

# Contract Writing

## Virginia Salesperson PLE Series

### MODULE 1

## Listing Agreements

#### Learning Objectives:

- Explain the nature of Listing Agreements
- Differentiate between the various types of Listing Agreements
- Understand how finding a ready, willing and able buyer or being the procuring cause of the sale affects commission

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#### BACKGROUND

A valid offer to purchase, if accepted, is a legally enforceable agreement between competent parties who agree to perform, or refrain from performing, certain acts or omissions. This legally enforceable agreement, also known as a contract, represents the exact meeting of the minds of the parties involved.

Real estate is a business of contracts—listing contracts, sales contracts, option contracts, leasing contracts, development contracts, installment sales contracts, and financing contracts to name a few. Although there are many fill-in-the-blank forms available to real estate agents, licensees must understand basic contract law in order to spot issues, to choose appropriate forms, and to understand when to seek the advice of a legal professional.

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## NATURE OF LISTING AGREEMENTS

### **Expiration**

State laws may require a specific termination date or impose a reasonable one if unstated in the agreement.

### **Compensation**

Real estate agents (brokers) generally earn payment (commission) upon one of two events—when the agent (broker) produces a ready, willing, and able buyer; and when the agent (broker) is the procuring cause of any sale or purchase.

**Ready, Willing, and Able:** Phrase describing a buyer who has made an offer consistent with the terms of a listing agreement, and who has the motivation and financial ability to perform. Such offers trigger the listing broker's right to a commission. If a broker hired by a seller obtains a buyer that makes an offer, and has sufficient financing to carry through with the transaction, that broker earns a commission regardless of whether the seller carries through with the sale.

**Procuring Cause:** An agent (broker) earns compensation (commission) if the agent (or his subagent, salesperson) is the procuring cause of the sale. In the event of a dispute over who produced a ready, willing, and able buyer, it is important to determine which broker was the procuring cause of the sale. Determining which broker is the procuring cause of a sale can be difficult to determine. Under most state laws, whether the broker is the procuring cause rests upon whether the broker “set in motion a chain of events which, without break in continuity, resulted in a sale or lease.”

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## TYPES OF LISTING AGREEMENTS

### **Open Listing**

Agency agreement between a seller and any number of brokers, wherein the seller promises to compensate the broker if the broker sells the property. Under an open listing contract, the owner is only obligated to pay a commission to a broker if she successfully sells the property, or if she is the procuring cause of the sale.

Alternatively, the owner may sell the property herself and owe no commission to any broker. The open listing contract may be oral or written, but it is unilateral (obligating only one party, the broker, to act), executory (will not arise unless or until a particular broker produces a buyer), and may have an indefinite expiration date. However, many state laws impose an expiration date if one is not explicitly stated.

### **Exclusive Listing**

An exclusive listing is a listing agreement between a seller and a single broker, (the exclusive agent), which provides the listing broker certain rights to a commission from the sale of the listed property for a limited time.

**Exclusive Agency:** A listing agreement where the seller agrees to pay the exclusive agent a commission if he or she sells the property, and if any other broker sells the property, as well. However, similar to the open listing agreement, the owner may sell the property himself and not be obligated to pay a commission to the broker. Unlike open listing agreements, exclusive listing agreements must be written, are bilateral (obligating both parties), for a personal service (it cannot be

assigned), and must have a definite expiration date. Exclusive listing agreements are also executory (will not arise unless or until a particular broker produces a buyer).

**Exclusive Right to Sell:** Similar to an exclusive agency, except that this listing agreement extends the greatest benefit (broadest opportunity for a commission) to the broker.

This is true because the seller/client agrees to list the property with a single broker (exclusive agent), and also agrees to pay that broker his commission regardless of who sells the property (another broker or even the seller himself). An exclusive right-to-sell must be written, is bilateral, executory, for a personal service, and must have a definite expiration date.

### **Net Listing**

Agency agreement between a seller and a real estate broker whereby the seller/client hires the broker to locate a buyer and agrees to compensate the broker with the difference between the actual sales price and some set amount of money. Under a net listing agreement, the broker is free to sell the house for as much as he can get and keep all monies above an amount set by the owner. Net listing agreements are illegal in most states. Net listings include net sales agreements as well as net lease agreements.

## PROGRESS CHECK 1

1. What is the difference between an open listing agreement and an exclusive agency listing agreement?
  - A. Options regarding who may receive commission
  - B. Number of brokers involved
  - C. The commission percentage rate
  - D. Open listings agreements are executory and exclusive listing agreements are executed
2. Which type of listing agreement is most beneficial to a licensee?
  - A. Exclusive agency
  - B. Open
  - C. Net
  - D. Exclusive right-to-sell
3. A buyer is considered "ready, willing and able" if they are all of the following EXCEPT:
  - A. Motivated to buy
  - B. Financially able to buy
  - C. Represented by a real estate agent
  - D. Has made an offer to buy
4. Which type of listing agreement is most beneficial to the seller?
  - A. Net
  - B. Open
  - C. Exclusive agency
  - D. Exclusive right-to-sell

# MODULE 2

## Buyer-Broker Agreements & Multiple Listing Service (MLS)

### Learning Objectives:

- Be familiar with the purpose of Buyer-Broker Agreements
- Understand the reason brokers use the Multiple Listing Service (MLS) and know the rules pertaining to the MLS system

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### BUYER BROKER AGREEMENTS

#### Background

A Buyer/broker agreement (buyer agency agreement or buyer agency employment contract) is an agency relationship between a broker and a buyer, often including a salesperson working under the broker as a subagent. Formal representation of the buyer creates an agency relationship between the buyer and broker, and carries certain rights and responsibilities. Such formal representation contrasts with the mere informal assistance a seller's agent may provide to a buyer without creating an agency relationship. Most states require that proper disclosure of this distinction be made to the buyer.

Just like the broker and seller, the nature of the relationship between buyer and broker should be established through a written agreement. There are different Buyer broker agreements, but each should clearly

specify the services to be offered, the responsibilities of the parties, and how, when, and by whom the broker is to be compensated.

An agreement to represent a buyer is an oral or written, bilateral or executory, personal service agreement (not assignable), that may not require an expiration date. In the absence of a specific expiration date, however, the agreement will be for a reasonable period of time (often set by state law).

### **Nature of Buyer-Broker Agreements**

Like listing agreements, the buyer/ broker agreement is between the broker and the buyer, often including a broker's salesperson as a subagent.

State custom and law may vary.

### **Open Buyer Agreement**

An open buyer agreement is the counterpart to an open listing. It's an agency relationship between a prospective buyer and a real estate broker which, like an open listing agency, permits any number of agents to be compensated depending upon who first brings suitable property to the buyer's attention. In this case, the buyer is obligated to compensate only that broker which produces property that the buyer actually purchases.

### **Exclusive Buyer Agreements**

Exclusive buyer agencies usually appear in two types: the exclusive agency buyer agency and the exclusive buyer agency.

**Exclusive Buyer Agency Agreement:** An Exclusive Buyer Agency is an agency relationship between a prospective buyer and a real estate broker, which obligates the buyer to compensate the agent if the buyer purchases property similar to that described in the contract, regardless of whether the buyer discovers the property on her own or through another agent. Exclusive buyer agency is the counterpart to the listing agreement known as the exclusive right to sell contract.

**Exclusive Agency Buyer Agency Agreement:** An Exclusive Agency Buyer Agency is an agency relationship between a prospective buyer and a real estate broker where the buyer is obligated to compensate the agent only if the agent locates suitable property the buyer is not obligated to compensate the agent if the buyer finds suitable property on his own or through another agent. Exclusive agency buyer agency is the counterpart to the listing agreement known as the exclusive agency listing agreement.

### **Termination of Buyer-Broker Agreements**

Similar to the listing agreement, the buyer broker agreement could be terminated under a number of circumstances short of full performance, including: abandonment by the broker (broker fails to take any steps to find suitable property for the buyer); breach; lapse of time (time specified in agency agreement or by state law expires); mutual agreement; death, insanity, or bankruptcy; revocation.



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## MULTIPLE LISTING SERVICE (MLS)

### **Background**

Organization of brokers (local or regional) who formally exchange listing information about real estate. The MLS exposes listed real estate to a variety of brokers, who in turn may present the listing to a variety of buyers. The seller lists his home with one broker who assumes primary agency responsibility for selling the property. The listing agent then adds the listing to the MLS with the seller's permission. Today, many MLS systems are at least partially accessible to the general public on the Internet.

### **Listing Agreements**

Properties listed in a MLS database are usually under an exclusive right to sell listing between the seller and an individual member broker (other member brokers treated as subagents of the seller).

### **Commissions**

Most MLS associations require the listing broker to split his or her commission with any member broker who is the procuring cause of sale.

## PROGRESS CHECK 2

1. Which of the following is NOT an acceptable reason to terminate a buyer-broker agreement prior to full performance?
  - A. Lapse of time
  - B. Abandonment by the broker
  - C. Bankruptcy
  - D. Error or omission
  
2. Buyer-broker agreements are NOT:
  - A. Assignable
  - B. Bilateral
  - C. Personal service agreements
  - D. Oral
  
3. Properties listed in a MLS database are usually under what type of listing agreement?
  - A. Open
  - B. Exclusive right-to-sell
  - C. Net
  - D. Exclusive agency
  
4. Broker Stan owns Premier Estates Realty, Salesperson Rebecca works at Premier Estates Realty and she has agreed to assist Orville with finding a new home to purchase. Orville has a signed agreement with who?
  - A. Premier Estates Realty
  - B. Salesperson Rebecca
  - C. Broker Stan
  - D. No one

# MODULE 3

## Elements of a Valid Contract

### Learning Objectives:

- Know the elements that are required in order to have a valid contract
- Understand how the various defenses affect contracts

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### BACKGROUND

There are three basic elements to any enforceable contract: an offer/acceptance, consideration (exchange of promises to perform), and lack of any defenses that otherwise cancel a contract or prevent it from being formed. These elements are intended to ensure there is an understanding, or a meeting of the minds between two parties.

