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2027 INAUGURAL & LEGISLATIVE CONFERENCE

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Seven Contract Mistakes REALTORS® and Their Buyers Should Avoid



Real estate purchase and sale contracts are both the lifeblood and the bane of a REALTOR®'s existence. When a property goes under contract it is a source of joy. When disputes arise in a real estate transaction, and the parties are fighting over the words in the contract, and even worse, the special stipulations you drafted, it can be a source of great anxiety. Mistakes in contracts can be costly both to the REALTOR® and the REALTOR®'s client. This article will address some of the most common mistakes in contracts and how they can be avoided.

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1 | Forgetting That Some Contracts Need Special Stipulations

The GAR Purchase and Sale Agreement works exceptionally well in most situations. However, no contract form can be a perfect fit for every unique piece of real estate or for every individual buyer and seller. In preparing a contract, REALTORS® should always ask their clients if there is anything particularly important to them that they want to make sure is addressed in the contract. So, for example, if the buyer is concerned about the size of the lot or the square footage of a house, it is best to add a seller warranty on those items that survive the closing. The more transactions a REALTOR® does, the better able a REALTOR® becomes at deciding whether and what special stipulations might be appropriate for a given transaction.

While REALTORS® may be best able to identify what unique issues need to be addressed in a contract based on their experience and their conversations with their clients, they should, whenever possible, try to use special stipulations prepared by an attorney or use one of the stipulations published in the GAR forms library. Additionally, they should make sure that the party they are working with has a chance to carefully review, edit and approve any special stipulation that is drafted.

2 | Including Language in Special Stipulations That is Already in the Contract

REALTORS® should avoid including language in special stipulations that is already in the GAR Purchase and Sale Agreement. Doing so creates a question of why this was done and whether the intent was to amend or possibly narrow the language that is already in the contract.

For example, let's say a REALTOR® adds language saying, "Buyer shall have the right to inspect the property immediately before closing". The GAR Purchase and Sale Agreement already gives buyers the right to inspect the property at all reasonable times from the binding agreement date up through and including the day of closing. So, in adding this language as a special stipulation, is the intent to emphasize this point or possibly narrow the inspection right to only immediately before the closing? While most REALTORS® would argue that their goal was to emphasize the point, the fact that a counter-argument could be made that the provision possibly limits a buyer's inspection rights should be reason enough not to include language that is already in the contract.

3 | Allowing Clients to Terminate Contracts Prematurely

Impatience is costing sellers what would otherwise be their clear entitlement to earnest money. Let's look at a typical situation where this occurs. The buyer is declined for financing after the financing contingency has expired but seven days before the closing. The due diligence period has also expired so there are no more contingencies left in the contract. The buyer's broker notifies the seller's broker that the buyer has been turned down for a loan. Now, if the seller just waits until the closing date, and the buyer fails to purchase the property, the buyer will be in breach of contract, and the seller will be entitled to the earnest money. However, too many sellers get impatient when they hear the bad news that the buyer's loan application was denied. They assume, often correctly, that the buyer will not be able to purchase the property. However, in their haste to get their property back on the market, they terminate their contract prematurely and, in so

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doing, put themselves in breach of contract. Of course, what the seller should have done was to wait to see if the buyer, however improbable, was able to find another source of funds to purchase the property. By terminating early, the buyer now gets his or her earnest money back due to the seller's default.

4 | Writing Repair Special Stipulations That Are Vague

Writing vague repair stipulations is a great way for buyers not to get the repairs they were hoping to get. What we often see are special stipulations such as "Seller to fix all of the defects in the attached inspection report" or "Observed areas of concern with the roof that may allow for water intrusion and concealed damage. Seller to have an evaluation by a roofer and correct if necessary."

Of course, the problem with this approach is that neither special stipulation addresses what the specific problems are, how they are going to be fixed and who is going to fix them. This is one of the more challenging areas for REALTORS® to address because how something should be fixed is often the subject of debate, is sometimes unknown until an area is opened, and sometimes requires multiple contractors to evaluate before the right corrective approach is agreed upon. REALTORS® are taught to try to answer the "who, what, when, where and how questions" regarding each needed repair but while this approach is appropriate, it often leads to very long stipulations that can be off-putting to sellers.

One approach that may reduce some of the lengthiness of repair special stipulations is to focus on the result that the buyer is looking for, rather than how any repair is going to be made. The special stipulation (at right) is an example of such an approach.

> *"Seller to correct the defects listed below such that upon the completion of the work, the items are in good working order and repair and fit for the purposes for which they are intended. Work for which a professional license is required in Georgia, such as plumbing or electrical, shall be performed by a person or company with such license. Other work shall be performed by a person or company whose full-time job is to install, repair and replace the item or items in question that are defective. Prior to closing, Seller shall obtain from the contractor and provide to the Buyer a copy of the description of the work, the paid receipt, and a one (1) year written warranty against the problem for which the work was performed reoccurring from each contractor correcting one of the defects, or which warranty shall be enforceable by Buyer."*



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5 | Mistakenly Thinking That a Contract Expires if a Party Fails to Close

Contracts do not automatically expire if the buyer or seller fail to show up for the closing. Instead, when a party fails to close, that party is then in breach of contract. However, the breaching party can cure the default by offering to immediately close on the property. If the non-breaching party (usually the seller), has no interest in working further with the breaching party (usually the buyer), the non-breaching party should send a notice of termination to the breaching party due to the failure of the breaching party to honor the terms of the contract. This is normally done the day after the closing date was missed since the buyer or seller could in theory unilaterally extend the closing date for eight days at 11:59 p.m. on the day of the closing.

6 | Not Explaining to Buyers What Needs to be in a Loan Denial Letter

Buyers regularly make the same three mistakes with regards to loan denial letters. Specifically, buyers frequently:

- **a** | Send a loan denial letter written by a lender other than the approved lender identified on the contingency exhibit;
- **b** | Send a letter for the wrong loan; and
- **c** | Send a loan denial letter later than seven days from the date the contract was terminated due to an inability to get financing.

Since each of these reasons is enough to cause the buyer to lose their earnest money, REALTORS® should explain in detail to buyers how this provision works and how to comply with its requirements.

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7 | Sellers Not Updating the Seller's Property Disclosure Statement or the Community Association Disclosure

Both the Seller's Property Disclosure Statement and the Community Association Disclosure need to be regularly updated whenever the information in these documents becomes outdated. With the Seller's Property Disclosure Statement, the information often becomes outdated when a home inspector discovers defects previously unknown to the seller. With the Community Association Disclosure, the information typically becomes outdated at year end when the annual assessment normally increases.

Failing to update the Seller's Property Disclosure Statement can get the seller sued by a buyer who learns of a previous inspection report and sues the seller for not disclosing a latent or hidden defect in that report. Failing to update the Community Association Disclosure can obligate the seller to pay any increase in the annual assessment if the previous year's annual assessment is disclosed to the buyer as the correct assessment. Both of these mistakes occur with great frequency because sellers routinely forget that updating their disclosure forms is a requirement under the contract. REALTORS® can prevent claims and save their clients money by simply reminding sellers of their legal obligations in this area.

In conclusion, major contract mistakes can be avoided by REALTORS® simply using greater diligence in thinking about the contracts they are filling out, in drafting special stipulations and in advising clients on contract pitfalls.

Seth G. Weissman is GAR General Counsel and senior partner of the law firm of Weissman PC.

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