

CONTRACTS AND CLOSING – POST 302 STUDY GUIDE

Contract Validity and Enforceability

- What type of conditions or circumstances make a contract valid? **A valid contract satisfies all legal requirements for a contract and is enforceable by law.** Essential elements of a valid contract are mutual assent (offer and acceptance), consideration, legal contractual capacity, and lawful objective. The Statute of Frauds requires all contracts to convey real property to be in writing and signed by all parties to be enforceable in a court of law.
- What type of conditions or circumstances make a contract void? **A void contract is unenforceable in a court of law.** Examples: (1) Contracts executed with a person declared mentally incompetent by a court of law. (2) Oral contract to sell real estate (can still be completed but no legal remedies). (3) Certain illegal contracts (all or only part of the contract can be unenforceable).
- What type of conditions or circumstances make a contract voidable? **A voidable contract is one where performance can be avoided by one of the parties based on some legal principle.** Examples: (1) Contract with a minor. (2) Contract with a person mentally incompetent in fact but not declared so by a court of law. (3) Contract with a person under the influence of both legal and illegal narcotics or alcohol.
- What are the three contract law categories of mentally incompetent persons? (1) Legally declared incompetent by a court of law. (2) Incompetent in fact but not declared so by a court of law. (3) Under the influence of narcotics.

Offer and Acceptance

- When an offer has been made, what must take place to create a binding contract? **It must be unconditionally accepted (signed) by the offeree and the acceptance must be properly communicated back to the offeror or offeror's agent.**
- After being informed of the seller's acceptance of the buyer's offer from the listing agent, must a buyer's agent notify the buyer of the seller's acceptance in order to form a binding contract? **No**
- A buyer's agent has received proper communication from a listing agent of acceptance of buyer's offer. Buyer has not been informed. Can buyer still withdraw the offer? **No. Once communication of acceptance has occurred (listing agent notifies the buyer's agent of the seller's acceptance), the buyer can not withdraw the offer even if the buyer has NOT been informed of the seller's acceptance.**
- What is the mailbox rule? **Applies as a method of communicating acceptance of an offer. Offer is considered accepted at date and time of mailing once in control of mail service and out of offeree's control. Must be properly addressed to the offeror or offeror's agent. Time of actual receipt by offeror is irrelevant. Neither party can withdraw offer or acceptance once mailed.**
- Can the offeree use the mailbox rule to accept an offer if the offeror agrees? **Yes**
- Does offeree mailing acceptance to the offeree's agent constitute communication to the offeror? **No**
- Does the offeror or offeror's agent have to receive a copy of the signed accepted contract from the buyer or buyer's agent to create a valid contract? **No, as long as proper communication of acceptance has occurred.**
- Can an offer be made with a time limit for acceptance? **Yes**
- Does an offer with a time limit require the offeror to leave the offer open for the entire time limit? **No**
- If an offer is withdrawn before communication of acceptance occurs, what happens to the:
 - Earnest money? **Returned to the buyer**
 - Due diligence fee? **If collected, returned to the buyer. Should not be given to seller until a contract is formed.**
- Absent a specific method of notification, what method does the seller's agent use to communicate acceptance to the buyer's agent? **Reasonable**
- What effect does a seller's change to a buyer's offer have on the offer? **It is a rejection of the offer**

Electronic Transactions

- Can a valid, enforceable contract between a buyer and seller be created via email without either party ever talking to each other? **Yes, as long as there is an offer, acceptance of the offer (signing) and proper communication of acceptance back to the offeror. All can be accomplished via email according to the Uniform Electronic Transactions Act.**
- What is required for an offer and acceptance to take place electronically? **Both parties must agree to doing business electronically**
- Is there a time limit to rescind acceptance automatically attached to an electronically submitted offer? **No**
- Is there a requirement to have original signatures on a single contract to make the electronic agreement enforceable? **No**
- When is an electronic acceptance deemed communicated? **When received in its entirety on the receiving parties' device or machine.**
- What should be done when having discussion or negotiation conversations electronically? **Be careful to make all parties aware that you are only discussing possibilities, not rejecting the offer or making a counteroffer.**