#### **Offer and Acceptance**

An offer is a promise from one party that he or she is willing to enter into a binding agreement with another party. When you make an offer to someone, you give them the power to create a contract should they accept your offer. Unless otherwise specified by its terms, an offer may be accepted by any reasonable manner—a party may accept an offer through a face to face conversation, or a party may accept an offer through formal written documents.

An offer may also be accepted by mailing it to the offeror. Where acceptance is properly made by mail, the law states that the acceptance becomes effective when it is deposited into a mailbox, and

not when it is received by the offeror. Other forms of acceptance do not become binding on the offeror until they are actually received.

Remember that an offer is not a contract, but an invitation to enter into a contract. However, making an offer should not be taken lightly, as it could be accepted, which will impose duties and obligations on the party making it. So, for those offers that one does not want to be bound by, the question often arises, “how can I terminate my offer?”

Offers may be **terminated** in several ways, including:

- **Acceptance:** Act of declaring a desire to create a contract consistent with a specific offer (offers must be accepted as the offer specifies). Unless otherwise specified by its terms, an offer may be accepted by any reasonable manner—a party may accept an offer through a face to face conversation, or a party may accept an offer through formal written documents, such as a real estate purchase agreement.
- **Rejection:** The party to whom the offer was made (offeree) may reject at any time prior to acceptance (unless the offer expires after a specified period of time).
- **Counteroffer:** Often, the offer to purchase is not the only offer exchanged between buyer and seller. The buyer (offeror—one who makes an offer) initially makes an offer to purchase to the seller (offeree—one who receives the offer). If the seller rejects the initial offer, and then makes a counteroffer, the roles are reversed. The seller then becomes the offeror and the buyer the offeree with respect to the seller’s counteroffer. By making a counteroffer, the initial offer is terminated by the offeree’s

rejection and replaced by a new offer. Multiple counteroffers may occur, with the roles of offeror and offeree switching between buyer and seller. An offeror may withdraw his offer at any time before the offeree accepts it. However, there is no sales contract until or unless one party accepts the other's offer.

- **Revocation:** An offeror (the one making the offer) may withdraw his offer at any time prior to its acceptance by the offeree (the one receiving the offer), unless for example, the offer is contained in a valid option contract. If the offeror withdraws the offer, the offeree no longer has the power to accept it and there can be no contract from the rejected offer.
- **Lapse of time:** Some offers terminate automatically if they are not accepted by a deadline established by the parties. Specifying a deadline for acceptance is one way to control an offer after it is communicated.
- **Death or insanity:** The death or insanity of either party prior to acceptance will terminate an offer.

## **Consideration**

For a contract to be legally binding, an offer and an acceptance must be supported by consideration. Consideration is a legal term that has a long history of interpretation and discourse in contract law. However, today it is understood to broadly exist where parties bargain with one another to exchange promises. Through this bargaining process, the parties agree, or promise, to do or not to do something like deliver goods in exchange for payment.

The thing that both parties agree to do or not to do is the essence of consideration. Without consideration, there is merely a one-sided promise to act out of charity, and courts are reluctant to bind someone to perform a charitable act (even if they so promise). As a result, if a person promises to give away property without any consideration (gift promise), but later changes his mind, the one-sided promise could be unenforceable.

**For Example:** *In a real estate transaction, the buyer makes an offer to buy property that the seller accepts. Dissecting this exchange of promises we find consideration is when the seller promises to do something (deliver the deed to the property at a specified time to the buyer), and the buyer promises to do something (pay a specified sum of money for that deed). Conversely, if a seller promised to merely give his property to another as a gift, the seller's one-sided promise would lack consideration and could be unenforceable.*

*This is true because there was no bargain for exchange of promises between the two parties, or no consideration (only the seller is promising to do something). We do not intend to communicate that one cannot give their property away they can! However, if one promises to give it away, but changes her mind, the promise could be unenforceable.*

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## DEFENSES

Even where there is an offer and acceptance that is supported by consideration there may not be a valid or enforceable contract. Certain defenses may exist that prevent a contract from being formed in the first place. Other defenses permit a party to escape liability from the contract, even though the contract is valid.

In either case, these two types of defenses result in either a contract being void (a theory that the contract was never properly formed) or voidable (a theory that a contract is valid, but fairness dictates that one may get out of the contract if he proves the defense).

The important distinction between contracts that are void and contracts that are voidable is as follows: void contracts are never binding, and voidable contracts are binding unless or until a party successfully asserts a relevant defense.

Common defenses which render a contract void or voidable include: incompetency, misrepresentation, mistake, illegality, and duress.

### **Incompetency**

Generally, courts assume people are competent to enter into contracts with one another. However, some people are legally unable to contract because they lack “capacity.” As a result, their contracts are void. People that entirely lack capacity to contract include those that are legally insane. Others have only a limited capacity to enter into contracts.

These contracts are voidable, which means that one must take steps to avoid responsibility for the contract. Both minors and intoxicated persons are examples of those with a limited capacity to contract.

Those who are adjudicated incompetent or insane by a court have no capacity to contract, and may never be a party to a legally binding contract. This is logical because legally incompetent individuals cannot be expected to understand the terms of a contract. Therefore, a legally incompetent person cannot agree because an agreement requires understanding.

However, if a legally incompetent person is judged to have been “lucid” or temporarily of sound mind at the time he entered into the contract, then the contract remains valid (even where the person returns to insanity after signing the contract). Finally, a person who is actually insane, but has not been declared insane by a court possesses a limited capacity to contract. His contracts are therefore voidable and not void.

Minors (those under 18 years of age in most states) have a limited capacity to contract. Therefore, their contracts are generally voidable. This means that a minor may enter into a contract, but he may escape liability for the contract if he subsequently rejects it.

*EXAMPLE: If a minor enters into a contract to buy a car, the minor will not be obligated under the contract to buy the car because he is not competent to contract. The contract is voidable on behalf of the minor.*

*However, if the minor wants to buy the car, the seller is bound by the terms of the contract and must sell. However, contracts with minors for necessities such as food or clothing are neither void nor voidable, and the minor will be held to such contracts.*

*EXAMPLE: Persons who were intoxicated at the time of the contract also have a limited capacity to contract. Such contracts may be voidable by the intoxicated person if they act promptly. If they do not act promptly to cancel the contract, their inaction will be taken as agreement, and the contract will be valid. If there is any dispute regarding one’s competency, it must be settled in a court.*



## **Fraud**

Fraud is any form of deceit by which one party intentionally attempts to gain an unfair advantage over another. The key to determining whether an action is fraudulent is whether or not it was intentional. If the deceit was not intentional, it is not fraud, but may be an instance of misrepresentation (discussed below).

Fraud includes intentionally making false statements and/or intentionally concealing material facts about a property. Fraud may result in damage awards by a court, and either a void or voidable contract depending upon the circumstances.

If a party to a contract is induced to sign the contract because of fraudulent statements or facts, then the contract is voidable by the injured party.

***EXAMPLE:** Sam Jones, who runs his business out of his home, signs a contract to buy a particular house because the seller pledges that local ordinances will allow his home business. Later Sam finds that this is not true, and that the seller knew it was not true. The seller is guilty of fraud and the contract is voidable by Sam.*

However, if a person has no knowledge or intention of becoming a party to a contract, yet is tricked into signing one, then a meeting of the minds never occurred and the contract is void (as if it never existed).

***EXAMPLE:** Sara Jones is contacted by a salesperson from the Heavenly Habitat subdivision and told that she has just won a two-bedroom house. Sara loves the house and when she is asked to sign a letter of endorsement for the subdivision, she does so gladly. Later, Sara finds out that rather than actually winning a*

*house, she has merely won a chance to win a house. Furthermore, the letter of endorsement she signed is actually a contract to buy a house if and when she fails to win one.*

Because Sara never intended to enter into a contract, and because she was intentionally deceived, the contract is void.

### **Misrepresentation**

Misrepresentation is a false statement or a concealment of a material fact. Unlike fraud, misrepresentations may be innocent and unintentional. However, even unintentional misrepresentation may be sufficient to render a contract void or voidable depending upon the circumstances and magnitude of the misrepresentation.

A primary consideration is whether or not the person who misrepresented the material fact should have known better. The question of unintentional misrepresentation is further complicated by the fact that different people are expected to have different levels of knowledge on a particular subject.

***EXAMPLE:** Consider the representation, “This house is really built well, and the foundation is particularly solid.” A year later, the house settles so badly that extensive repairs are needed to correct the problem.*

Whether someone has made a misrepresentation turns on who made the original statement.

1. If a seller made the statement, he or she would not likely be liable if, at the time the statement was made, the foundation appeared to be in good shape—sellers are not expected to have special knowledge about construction;

2. If a salesperson made this statement, he or she may be liable for damages and could have their license suspended or revoked, even if the misrepresentation was innocent, if a court concludes that they should have known about the faulty foundation or should have found out about the faulty foundation, before making the statement;
3. However, if the developer made this statement he would certainly be liable for misrepresentation or even fraud if his misrepresentation was intentional.

### **Contrast Puffing with Misrepresentation and Fraud:**

Puffing is a harmless statement or exaggeration that a reasonable person would be expected to recognize, such as: “This is the most beautiful house in the city,” and “You will never find a buy like this again.” Puffing is not misrepresentation or fraud because it is a statement of personal opinion. However, the lines between puffing, misrepresentation, and fraud can be blurry, so use caution!

