time is of the essence” is an important term in any contract, and especially in a residential real estate sales contract. It means that where a deadline is given, such as a date for closing, then a failure to keep to that deadline is a material breach by the person who failed to keep to the

time line. If the term is omitted from the contract, then a judge could impose a “reasonable time” standard on performance thereby allowing a breaching party more time.

### **Closing or settlement date**

If a contract is written without a closing date set, it is still enforceable. A judge will imply a reasonable settlement date after considering the facts and circumstances of the parties.

It is recommended that all contracts have a settlement date, however, in order to avoid future problems when the buyer, for example, fails to timely get his financing lined up and the seller wants to close out this contract.

### **Release of deposit/contract post breach**

Here are the common problems.

***Problem #1:*** Buyer fails to get financing and does not show up for closing. Seller demands that the real estate agent turn over the earnest money deposit over to him as liquidated damages. The agent is bound, under Virginia law to not release the deposit without the consent of both parties, a court order, or in the situation where the release is clearly appropriate; the agent is permitted under Virginia regulations to give the breaching party a 30-day notice to object to the release of the money. If there is an objection, the real estate agent must either hold onto the money pending court order or file an

interpleader action in the courts to force the parties to litigate the breach issue.

***Problem #2:*** The buyer failed to close. Seller wants to re-list the house but the real estate agent is afraid to get a new contract without the old one being released. Sometimes, a title company closing on a new contract will want a release of the old one. The buyer then refuses to sign a release. The choices of the seller are (1) to release the deposit back to the buyer with a signed release document (2) file a suit against buyer to bring the claims to a final result in court or (3) have the buyer acknowledge that the contract is over even though he believes that he is entitled to the return of the deposit. In this manner, the buyer has recognized that the contract is no longer in effect and that the buyer's only claim is for the return of the deposit. This type of letter would go a long way to solving this problem. Then the parties merely sue each other to resolve who is entitled to the deposit.

## **Bankruptcy & Foreclosure**

Unfortunately, some sellers have found themselves facing foreclosure after the contract of sale has been signed, and in order to stop the foreclosure, have filed bankruptcy, hoping that the bankruptcy court will approve the sale or order a "cram down" which will require the lender accept a short-sale.

Bankruptcy will stop the foreclosure for a while but it also stops the contract closing unless the bankruptcy judge approves going ahead with the sale.

A common situation arises where the seller cannot afford to make his mortgage payments during the period after he filed for bankruptcy. The law requires that he make his post bankruptcy mortgage payments in a timely fashion. If he does not, then the lender may get the bankruptcy judge to allow the foreclosure to proceed.

A foreclosure sale by a lender secured with a mortgage that was filed before the contract of sale was signed, will terminate the contract. Picture the situation where the buyer has sold his first home in anticipation of moving into the new home, but the seller of the new home is foreclosed and the property is sold to someone else.

## **Friedlander, Friedlander & Earman, P.C.**

### **The firm**

The firm was founded in 1925 by Mark P. Friedlander, Sr (1903-1978). The firm continues now into its third generation. The focus of the firm is civil transactional and litigation in the areas of real estate, zoning, landlord-tenant, commercial, business, entities wills, probate and estate planning.

## The attorneys

**Mark P. Friedlander, Jr.** B.A. degree, University of Virginia (1951); L.L.B. - University of Virginia (1957); former Air Force B-29 pilot; Member of Virginia and District of Columbia bars, in both state and federal courts including the Supreme Court. Former Commissioner in Chancery for Arlington County Circuit Court. Served as Liaison Counsel for the Swine Flu Plaintiffs Steering Committee prosecuting the national multi-district litigation against the United States arising from personal injury claims from the Swine Flu Immunization Program of 1976. Extensive trial experience in real estate litigation, zoning, product liability, construction, contracts, business, and many other areas of civil law. Co-authored *Hand-book of Successful Franchising*, Van Nostrand Reinhold Company 1st Ed 1981, 2nd Ed 1985, and *Winning the War Within*, Rodale, 1986, *The Immune System*, Lerner Publishing Co. 1998, a layman's guide to immunology, *Outbreak*, a beginners look at epidemiology, 2000, *When Objects Talk*, Beginner's Forensic Science, 2001, and several books on aviation history and Shakespearean lore. Past chairman, Town of Vienna Board of Zoning Appeals, Chairman Krasnow Institute for Advanced Studies at George Mason University, focusing on the neurosciences and is a past member of the Paralegal Curriculum Advisory Committee, No. VA Community College. He is a member of the American Trial Lawyers Assn & VA Trial Lawyers Assn.

**Jerome P. Friedlander, II:** B.S. degree, Georgetown University Accounting/Business Adm. (1965); L.L.B. -

University of Virginia (1968); Former Captain with the 82nd Airborne Division with service in Vietnam; Member of VA and DC Bars, at both state and federal levels including the U.S. Supreme Court. Currently he is a member of the Wealth Counsel, a national association of estate planning attorneys He was President of the McLean Bar Association (2009-2010) and Past President of Northern Virginia Chapter of the Federal Bar Association. He is an Honorary Member in the Association of Fellows & Legal Scholars of the Center for International Legal Studies.

He is the author of Virginia Practice Series, *Landlord-Tenant Law*, Thomson/West, (originally published by Michie and then Lexis Law Publishing with supplements every year since 1992); *The Broker's Guide to Virginia Real Estate Law*, Lexstone Publishing 2003, 2<sup>nd</sup> edition, 2009; *The Limited Liability Company - With a State by State Review*, 1994 The Michie Company; *The Basics of Residential Landlord & Tenant Law*, Peppercorn Paperworks LLC, 1989 with annual supplements; Chapter on Virginia Law in *Legal Aspects of Doing Business in North American and Canada*, Kluwer/West.

Jerry teaches Broker's Law at the No. VA Assn of Realtors, along with various related topics. He also teaches advanced estate planning.

and prior to that, she was Chairman of the Falls Church Planning Commission.