Impossibility of Performance

- Does impossibility of performance discharge a contract? **Generally, no. Performance is not excused by unforeseen difficulties, by unusual and unexpected expenses, by strikes, by the difficulty of obtaining raw materials, by fire, or by accidents.**
- What must happen for impossibility of performance to discharge a contract? **Express language to that effect should be included in the contract.**
- Does the seller dying after contract formation but prior to closing void the contract? **No. The seller's estate is obligated to complete performance under the contract terms. Death does not automatically terminate a contract.**

Names

- How should parties to the transaction be identified in the sales contract? **By their full legal names.**
- What names cannot be used for buyers or sellers? **Nick names**
- Give an example of how marital interest may be indicated when entering names on the Offer to Purchase and Contract? **Michael Albert Smith and wife Elizabeth Tonya Smith**
- When liquidating an estate, who are the "owners"? **The seller's estate, which would be the heirs, unless a power of attorney has been given to the administrator.**

Disposition of Earnest Money Deposit

- When can earnest money deposits be returned to the buyer? **Buyer terminates the contract prior to the end of Due Diligence Period, the seller defaults, or the property is destroyed (or other contract condition is not met even if after the end of the Due Diligence Period.)**
- What type of damages do earnest money deposits represent to the seller? **Liquidated**
- Where is the buyer's Earnest Money Deposit held? **In the trust account of the escrow agent named in the sales contract.**
- If an Initial Earnest Money Deposit check is provided with the buyer's offer and the offer is subsequently withdrawn by the buyer prior to receiving the seller's acceptance, who gets the earnest money? **The Earnest Money Deposit check will be returned to the buyer since no contract was created. The check should be deposited into the escrow agent's trust account within 3 banking days after contract formation.**
- If during the Due Diligence Period the buyer decides to terminate the contract, who gets the Earnest Money Deposit? **The buyer will receive a refund of the Earnest Money Deposit from the escrow agent.**
- What reason must the buyer give to have their Earnest Money Deposit returned if the buyer properly terminates the contract during the Due Diligence Period? **None. The buyer can terminate for any reason or no reason.**
- If, after the Due Diligence Period, the buyer breaches the contract, who gets the earnest money? **The seller**

- If, after the Due Diligence Period but before closing, the property is destroyed and the buyer decides to withdraw from the contract, who gets the earnest money? **The buyer**
- If, before closing, the property is destroyed; is the buyer required to withdraw from the contract? **No**
- If not, what are the buyer's options? **The buyer gets the insurance money**
- When should the broker disburse the earnest money to the closing attorney? **No more than 10 days prior to the settlement date.**

Due Diligence Period and Due Diligence Fees

- If during the Due Diligence Period the buyer decides to terminate the contract, who gets the Due Diligence Fee? **The seller will retain the Due Diligence Fee.**
- When can due diligence fees be returned to the buyer? **When the seller defaults.**
- What is the Due Diligence Period? **The time period that a buyer can inspect any areas of the property or circumstances affecting the property for the buyer's satisfaction.**
- What fees are returned to the buyer if the contract is terminated prior to the end of the due diligence period? **Earnest money deposits are returned.**
- Are Due Diligence fees required? **No**
- Who gets the Due Diligence fee? **The seller. It is a check made out directly to the seller.**
- Does the Due Diligence fee have to be placed in an escrow account? **No. The check is made out to the seller.**
- Does the contract automatically terminate at the end of the Due Diligence Period if the buyer does not inform the seller that the buyer intends to complete the transaction? **No**
- What buyer Property Investigations are recommended as part of the Buyer's Due Diligence Process in the Offer to Purchase and Contract 2-T? **See the contract.**
- Can the buyer continue to inspect the property after the end of the due diligence period? **Yes**
- What form should the buyer use to request repairs or improvements to the property during the Due Diligence Period? **Due Diligence Request and Agreement**
- When must the seller complete all repairs or improvements to the property negotiated during the Due Diligence Period? **By the settlement date.**
- Is the buyer limited to only requesting repairs on certain items? **No**
- Is the buyer limited to only investigating the items listed in the contract? **No**
- Is the seller required to make any repairs to the property prior to contract formation? **No**
- Is seller obligated to agree to any repair requests from the buyer? **No**
- Is a Due Diligence Period automatically extended if the buyer requests it or if the buyer is unable to complete inspections prior to the end of the Due Diligence Period? **No**