### **Estoppel**

Estoppel is a legal doctrine that stops, or prevents, a person from cancelling a contract due to certain deficiencies with the essential elements. Generally, estoppel arises where a party to a contract is aware that the other party is relying on them to perform as agreed, even though there may be deficiencies that otherwise prevent a valid contract from being formed (such as a lack of consideration or failure to obtain the agreement in writing). Where a party so relies and suffers some harm as a result, a court may apply the doctrine of estoppel.

***EXAMPLE:** Your employer tells you that he will pay you a pension when you retire. Relying upon this statement, you retire at an age where obtaining new employment is difficult because you are expecting that pension income.*

Even though there may be no consideration in this example (arguably, only the employer agreed to do something, which renders this a one-sided agreement—see the discussion on consideration above), courts may enforce the agreement as a contract to prevent an inequitable result (your reliance on your employer’s promise put you in a worse situation).

More specific to real estate, an estoppel certificate (certificate of no defense, or estoppel letter) is a legal document that clarifies the exact amount of debt owed by one party to another and/or the situation between the parties as of a specified date.

Such a document is used by lenders to establish the mortgage amount owed as of a certain date, and by landlords and tenants to establish amounts owed (or not owed) as of a certain date. If properly drawn up and executed, all parties to the certificate are thereafter estopped from claiming any position to the contrary.

### **Mistake**

A mistake is an error or misunderstanding. Contracts are voidable if based on a mutual, unintentional, material mistake.

***EXAMPLE:** A subdivision developer and a buyer sign a sales contract on a lot in the subdivision. Later, it turns out that the developer honestly thought they were contracting for Lot A and the buyer honestly thought they were contracting for*

*Lot B. If the two can resolve their differences, fine. But if not, the contract is voidable by either party because there was no meeting of the minds.*

Note that this mistake is: 1) mutual (both mistakenly misidentified the property); 2) unintentional; and 3) material (specifying the correct piece of property is at the heart of the contract). Ignorance of the law and poor judgment are not valid reasons for claiming a mistake of fact.

***EXAMPLE:** Bob the Blaster runs a blasting and excavation company. Bob signs a contract to purchase property located on the main drag of Acme City. Bob intends to use his new business location to test his blasting equipment before rolling it out in the field. After signing the contract, Bob discovers that blasting activities are illegal within the city limits of Acme.*

Assuming no fraud or misrepresentation by the seller, Bob's ignorance of the law does NOT result in either a void or voidable contract, and is NOT an example of mistake.

## **Illegality**

Courts cannot be called upon to enforce contracts that require one to break the law. For example, murder contracts, or contracts to purchase illegal goods or services are void and unenforceable.

## **Duress**

Duress exists where one is coerced into entering a contract by physical or threatening behavior. Such 'gun to the head' behavior does not result in a meeting of the minds. Therefore, such contracts are void from their inception and no action need be taken to render them so.

## PROGRESS CHECK 3

1. \_\_\_\_\_ is when one person intentionally tries to gain an unfair advantage over another.
  - A. Fraud
  - B. Duress
  - C. Misrepresentation
  - D. Consideration
2. Which of the following shows the exact amount of money owed from one party in a contract to another?
  - A. A promissory note
  - B. A contract addendum
  - C. An estoppel certificate
  - D. A consideration agreement
3. A mistake in a contract renders the contract:
  - A. Invalid
  - B. Void
  - C. Illegal
  - D. Voidable
4. Kenny is selling his farm so he can retire. Dolly made an offer via email on Monday and Kenny verbally counteroffered on Tuesday. On Wednesday Dolly talked the counteroffer over with her agent and they agreed to accept the offer. Dolly signed the counteroffer on Thursday morning and put it in the mailbox right after she sign to ensure it went out in the morning mail. Kenny received the signed counteroffer on Saturday afternoon. When was Dolly's acceptance effective?
  - A. On Wednesday
  - B. On Thursday
  - C. On Saturday

# MODULE 4

## Methods of Formation

### Learning Objective:

- Understand the various methods of forming a contract and how the number of parties to a contract varies based on the reason for the transaction

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### METHODS OF FORMATION

#### Background

Contracts, whether for real estate or other matters, may be created by formal adoption of express terms, as well as by terms which may be implied. Contracts may also obligate one or more persons to perform a task, depending upon whether it was created unilaterally or bilaterally. In this part, we briefly discuss these and other basic methods of contract formation.

#### Oral

A contract does not always need to be in writing; the basic elements of contract formation can be satisfied orally. However, oral contracts may be more difficult to prove in the event the parties turn to a court for enforcement. Contracts for the sale of land must be written and cannot be oral. This is true due to a legal rule called the “statute of frauds” (discussed later).

## **Express or Implied**

Any contract may contain express or implied terms. An express contract is one in which all terms and conditions are specified and agreed to in writing, orally, or both. An implied contract contains terms that have not been expressly stated or reduced to writing.

Instead, implied contracts contain terms that may be inferred from the nature of the transaction or the conduct of the parties. Implied terms in a contract can be the source of dispute; it is best to reduce all terms of an agreement to writing.

In the event of a dispute, courts may or may not rule that a term or condition is implied. Poorly drafted contracts, or contracts that leave something to subsequent agreement, often lead to litigation. Courts may determine that implied terms were actually a part of the preliminary negotiations rather than the contract itself.

## **Unilateral or Bilateral**

Contracts may be unilateral (obligating only one party to act) or bilateral (obligating both parties to act). A contract is unilateral when one party promises to perform without first receiving a promise to perform from the other party.

Technically, you could describe the promise or obligation in a unilateral contract as only a unilateral offer because there is no meeting of the minds until the second party decides to perform or to accept.



***EXAMPLE:** Jon lost his dog. Jon posts a sign around town stating that he will pay \$100 to anyone who finds and returns his dog. Jon's offer may only be accepted by performance that is, someone only has a contractual right to the \$100 after they find and return the dog.*

Much more common, especially in real estate transactions, is the bilateral contract. A contract is bilateral when both parties make promises of performance. That is, one party makes a promise in terms of an offer, and the other party makes a promise in terms of an acceptance of that offer.

Bilateral real estate related contracts include:

1. a real estate sales contract, where the buyer promises to buy and the seller promises to sell;
2. certain listing contracts signed by both seller and broker, where the seller promises to pay, and the broker also promises to do certain things such as advertise the property and use his best efforts to sell it.

## **PROGRESS CHECK 4**

1. In which type of contract is there the most opportunity for a dispute to arise?
  - A. Express
  - B. Unilateral
  - C. Executed
  - D. Implied

2. The \_\_\_\_\_ requires that contracts for the sale of land be written (not oral).
- A. State Constitution
  - B. Statute of limitations
  - C. Statute of frauds
  - D. Local zoning laws
3. What element of a typical contract is missing from a unilateral contract?
- A. Consideration
  - B. A notary
  - C. A written document
  - D. A meeting of the minds
4. An \_\_\_\_\_ contract is one in which all terms and conditions are specified and agreed to in writing, orally, or both.
- A. Express
  - B. Unilateral
  - C. Executed
  - D. Implied

# MODULE 5

## Performance Obligations

### Learning Objectives:

- Explain the performance obligations pertaining to real estate contracts
- Identify typical clauses found within real estate contracts
- Be able to differentiate between an executory and an executed contract
- Know the various conditions or restrictions that can be found in real estate contracts
- Understand the purpose of a home inspection, who the inspection benefits and the timing of having an inspection completed

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### BACKGROUND

Once a valid contract arises (offer/acceptance, consideration, lack of defenses), which may be an express, implied, unilateral, or bilateral contract in nature, the obligation to do (or perform) what was agreed to may be controlled by additional factors.

These additional factors that may govern one's obligation to perform include: whether the contract is executory, whether the contract may be transferred or assigned to a person other than an original party to the agreement, and whether the contract contains various conditions or restrictions. Here, we discuss these basic contract characteristics of performance under two headings: when must the parties perform, and who may perform?

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## EXECUTORY OR EXECUTED

A contract is “executory” when one or both parties has not yet performed. An example would be a sales contract where a seller has pledged to sell, and a buyer pledged to buy, but neither has yet performed. A contract is “executed” when there is nothing left to do by either party both have fully performed.

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## CONDITIONS

Contracts may contain various conditions, or contingencies. A condition is an event which may not be certain to occur, but must occur before performance under a contract is due.

***EXAMPLE:** A lessee may operate the leased premises as a restaurant provided that he first obtains the necessary parking variance, or a buyer agrees to buy the property contingent upon his obtaining the necessary financing.*

Conditions are often indicated by words such as “if,” “when,” “unless,” or “provided.” If a condition fails to occur, the parties are usually not entitled to damages because conditions are merely limitations; they do not create obligations. A condition can be almost any event and may be left to either party to execute.

***EXAMPLE:** A homeowner may condition payment for painting his house upon his satisfaction with the paint job. Also, an insurance company may condition payment of a claim upon the claimant furnishing proof of the loss. In these examples, there is a valid contract, but one or another party is not obligated to perform unless or until the condition or conditions are satisfied.*

## **Timing**

If specific times have not been stated for performance, the law will imply that a reasonable time was intended. “Reasonable” is what may be fairly allowed and required considering the nature of the act to be performed. When parties specify a definite time and further agree that “time is of the essence,” the parties will be held exactly to the time period specified.

## **Restrictions**

There are private restrictions and public restrictions that apply to property. Private covenants, conditions, and restrictions may be imposed on the use of real property by owners or developers. These include restrictive covenants written into real property instruments such as deeds, leases, and condominium declarations.

Some restrictions may enhance property values by promoting certain uniformity. Residential restrictive covenants commonly address lot size, types of architecture or building materials that can be used, and items such as whether or not outside clotheslines are permitted.

Illegal restrictive covenants, such as those that violate fair housing laws, are void and unenforceable. Buyers who discover illegal covenants in documents may choose to buy, ignoring the illegal covenant, or they may choose to insist on the removal of the illegal covenant prior to purchase.

Buyers are usually not within their right to completely void the contract, but they can prevent the transfer of title until the illegal restriction is removed. Public restrictions on the private use of property are usually accomplished by way of zoning ordinances.

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## WHO MAY PERFORM?

Sometimes, the parties to a contract agree to permit third persons to carry out performance obligations.

### **Assignable or Non-Assignable**

An “assignment” is the transfer of the right, title, or interest of one person (“assignor”) to another (“assignee”). Some contracts may be assigned to another person and some may not. Whether a contract is assignable depends upon the subject of the contract, and whether or not the parties, despite the subject, have specifically agreed to forbid assignment.

*EXAMPLE: Contracts for a personal service, such as a contract for a specific real estate agent to sell your property (listing agreement) are not assignable. However, most other real estate contracts, such as mortgage contracts, trust deeds, contracts for sale, lease contracts, and options are assignable, unless the parties agree otherwise in the contract.*

### **Power of Attorney**

A power of attorney is a legal, written document in which one person appoints another to be his attorney-in-fact, authorizing him to act on his behalf. The death of either party automatically revokes the power of attorney because it is a personal authorization. Thus, when an attorney-in-fact is conveying property on behalf of a grantor, proof is usually required that the grantor is alive at the time of the signing.

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## CONTRACT CLAUSES

In addition to addressing matters such as identity of the parties, property description, purchase price, closing (settlement) date, identity of the settlement agent, and date of possession, a contract

could also have one, or more, of the clauses detailed in the following slides.

### **Acceleration**

Specifies that if the borrower violates the covenants of the mortgage or DOT, then the entire loan balance becomes due and payable upon demand. In other words, the life of the loan is shortened, or accelerated to its end.

The lender may accelerate the note only if this clause is expressly included in the loan document. Also, the lender must give the debtor adequate notice (usually prescribed by law), and specify a time period to allow the debtor to cure the default. May appear in a Mortgage, Lease, Deed of Trust, and Installment Sales contracts (land installment contracts).

### **Contingency**

In a purchase transaction, there may be several provisions (contingencies) that must be met during the executory period of the contract before a party has the obligation to perform. The presence of contingencies is often indicated by words such as “if,” “when,” “unless,” or “provided.” If the contingency fails, the contract is voidable at the option of the party that the contingency is designed to protect/benefit.

*EXAMPLES: finance contingency (buyer does not have to buy if lender does not give him the loan), home inspection contingency (if inspector finds a problem, buyer does not have to buy).*

## **Default**

This provision sets forth the rights and obligations of the parties in the event that one party fails to perform. It lists the events that constitute de- fault and may also address the remedies (specific performance, damages) available to the parties in the event of a default.

## **Liquidated Damages**

Damages specifically agreed to by contracting parties in the event of a breach. In the event of a buyer default, sellers usually want the option of accepting a certain sum in damages (usually the earnest money deposit or accumulated payments made under the contract). Usually, this clause states that if the seller chooses liquidated damages as a remedy for a buyer's breach, he cannot also sue for other damages.

## **Notice**

In most contracts, the parties must give each other notice of different events during the executor period (title objections, results of inspection reports, whether the loan has been rejected or obtained, etc.) Notice provisions state where a party must be officially notified (home address, work address, through agent) and how (via fax, email, hand delivery, etc.). There are 3 types of notice, detailed in the next slides.

**Actual Notice:** Actual notice means that an individual received information or documents. When a person searches the public record, inspects the property, or is shown a legal instrument evidencing title, that person has actual notice of a deed's status.



**Constructive (Legal) Notice:** Constructive notice is a legal concept that charges the public with the responsibility to examine public records and to physically inspect property to proactively discover competing interests or claims on real estate. Recording a deed at a county courthouse, for example, provides constructive notice of ownership in the public record. Therefore, even if one lacks actual notice, they are charged with constructive notice of anything properly recorded in the public record.

**Inquiry Notice:** The law presumes notice when factors exist that would make a reasonable person inquire further, whether or not a person actually inquires further or discovers information.

### **Property Condition**

Most contracts provide that, at the closing date, the property will be in substantially the same condition as on the date the parties first signed the contract, (normal wear and tear excepted).

### **Prorations**

Any item that will be prorated (adjusted) between the parties at settlement date (property taxes, utilities, special assessments, HOA fees) should be set forth in a prorations clause.

### **Risk of Loss**

This clause usually provides that the seller bears the risk of loss due to fire or other casualty that occurs during the executory period of the contract.

## **Survival/Merger**

Under the law in many states, the promises and obligations in the contract are “merged” into the deed of conveyance and do not survive settlement. This means that if a party does not fully perform and the other accepts the property at settlement, he cannot later insist on full performance. The parties can circumvent the merger doctrine through a contract clause that allows the promises and obligations to “survive” closing.

*EXAMPLE: In a contract with a merger clause, a seller promises to deliver the house with newly painted shutters. The seller does not paint the shutters. The buyer accepts the house at settlement without objection or attempt to get a credit/reduction in price for the cost of painting shutters. After settlement, the buyer cannot sue the seller for the cost of painting the shutters.*

## **Time is of the Essence**

As a general rule, time limits in contracts imply “reasonable time” and are not strictly enforceable.

*EXAMPLE: A closing date that is set for July 15 means July 15 or a reasonable time thereafter. Most parties prefer the dates in a real estate contract to be enforced strictly so they include a “time is of the essence” provision.*

This phrase may appear in a contract, which means that the parties have agreed on a definite time for performing and that a party will breach the contract unless performance is rendered by the exact time specified.

*EXAMPLE: If the parties specify a closing date and time as “November 3, 2009, at 12:00pm,” and further specify that “time is of the essence,” then a party who arrives to the closing at 12:05pm is in breach of the sales contract.*

## **Title**

This provision addresses the quality of title that the seller must deliver (marketable title; insurable title), the interest being conveyed (fee simple), and the title warranties that the seller will make in the deed (general warranty, special warranty).

The title clause usually allows the seller to extend the settlement date for a specified time period to correct (if he can) any title defects revealed during the buyer's title search. If the title defects cannot be corrected, the contract is voidable at the option of the buyer. Most title clauses state that the purchaser is willing to accept common easements and restrictions recorded in land records.

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## **HOME INSPECTION**

In Virginia, it is common practice to conduct a home inspection after a contract is ratified. A contract will often include a home inspection contingency that provides a purchaser with the option of requesting additional repairs that are not already included in the contract.

It can also cancel the contract if the inspection provides information that makes the buyer reconsider the decision to purchase the home. The inspection findings can begin an entirely new set of negotiations between a buyer and seller. If the parties are able to reach an agreement, the seller may be required to make the requested repairs. Should an agreement never be reached, the contract becomes void.

## **Inspection & Report Period**

This is clearly stated in the contract regarding an agreed upon number of days that are given to the purchaser to conduct an appropriate

inspection. It most often includes a statement that the inspection is the sole cost and expense of the purchaser.

Such inspections can include building structure, flooring, foundations, HVAC, electrical, plumbing, insulation, drainage, windows, septic systems, and lead-based paint. Cosmetic items and other items of preference are not included in the inspection contingency.

### **Report**

If the inspection reveals defects that were unknown to the purchaser and the purchaser wishes to remedy, these defects should be presented to the seller, along with repair costs, before the Inspection & Report Period has ended. Inspection reports should also be provided to the seller.

### **Response**

The seller also has a set number of days to respond in writing to the purchaser's request. If the seller agrees to all repairs, an Addendum becomes effective. If the seller does not agree to all repairs, a negotiation period begins. During negotiation, any of the parties can accept the other's requests and end the negotiation.

If an agreement is not made at the end of the negotiation period, the purchaser can either terminate the contract or accept the seller's last offer. Difficulties can arise during negotiations if the purchase is unreasonable in the request of non-material defects, if the purchaser is not willing to negotiate and decides to terminate the contract (even if the seller offers to make repairs), or if the seller is not willing to make any necessary repairs to the property.

## PROGRESS CHECK 5

1. Public restrictions on the private use of property are usually accomplished by:
  - A. HOA Regulations
  - B. Mortgage clauses
  - C. Zoning ordinances
  - D. Deed covenants
  
2. If title defects cannot be corrected, the contract is:
  - A. Void
  - B. Voidable by the buyer
  - C. Illegal
  - D. Voidable by the seller
  
3. A contract becomes "executed" if:
  - A. Full performance has not been achieved but the expiration date has passed
  - B. It contains illegal terms
  - C. There has been a breach
  - D. Full performance has been achieved
  
4. Recording a deed at a county courthouse provides \_\_\_\_\_ notice of ownership in the public record.
  - A. Implied
  - B. Constructive
  - C. Actual
  - D. Verified

# MODULE 6

## Enforcement of Contracts

### Learning Objectives:

- Understand Contract Enforcement
- Explain the difference between the Statute of Frauds and the Statute of Limitations and understand how each pertains to real estate contracts

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### BACKGROUND

A valid contract can be oral or written so long as it contains the essential elements (offer/acceptance, consideration, and lack of defenses). But do not assume that all valid contracts are enforceable. In fact, courts will refuse to enforce some valid contracts.

For example, most real estate contracts must be in writing in order for courts to enforce them. Also, if you delay in filing a lawsuit to enforce a valid contract, courts may refuse to hear it. Below, we discuss validly formed, but unenforceable contracts.

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### STATUTE OF FRAUDS

The “Statute of Frauds” refers to state laws that require certain contracts to be in writing in order to be enforceable. The Statute of Frauds requires that all real estate contracts involving the sale of land, or the transfer of any ownership interest in land, be in writing and be signed in order to be enforceable.

As a result, courts may not enforce oral land sales contracts even if they are valid (that is, even if they contain the essential contract elements). All real estate leases for more than one year must also be in writing and signed in order to be enforceable. However, oral real estate leases for a period of one year or less are enforceable and need not be written.

The concept of estoppel (discussed previously) may override the statute of frauds and render an oral contract for the sale of land enforceable. However, estoppel applies only in limited circumstances where one unfairly relies on another's promise and suffers harm as a result.

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## STATUTE OF LIMITATIONS

“Statutes of Limitations” are laws that establish time limits on one's ability to bring a legal action, including an action to enforce a contract. If a lawsuit is filed to seek enforcement of a contract beyond the limitations period, courts will not hear the suit. These laws are intended to facilitate commerce by limiting liability.

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## DEATH OF PARTIES

Existing contracts for the sale of land survive the death of either party. In such cases, the estate of a deceased party must complete the real estate transaction. However, the death of either party terminates an offer that has not been accepted because offers are not yet contracts. But unlike real estate sales contracts, a personal service contract such as a listing agreement, does not survive the death of either party.

## PROGRESS CHECK 6

1. The Statute of Frauds requires:
  - A. Contracts to be in writing to be enforceable
  - B. Proven acts of misrepresentation or fraud must be considered first degree misdemeanors
  - C. Legal actions regarding contracts to be initiated within a set time limit
  - D. Deeds to be recorded publicly to avoid future title defects
2. The essential elements of a valid contract include: offer/acceptance, consideration and \_\_\_\_\_.
  - A. An expiration date
  - B. A meeting of the minds
  - C. Lack of defenses
  - D. Terms put in writing, signed and notarized
3. Which of the following contracts survives the death of either party?
  - A. A listing agreement
  - B. An offer to purchase real estate
  - C. An executory real estate purchase agreement
4. The Statute of Limitations was established for all of the following, EXCEPT:
  - A. To help facilitate commerce
  - B. To attempt to prevent disputes by enforcing only contracts in writing
  - C. To add limits to liability within contracts
  - D. To establish time limits on the ability to bring legal actions



# MODULE 7

## Contract Writing

### Learning Objectives:

- Be familiar with the multiple aspects that need to be considered when contract writing in the real estate field
- Identify an Installment Sales contract and an Option contract based on the purpose and specifics of each
- Know how real estate contracts can be terminated to include breach by either the buyer or the seller
- Describe the disclosures and/or disclaimer that need to be included in a real estate contract and be able to differentiate between the two
- Understand what a material fact is and how it differs from a latent defect

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### BACKGROUND

Before there is a sales contract, an offer to purchase is tendered to the seller. Offers alone are not contracts, but are invitations to enter into a contract. The offer to purchase is often formatted as a sales contract (containing proposed terms and conditions of sale), but without the seller's signature. When signed by only the buyer, the offer to purchase is merely an offer and not a binding sales contract.

However, should the seller accept the buyer's offer (generally by signing and delivering it), the offer then becomes the sales contract and both parties are bound to the terms and conditions stated therein.

The contract is executory after both parties sign it because performance is not yet due.

## **Purchase Agreements**

Purchase agreements, also known as sales contracts, specify the terms and conditions of sale between a buyer and seller of real estate. The sales agreement not only obligates a buyer to buy and a seller to sell, but it also specifies the terms, conditions, and mechanics of the real estate closing. The real estate closing is the event where ownership of the property is actually exchanged for the sales price and the terms of the sales contract are to be fulfilled.

The date and time of the closing, as well as the sales price of the property and the method of financing, are but a few of the important details that appear in sales contracts. When signed by both parties, a purchase agreement transfers equitable title to the buyer. Only after closing does the buyer receive legal title.

**Parties:** The parties to a residential sales contract are the buyer and the seller, or the vendee and vendor. The vendee is the buyer and the vendor is the seller. As we will discuss below, the buyer begins the contracting process by making an offer. The seller then must determine whether to accept that offer and enter into a contract (sales agreement) with the buyer.

**Elements:** Sales contracts are written, bilateral, executory (the contract is executory in that it is an agreement to transfer the deed to property at a future time through the closing process), and assignable (not involving personal services like listing and buyer broker agreements) contracts that are binding on all assignees and their heirs.

Just like any contract, sales contracts must contain the three basic contract elements—offer/ acceptance, consideration, and lack of any defenses. Along with these elements, there can, but need not be, a pledge or deposit of earnest money.

**Earnest Money:** Earnest money is a cash deposit that usually accompanies an offer to purchase. This deposit is evidence that the offeror intends in good faith to purchase the property. Customarily, earnest money is given to the licensee when the parties sign the sales contract, and its reception is acknowledged in the contract. In addition to the basic elements, sales contracts must describe the property in question. However, a legal description is not necessary in sales contracts; an address will suffice.

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## INSTALLMENT SALES CONTRACTS

An installment sales contract, also known as an “Agreement for Deed,” a “Land Contract,” or a “Contract for Deed,” is similar in some ways to the typical sales contract. They are written, bilateral, executory, and assignable contracts that bind assignees and heirs.

However, unlike a contract for sale where the purchase price is paid in full (usually through a mortgage) and title is transferred at closing, an installment sales contract defers payment of all or a portion of the sales price and title remains with the seller unless or until the buyer completes all payments.

The purchase price is often paid in installments over the period of the contract, with the final balance due at a later date (maturity). Only

after the buyer (also known as the vendee) completes all payments must the seller (also known as the vendor) deliver title.

Thus the installment sales contract contains elements of both a sales contract and a financing instrument (like a mortgage). Because the installment sales contract acts as a sales contract, a financing instrument, and a promise of a deed, it should be recorded to protect the buyer. Typical sales contracts are not generally recorded, unless there is an unusually long time between signing the agreement and closing.

If the seller defaults on an installment sales contract, the buyer may sue for specific performance, damages, or rescission. If the buyer defaults, the seller may evict the buyer and repossess the property. While the seller retains legal title to the property unless or until the buyer completes all payments, many states require the seller to go through foreclosure proceedings to collect money from a defaulting buyer and to regain possession of the property.

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## OPTION CONTRACTS

An option is a written, unilateral, executory, and assignable contract with a definite termination date between a property owner and a prospective buyer or lessee whereby the owner provides the right to buy or rent a particular piece of property for a fixed price at any time during an agreed upon period of time. When the option contract expires, the buyer/lessee no longer has the right to buy at the price and terms agreed to.

Instead, the seller is free to accept an offer from a different buyer and the first buyer is free to make a new offer.

An option contract must contain all of the essential elements and terms of the underlying contract for sale, so that if the buyer (also known as the optionee) decides to exercise the option, the option can then become a binding sales contract. If the option fails to contain all of the material terms of the future sales contract, it may be unenforceable.

The consideration may be applied to the purchase price in the event the option is exercised. However, the consideration may never be wholly returned to the optionee if he fails to exercise the option, because it would then fail to be consideration and the contract would be invalid.

Do not confuse an option contract with a right of first refusal! A right of first refusal gives its holder the right to be the first person to consider an offer to sell or lease property. A right of first refusal is not a contract and need not be accompanied by consideration because the owner is not bound by the right until he actually decides to sell or entertains an offer to buy or lease from a third party.

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## **TERMINATION OF PURCHASE AGREEMENTS**

Like any contract, sales contracts may be terminated under certain circumstances, and the cleanest way to terminate a sales contract is through complete performance—once all parties perform as agreed, the contract terminates naturally. However, it is often a dispute that causes a sales contract to terminate before performance is completed.

## **Breach by Buyer**

The buyer is in breach of the sales contract where she fails to materially perform as she agreed. Generally, remedies for a breach are specified in the sales contract. The most common remedy for the buyer's breach is forfeiture of her earnest money deposit. This is true because the buyer's deposit usually represents the agreed upon liquidated damages.

However, to be enforceable, the contract must specify a reasonable amount of money for liquidated damages. Where a remedy is not specified in the contract or the remedy is not limited to liquidated damages alone, the seller may sue the buyer for any damages she has suffered or for specific performance. Specific performance forces the buyer to carry through with the sale as agreed.

If the seller defaults on the contract, the buyer can terminate the contract and force the seller to return her earnest money. If there are no provisions for liquidated damages, the buyer may also sue for any damages she suffered, or for specific performance, which forces the seller to sell the property as agreed.

## **Breach by Seller**

Unlike personal service contracts (where courts would not force someone to perform as they agreed and would rely instead on money damages), specific performance is common with real estate transactions because each piece of property is unique and may not be remedied by the mere payment of money.

## **Death of Either Party**

It is important to remember that the death of a party to a sales contract will NOT cause it to terminate. In the event of a death, the

deceased party's estate will be obligated to perform under the terms of a valid sales contract.

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## DRAFTING PURCHASE AGREEMENTS

Brokers and agents frequently use standard sales contract forms that are commercially available, rather than drafting contracts from scratch. While brokers may assist and advise clients in filling out these standard form contracts, they must not charge an extra fee for this service. If a broker charges a separate fee for this service, the broker would be engaging in the practice of law.

Only licensed attorneys may practice law. All states have strict laws which punish anyone (including law school graduates) who practice law without a license. Therefore, it is important that the broker and agent avoid any activity that constitutes the practice of law.

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## DISCLOSURES AND DISCLAIMERS

Under many state laws, residential property sellers must either: disclose material information about property they are selling; or sign a disclaimer stating that the property will be transferred "as is." Often, these disclosure laws apply regardless of whether a real estate licensee is involved in the transaction.

Should a seller choose to disclose material information, most states provide a standard disclosure form. The standard disclosure form lists mandatory disclosures about the physical condition of the property that the owner has actual knowledge of.

These disclosures usually include the condition of: water and sewer systems, insulation, roofing, plumbing, electrical, HVAC systems, structural defects, land use, termites, and hazardous or regulated materials such as radon, asbestos, and lead-based paint.

Some disclosures are usually exempt, such as whether:

- An occupant is or was afflicted with human immunodeficiency virus (HIV). Disclosure of a person's HIV status could violate fair housing laws and the Federal Privacy Act.
- The property was the site of an act or occurrence which had no effect on the physical structure, the environment, or the improvements to the property.

Instead of making the specific disclosures above, most states permit the seller to sign a disclaimer statement, which generally states that the purchaser will be receiving the property "as is" with all defects which may or may not exist, except as otherwise provided in the real estate purchase contract.

### **Known Material Facts**

Real estate agents are obligated to obtain and verify information that a reasonable person would find important to the transaction. This obligation applies regardless of whether such information is favorable to the agent's client. Failing to obtain and verify such information may result in liability.

For example, a seller's agent must disclose information about known material defects in the property to all prospective buyers, as discussed below.



In addition to any state laws that may require disclosure or disclaimer of any specific real property elements, the broker has a common law agency duty to disclose known material facts about a property's condition to the customer. Material facts include any latent defects the broker may be aware of.

### **Latent Defects**

Known latent defects must be disclosed in order to avoid misrepresentation. A failure to disclose known latent defects could be grounds to rescind the sales contract (recall that misrepresentation can result in a void or voidable contract depending upon the circumstances). A latent defect is a defect in construction that is not readily apparent.

Examples of latent defects include: termite damage and rotted floor boards. Defects that are readily apparent like cracked concrete in the driveway are generally not considered to be latent defects (because they are not hidden).

## **PROGRESS CHECK 7**

1. In order to protect the buyer, an installment sales contract should be:
  - A. Notarized
  - B. Approved by a judge
  - C. Recorded
  - D. Insured

2. Which of the following would be considered a latent defect?
  - A. A missing outlet cover
  - B. A broken window
  - C. Worn carpet
  - D. A crack in the foundation
  
3. Broker Devon uses the flat rate commission structure and is charging Seller Simon the following: \$2,000 for marketing, \$200 to list on MLS, \$500 to assist with filling out the sales contract forms and \$1,500 for his time, labor and communications. Where has Broker Devon gone wrong?
  - A. It is against license law to charge flat fees as commission
  - B. It is an unauthorized practice of law to charge a fee for assisting with sales contract forms
  - C. It is excessive to charge for marketing AND MLS fees
  - D. It is against license law to charge a client for labor or communications
  
4. At what point would a buyer receive legal title to a property in conjunction with a real estate sale?
  - A. Only in case of a breach by the seller
  - B. Once the buyer's offer is accepted by the seller
  - C. After closing has taken place and the sale is final
  - D. Once the sales contract is signed by both parties

# MODULE 8

## Counteroffers

### Learning Objective:

- Know the purpose and rules regarding counteroffers

Often, the offer to purchase is not the only offer exchanged between buyer and seller. The seller may make a counteroffer, the buyer may make a counteroffer to the seller's counteroffer, and so on.

As discussed, the buyer (offeror—one who makes an offer) initially makes an offer to purchase to the seller (offeree—one who receives the offer). If the seller rejects the initial offer, and then makes a counteroffer, the roles are reversed.

The seller then becomes the offeror and the buyer the offeree with respect to the seller's counteroffer. Multiple counteroffers may occur, with the roles of offeror and offeree switching between buyer and seller.

An offeror may withdraw his offer at any time before the offeree accepts it. However, there is no sales contract until or unless one party accepts the other's offer.

## PROGRESS CHECK 8

1. Regarding real estate sales. who is allowed to make a counteroffer?
  - A. Only the buyer
  - B. The buyer or seller
  - C. Only the seller
  - D. Only a licensed real estate agent
  
2. Seller Henrico receives an offer from Buyer Wanda and decides to submit a counteroffer. Wanda received his counteroffer and plans to discuss it with her agent the following day. In the meantime, Henrico receives a second offer from Buyer Cecil with agreeable terms and would like to accept Cecil's offer, is Henrico allowed to accept Cecil's offer?
  - A. Only if Wanda does not accept his counteroffer
  - B. No, if he sent Wanda a counteroffer he is already under contract with her
  - C. Yes, he may accept immediately
  - D. He may only accept if he is able to withdraw his counteroffer with Wanda prior to her acceptance
  
3. Jim made an offer to purchase Anna's home. Anna countered Jim's offer to add time to the closing date. Anna then received another offer from Miguel and spoke to agent Felisha about some of the terms in the offer. Which of these people could be called "offeror"?
  - A. Only Anna the Seller
  - B. Jim, Anna and Miguel
  - C. Only Jim and Miguel
  - D. Felisha

4. Multiple counteroffers:

- A. Must be presented to the seller in the order of best offer to worst offer
- B. Must be presented to the seller one at a time with at least 24 hours allowed for consideration of each offer
- C. Creates confusion, the licensee should only present the first one to come in
- D. Must all be presented to the seller as soon as they are received

# MODULE 9

## Lease Contracts

### Learning Objectives:

- Explain the parameters surrounding the various types of lease contracts
- Identify the typical parties and elements that make up a real estate lease contract
- Explain how a covenant pertains to a lease and name the various types of lease covenants

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### LEASE CONTRACTS

A lease transfers the right of exclusive use and possession (but not ownership) of real estate for a specified period of time. By transferring the right of use, a lease establishes a legal interest in real property.

However, because a lease does not convey ownership, it is classified as personal rather than real property. In this section, we focus on the lease as a contract, and examine specific types of lease contracts and their proper use.

Contracts for lease may be written or oral (oral so long as they are for one year or less—see our discussion of the “Statute of Frauds,” bilateral, executory, and sometimes assignable contracts that can be for a definite or indefinite period of time, depending upon the type of tenancy.

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## LEASE CONTRACTS - PARTIES

The parties to a lease are the lessor (owner) and the lessee (tenant). If a lessee leases part of his interest—either a portion of the lease term or a portion of the leased premises—to another, he is subletting the premises to a sublessee. The sublessee pays rent to the lessee and has no contractual obligation to the lessor.

Most leases contain clauses prohibiting subletting without prior consent of the lessor. Assigning a lease contract transfers all rights and interest that a lessee/ assignor possesses to the lessee/assignee. The assignee usually becomes primarily liable to the landlord, while the assignor remains secondarily liable.

### **Effect of Voluntary Transfer (Voluntary Alienation)**

Voluntary sales and transfers of leased real property do not affect (or terminate) the underlying lease because the lease is a contractual personal property right. Residential leases may contain cancellation clauses, which permits landlords to cancel residential leases upon the sale of the property.

This allows a new owner to take the property without the existing lease. However, without a cancellation clause, the mere sale of the property will not terminate the lease (property transfers subject to an encumbrance).

### **Effect of Involuntary Transfer (Involuntary Alienation)**

1. **Foreclosure:** Most states have laws that terminate leases upon foreclosure (involuntary transfer).

2. **Eminent Domain:** A government taking of leased land terminates the lease.

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## LEASE CONTRACTS - ELEMENTS

To determine whether a lease is valid, courts apply contract law and look for the three basic elements— offer/acceptance, consideration, and lack of defenses. In addition to the basic contract elements, leases may contain other mandatory and optional elements as follows:

### **Writing**

The statute of frauds requires that leases for more than one year (one year plus one day) must be in writing to be enforced.

### **Signatures**

A lease is both a contract outlining the rights and obligations of the landlord and tenant, and a conveyance creating a leasehold estate in real property. Therefore, a lease of more than one year must be signed by the landlord. The tenant's signature is often not essential if the tenant has taken possession of the premises.

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## LEASE CONTRACTS - COVENANTS

Just as deeds have standard clauses and covenants, so do leases. In fact, some of the same clauses and covenants used in deeds are also recited in leases. The following are some clauses and covenants commonly found in leases:

### **Exclusive Right of Possession**

Most leases transfer the exclusive right of possession and use for a specified period of time through a covenant of quiet enjoyment. While



a landlord must guarantee a tenant the right of quiet enjoyment, the landlord retains fee title (referred to as leased fee title) and a reversionary estate. That is, the landlord retains ownership and the right to repossess the property after the lease term has expired.

### **Restrictive Covenants**

A landlord may restrict the use of the premises by means of restrictive covenants. For example, restrictive covenants in a shopping center lease might restrict one restaurant tenant to seafood items only, while restricting another to the sale of hamburgers and hot dogs only.

### **Protective Covenants**

Protective covenants are used to promote and protect a lessee's interests. For example, a lessee in a commercial or retail space may wish to obtain a protective covenant from the lessor, promising to prevent competitors from leasing in the same development.

### **Subordination Clause**

A subordination clause states that the lease is subordinate to all present and future mortgages affecting the property. Thus, the lessee agrees that the mortgager's rights are superior to her own. In the event of a foreclosure, this could result in the early termination of the lease.

### **Option Clause**

An option clause allows the lessee to extend the present lease, lease additional space, or purchase the leased property at a specific price, for a specific period of time, under specific terms and conditions. This functions just like an option sales contract. However, in this case, rent is valid consideration.

## **Escalator Clause**

An escalator clause allows the lessor to adjust payments up or down in response to specified contingencies. For example, an escalator clause in a lease might provide that rent increases when taxes or insurance premiums on the property increased by a certain amount.

## **Sale-Leaseback**

A sale-leaseback is a real estate sales/financing technique whereby an owner sells property to an investor or lender, then leases that same property back from the buyer for a period of time. This is commonly used to assist homeowners wishing to close on one home while awaiting completion of another.

These are only a few of the covenants and conditions found in leases. Other covenants or agreements might set forth what happens if the tenant sells his business, the right to sublet the premises, lease assignment, conditions of the premises, maintenance and repair responsibilities of the tenant and landlord, installation of trade fixtures, liability, insurance coverage, security deposits and disposition, and the landlord's rights in case of a tenant's default.

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## **LEASE CONTRACTS - TYPES OF LEASE AGREEMENTS**

There are different types of leasing agreements based in part on how rent is determined.

### **Gross Lease**

In a gross lease (also called a fixed lease or flat lease), the lessee pays rent at a fixed rate. In turn, the lessor pays taxes, insurance and all

other expenses such as maintenance and repairs. This is the most common type of leasing agreement.

### **Net Lease**

In a net lease, the lessee pays a base rent (a fixed amount) and also pays a prorated share of expenses associated with the building, such as taxes, insurance, and other specified operating expenses. The agreed upon expenses and operating costs to be paid by the lessee must be specified in the lease.

The lessee's prorata share is usually based on the amount of square footage leased. The base rent plus the prorata share of all the other expenses is referred to as the effective rent. Net leases are most common with commercial or industrial properties.

### **Percentage Lease**

The percentage lease usually requires a fixed minimum rent to be paid regardless of the tenant's business income. However, in addition to the fixed rent, the tenant pays a percentage of any business income that exceeds an agreed upon minimum amount of gross income. A percentage lease allows the landlord to participate in the good business fortunes of his tenants. Both a gross lease and a net lease may be percentage leases, as an additional method of determining monthly rent.

### **Graduated Lease**

A graduated lease provides for predetermined rental increases at specified times. An index lease for example, is a type of graduated lease which adjusts the rent up or down periodically based on changes in a specified index, such as the Consumer Price Index (CPI). There is

usually a cap set on the maximum change allowed over a period (such as 4% or 6%).

### **Ground/Land Lease**

A ground lease, also called a land or Pad lease, is a lease whereby an owner leases vacant land (or ground) to a tenant, who then builds his own building. These are long-term leases (typically 50 to 99 years) that enable the builder (lessee) to realize a return on his investment. Ground leases often involve elements of net leases and are most commonly used for commercial property.

### **Proprietary Lease**

A proprietary lease is a written lease without a fixed rental amount. It is primarily used in cooperatives. The lease is between the corporation (owner) and the stockholder (tenant). It is proprietary because the tenant is also a stockholder in the corporation that owns the building.

Rather than paying a fixed rent, the tenant (stockholder) pays a proportionate share of the carrying charges of the corporation. When a unit is sold, the proprietary lease is assigned to the buyer along with the seller's stock.

### **Revaluation Lease**

A revaluation lease (reappraisal lease) is one in which rent is adjusted periodically, according to the revaluation (reappraisal) of the real estate.

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## LEASE CONTRACTS - TERMINATION OF LEASES

Leases may be terminated in a variety of ways, depending upon the type of leasehold. Below, we discuss the most common methods of termination.

### **Expiration of the Term**

Leases that specify a definite time period (tenancy for years) expire automatically on the date specified. Periodic leases (tenancy from year to year), which renew at set intervals, will not expire automatically. Rather, periodic leases require proper notice, usually written, in order for one party to terminate.

### **Timely Notice**

Leases that specify a definite time period (tenancy for years) expire automatically on the date specified. Periodic leases (tenancy from year to year), which renew at set intervals, will not expire automatically. Rather, periodic leases require proper notice, usually written, in order to terminate.

Most state laws impose a minimum amount of notice to terminate a lease. However, most periodic leases, if in writing, specify a time period for proper notice that may lawfully exceed the minimum state law requirement. Without valid and timely notice, periodic leases automatically renew.

### **Destruction/Condemnation of the Property**

A lease may be terminated due to the destruction or condemnation of the property because possession, use, and quiet enjoyment are the basis of, and reason for, a lease.

## **Agreement**

The parties may terminate a lease by agreement. If a lessee offers to surrender the lease and the lessor accepts, then the lease will terminate and the lessee will no longer be liable for rent. Oral surrender agreements are usually valid and enforceable if the unexpired lease term is for one year or less. However, if the unexpired term is longer than one year the agreement must be in writing to be enforced.

## **Eviction**

If either party breaches the lease contract, the non-breaching party may sue for damages or to terminate the lease (eviction).

1. **Eviction by Landlord:** Landlord (owner) seeks court order to remove the tenant for materially breaching the lease contract (failing to pay rent). The landlord may sue the tenant for rent and any other damages.
2. **Eviction by Tenant:** The tenant may sue the landlord for constructive eviction. Constructive Eviction is when a tenant vacates leased premises without liability for rental payments because the landlord's action, or lack of action, renders the leased premises uninhabitable. In order to avoid liability, the tenant must vacate the premises promptly, and must be able to prove that the premises were indeed rendered uninhabitable (such as lack of heat, electricity, water, fire, or floods). The tenant's duty to pay rent is not terminated if the tenant remains in possession of the premises, or a court determines otherwise.

## **Rescission And Cancellation Agreements**

Similar to cancellation by agreement, the parties may agree to include a cancellation clause in a lease. Such clauses may be found in commercial and residential leases, as well as sales contracts. In a commercial or industrial lease, such clauses grant either party the right to terminate the lease upon specified conditions or the payment of specified sums of money.

The money paid for cancellation is usually sufficient to cover any damages or losses that would otherwise be incurred by the non-cancelling party (such as brokerage fees, amortization, and loss of rental income). Cancellation fees paid by tenants are generally tax deductible. Cancellation fees paid by landlords are generally treated as a capital expenditure.

Residential leases may contain cancellation clauses, which permit the landlord to cancel the residential leases upon the sale of the property. This allows a new owner to take the property without the existing lease.

In sales contracts, a cancellation clause may be used to manage any “back up” offers. For example, if a seller accepts an offer, but wants to entertain an offer from another buyer just in case the first buyer fails to complete the sale, he could accept the back up offer so long as he includes a cancellation clause. The cancellation clause specifies that the back up offer is accepted only if the initial contract is cancelled in writing.

## **Abandonment**

If a lessee abandons the leased premises without formal surrender and acceptance, the lease is terminated and the lessor regains full

possession and control of the premises. However, the lessee remains liable for any past or future rent until the lease expires.

### **Breach**

A breach is any violation of the terms or conditions of a lease without legal excuse. If the tenant is in breach, the landlord may sue for rent, damages, and may move to evict the tenant. If the landlord is in breach, the tenant may sue for damages and may claim “constructive eviction” if applicable.

With actual eviction, the landlord seeks a court order to remove the tenant from the premises. With constructive eviction, the tenant vacates the premises without liability because the landlord’s actions, or lack of action, renders the leased premises uninhabitable.

In order to avoid liability, the tenant must vacate the premises promptly, and must be able to prove that the premises were indeed rendered uninhabitable (such as lack of heat, electricity, water, fire, or floods).

The tenant’s duty to pay rent is not terminated if the tenant remains in possession of the premises. An action to evict is proper for an owner seeking to regain possession from one who has no legal right to possession, such as an adverse possessor or tenant at sufferance.



## PROGRESS CHECK 9

1. Under which type of lease are a tenant's business profits part of the rent?
  - A. Graduated
  - B. Ground
  - C. Proprietary
  - D. Percentage
2. Which clause in a sales contract helps to manage "back up" offers?
  - A. Cancellation clause
  - B. Severalty clause
  - C. Offers clause
  - D. Alternative clause
3. What does a cancellation clause in a lease permit?
  - A. Allows the landlord to cancel a tenant's lease if rent is not paid in over 60 days
  - B. Allows the tenant to cancel his lease if 30 days notice is provided
  - C. Allows the landlord to cancel leases if the property is sold
  - D. Allows the tenant to cancel the lease if maintenance issues are not repaired within 14 days
4. Under which type of lease is the tenant only responsible for the rent and the landlord pays all other expenses?
  - A. Net lease
  - B. Gross lease
  - C. Ground lease
  - D. Proprietary lease

# MODULE 10

## Contract Termination

### Learning Objective

- Identify the various ways a real estate contract may be terminated

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### BACKGROUND

Now, we will address the end of a contract, or that point when there are no additional duties and the contract terminates. When parties have fully performed their obligations under a contract, the contract is “discharged” and the obligations terminate because all conditions have been satisfied. Full performance is the ideal way to terminate a contract. However, there are other ways to terminate a contract as discussed below.

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### RESCISSION/CANCELLATION AGREEMENTS

Rescission or cancellation agreements refer to agreed upon remedies in a contract that allow parties to terminate the contract, and return to their original position, under specified conditions. It is not necessary to prove that money damages were suffered in order to rescind a contract.

Under some laws, purchasers may rescind a contract for any reason whatsoever for a limited time. These rescission periods are usually

from 3 to 10 days and are commonly referred to as a cooling off period. The Federal Truth-in-Lending Act, for example, guarantees a rescission period in some financial transactions, as do most state time-share and condominium laws.

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## NOVATION

Novation refers to the situation where the parties agree to substitute a new agreement in part or in full for an old one. By novation, the old agreement is terminated and ceases to bind the parties. Instead, the parties are bound by the new agreement.

*EXAMPLE: A buyer may agree to buy property subject to the existing mortgage. In this case, the mortgage company terminates the mortgage agreement with the seller and institutes it instead with the buyer who takes over the seller's responsibilities.*

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## ASSIGNMENT

As we discussed above, an assignment is the transfer of the right, title, or interest of one person (assignor) to another (assignee). In such cases, the assignee becomes primarily liable, and the assignor remains secondarily liable. This means that in the event of a breach, the non-breaching party must first seek damages from the party that is primarily liable.

The non-breaching party can only pursue action against the party that is secondarily liable if he is unable to obtain relief from the party that is primarily liable. However, an assignment accompanied by novation could eliminate any secondary liability.

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## IMPOSSIBILITY

A party may be excused from performing under an otherwise binding contract where she can no longer legally perform as she agreed. Examples include situations where two parties agree to close on a house within a specified period of time. However, prior to closing, the house is destroyed by fire. In such cases, even though there is a valid sales contract in place, the buyer is no longer required to complete closing because it is impossible for the seller to perform (produce the home).

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## BREACH OF CONTRACT

A breach of contract occurs where either party fails to perform as agreed in the contract without any recognized legal excuse. A “breach” may occur where the failure to perform involves only a minor defect, regardless of whether it is intentional. Where there is a breach of contract, the non-breaching party may terminate the contract and seek a remedy for the breach. Remedies for breach of contract may consist of monetary damages or an action for “specific performance.”

Monetary damages are limited to an amount specifically agreed upon (so called “liquidated damages” provisions), such as earnest money or accumulated payments, or to a monetary loss that a party actually suffers due to the breach.

**EXAMPLE:** *If a builder agrees to build a home for \$100,000, and the home will only cost \$90,000 to construct, the builder’s monetary damages would only be \$10,000 or the amount of profit he would have made from building the house.*

## **Specific Performance**

Specific performance is a court ordered remedy that forces the breaching party to perform as she agreed upon in the contract (to sell the property for the agreed price, for example). Specific performance is a common remedy in real estate because each piece of real estate is unique such that monetary damages may never suffice to remedy the breach.

## **Partial Performance**

The parties may mutually agree that only partially performing as agreed in the contract is sufficient to discharge the contract without breaching it. This “good enough” approach is acceptable only where both parties agree.

## **Substantial Performance**

That a party substantially performed may be grounds to require payment as agreed to in the contract. This commonly applies in the construction context. This doctrine protects people such as builders that complete their performance with only minor defects. While the general rule would declare that the builder is in breach of the contract, which would allow the buyer to terminate the contract, the doctrine of substantial performance would still require payment less the cost of any defects.

## PROGRESS CHECK 10

1. A contract "cooling off" period is usually a \_\_\_\_\_ day period to allow for contract cancellations.
  - A. 1-3 days
  - B. 3-5 days
  - C. 3-10 days
  - D. 5-10 days
2. The doctrine of substantial performance allows a construction contractor:
  - A. To receive partial payment even if there are minor defects in construction
  - B. To partially meet the terms of the contract and not be in breach
  - C. To increase the total price listed in the contract based on unforeseen costs that arise
  - D. To still receive payment if the buyer breaches the contract
3. Which of the following is allowed to be paid as monetary damages when there is a breach of contract?
  - A. Only actual damages incurred by the non breaching party
  - B. Actual damages, interest and pain and suffering
  - C. Actual damages and any courts fees that are incurred because of the breach
  - D. Only the amount agreed upon between both parties to the contract
4. Regarding contract termination, the key aspect of rescission is:
  - A. There has to be proof of monetary loss in order to rescind
  - B. Rescission is a privilege only allowed to a seller
  - C. Rescission must return the parties to their original status
  - D. Only a judge can order rescission of a contract

# MODULE 11

## How to Write A Contract

### Learning Objectives

- Review sample sales contracts from state and local associations
- Identify key components and common pitfalls when filling out contracts
- Review Brokerage Agreement Changes due to NAR 2024 Settlement

### BACKGROUND

Attention to detail when completing a contract is a crucial skill for all licensees. While your supervising broker and firm will dictate the specific forms to use when completing brokerage and purchase agreements, becoming familiar with standard forms is essential. In this module licensee will have the opportunity to review two different purchase agreements, along with key components for how to complete them. Additionally, licensees will review updated agency agreements in light of the recent changes due to the NAR Settlement.

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## VIRGINIA REALTORS® RESIDENTIAL CONTRACT OF PURCHASE

When filling out the **Virginia REALTORS® Residential Contract of Purchase** (Form 600), it is crucial to ensure the following key areas are accurately completed, as these sections often lead to major issues if filled incorrectly:

1. **Real Property Description (Section 1):** Ensure the property's legal description and address are filled in completely and accurately. This avoids confusion about what is included in the sale.
2. **Purchase Price and Payment Terms (Section 3):** Double-check that the purchase price is clearly stated in both words and numbers. Ensure any financing details, such as third-party loans, seller financing, or cash payments, are correctly specified.
3. **Deposit (Section 4):** Clearly indicate the amount of the deposit, who the escrow agent is, and whether the deposit has been paid or will be paid within the specified time. This ensures proper handling of escrow funds.
4. **Financing (Section 5):** If financing is involved, ensure that all terms, such as loan amounts, interest rates, and deadlines for obtaining financing, are filled in accurately. Incorrect or incomplete financing details can jeopardize the deal.
5. **Property Condition and Inspections (Sections 16 and 19):** Indicate whether the buyer is waiving inspections or intends to



conduct them. Clarify any contingency for inspections and whether any repairs or improvements are expected before settlement.

6. **Settlement Date (Section 9):** Provide a specific date for the settlement, as failure to do so can lead to delays or confusion. This section also defines when possession will transfer to the buyer.
7. **Disclosures (Sections 22-23):** If the property is part of a condominium or property owners' association, ensure that all necessary resale certificates or disclosure packets are obtained and provided to the buyer. Timely delivery of these documents is critical for compliance with state laws.
8. **Signatures and Ratification (Section 32):** Ensure all parties, including the buyers, sellers, and agents, sign the contract where required. The ratification date must be filled out to confirm when the contract becomes legally binding.

Failing to address these areas can lead to legal disputes or delays in the transaction, so it's essential that they are handled with care. A Sample VAR Contract is located in the course Addendum.

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## NVAR STANDARD PURCHASE CONTRACT

For the **NVAR Residential Sales Contract** (NVAR K1321 form), here are the key areas to focus on to avoid issues during completion:

1. **Property Description (Section 1):** Ensure that the legal description and full address of the property, including Tax Map/ID, subdivision, and parking spaces (if applicable), are correct. Incorrect or incomplete property information can cause disputes.
2. **Price and Financing (Section 2):** Verify that the down payment, financing details, and total sales price are accurate. Any financing contingency must be clear, especially regarding loan types (e.g., FHA, VA, or conventional) and the deadlines for applying for financing.
3. **Deposit (Section 3):** The deposit amount, how it will be held, and the timeline for delivering it to the escrow agent must be clearly specified. Make sure the deposit is paid within the agreed timeframe.
4. **Settlement Date and Settlement Agent (Sections 4 and 5):** Clearly specify the settlement date and ensure the correct designation of the settlement agent. Delays or misunderstandings about the settlement timeline can create significant issues.
5. **Delivery (Section 6):** Make sure all delivery methods (email, fax, etc.) are clearly chosen and include accurate contact details. This ensures that all critical notices, such as disclosures or

amendments, are received properly.

6. **Virginia Property Owners' Association and Condominium Disclosures (Sections 8 and 9):** If the property is subject to a property owners' association or condominium association, ensure that required disclosure packets are provided. The buyer's right to cancel based on receiving or not receiving these documents must be respected.
7. **Property Condition and Inspections (Section 10):** Confirm whether the sale is contingent upon inspections, and ensure all inspection agreements are attached. If inspections are waived, it should be clearly documented to avoid disputes.
8. **Personal Property and Fixtures (Section 13):** Ensure clarity about what personal property and fixtures convey with the sale, such as appliances, ceiling fans, and window treatments. Disputes often arise about whether certain items were included.
9. **Title (Section 20):** It is important that the title is good, marketable, and insurable. Make sure any issues related to the title are handled before the settlement date.
10. **Default and Remedies (Section 28):** Understand the consequences if either party defaults. Clearly specify how deposit funds will be handled in the case of buyer or seller default and the remedies available to the non-defaulting party.

These sections are crucial to a smooth transaction, as errors or omissions can lead to disputes, delays, or legal complications. A Sample NVAR Purchase Contract is located in the course Addendum.

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## UPDATED BROKERAGE AGREEMENTS IN LIGHT OF 2024 NAR SETTLEMENT

Beginning August 17, 2024, licensees will need to carefully review all versions of their existing and new brokerage agreements. Best practices are to defer your supervising broker for current contract forms and agreements related to representing buyers or listing agreements.

### **Sample from Northern Virginia Association of Realtors**

NVAR's new brokerage agreement (both listing and buyer-broker agreements) will be required beginning on August 17th. This means that all clients should sign the new versions of the brokerage agreements.

This is important because the pre-July 1 versions of the brokerage agreements do not fully comply with the practice changes required by the settlement agreement.

**For example:** Buyer's agents are prohibited from receiving any compensation in excess of what is agreed to in Paragraph 8 of the Buyer-Broker Agreement after August 17, 2024.

Listing brokers should inform their clients that offers of compensation will no longer be an option on Bright MLS.

If your client is unable or unwilling to execute a new brokerage agreement, please consult an attorney to advise on how to properly amend the brokerage agreement to ensure accuracy.

Please find a link to the updated agency agreements forms:

<https://www.nvar.com/realtors/laws-ethics/forms-revisions/form-changes/form-changes/2024/08/05/standard-forms-changes-august-14-2024>