Fixtures

- What fixtures are shown on form NCAR/NCBA Standard Form 2-T Offer to Purchase and Contract as being included with the property? **Examples: Storage sheds, window/door blinds and shades, door and window screens, surface mounting brackets for televisions and speakers, mailboxes, light fixtures (including bulbs), etc.**
- What fixtures would not be included? **Refrigerators (unless built-in), washers and dryers, trees in movable containers, etc.**

Buyer Representations

- What buyer representations are addressed in the Offer to Purchase and Contract – Form 2T? **Where the buyer is obtaining the funds necessary to complete the purchase, buyer's other property requirements, status of the buyer's receipt of the required RPOADS and MOG disclosures.**
- Can all representations be changed to a condition? **No**
- What is required to change an allowed representation to a condition? **If allowed, must attach the appropriate addendum that changes it into a condition.**

- Is the contract conditioned on the buyer's ability to obtain a loan or the funds necessary to purchase the property? **No**

Seller Obligations

- What are the 14 seller obligations in Paragraph 8(a) to (n) of the Offer to Purchase and Contract Form 2-T? **See the contract.**
- When is the seller required to correct any title defects (even those discovered after the Due Diligence Period)? **By the settlement date.**

Contingent Sale and Back-up Contract Addendum

- Has the Contingent Sale Addendum been eliminated? **Yes. It was eliminated July 1, 2019. If a buyer and seller want to agree to make the contract contingent or conditioned on the sale or lease of a buyer's other property, an appropriate contingency addendum should be drafted by an attorney.**
- When is the Back-up Contract Addendum used? **When a buyer wants to make an offer and enter into a sales contract to purchase a property that is already under contract for sale. Brokers are required to present all offers.**

Additional Provisions Addendum

- When is the Additional Provisions Addendum used? **(1) Putting an expiration time/date on an offer. (2) Septic system installation/modifications on properties with improvements already on them. (3) When the property is being conveyed subject to leases or tenant rights. (4) When the buyer and seller want to agree that the seller is going make repairs and/or improvements to the property as part of the contract. (5) When a manufactured/mobile home is conveying as personal property. (6) To determine whether the buyer or seller is going to pay for preparation of the pool or spa for inspection.**
- If the buyer uses the Additional Provisions Addendum to request that the seller make certain repairs or improvements to the property as part of the contract, when should those repairs or improvements be completed? **Prior to the settlement date.**

Offer to Purchase and Contract – Vacant Lot/Land 12-T

- When is the Standard Form 12-T Offer to Purchase and Contract – Vacant Lot/Land used? **When a buyer wants to purchase an undeveloped lot in a subdivision to build a house.**
- Can this sales contract be used to purchase large tracts of land? **No**

Lead-Based Paint

- When must the Lead-Based Paint Addendum be attached to the Offer to Purchase and Contract? **When the home was built prior to 1978.**
- Does the seller have to certify that the property is free of lead-based paint? **No**

Submitting Offers to Seller

- When should offers be presented to the seller? **Immediately but in no case later than 3 days from the broker's receipt of the offer.**
- Is the existence of multiple offers a material fact that the listing agent must disclose to prospective buyers or buyer's agents? **No**
- What does the listing agent require to share the existence of offers with other buyers or buyer's agents? **The seller's permission.**
- How must concurrent multiple offers be presented to the seller? **Present all offers to the seller immediately and in no certain order. There is no priority to offers. For example, the broker does not have to present the first offer received first.**

Response to Buyer's Offer (340-T)

- What is NCAR form 340-T Response to Buyer's Offer used for? (1) To reject the Buyer's original offer and suggest terms that the Buyer might include in a new offer to the Seller. (2) To set a time/date deadline for review of offers received by the seller. (3) To reject a buyer's offer.
- Does the Response to Buyer's Offer form create a counteroffer or conditional acceptance of the buyer's offer? No
- Does the Response to Buyer's Offer form create a binding contract if signed by the Buyer? No

Sales Contracts and Practices

- Can the NCAR/NCBA Offer to Purchase and Contract be used as an offer to purchase by a buyer or an offer to sell by a seller? Yes
- Can a listing agent sign on behalf of their seller-client and accept an offer to purchase from a buyer? No
- Can a pre-printed sales contract provided by a broker include the brokerage fee split between cooperating real estate firms? No
- Does the N.C. Real Estate Commission write or approve real estate sales contract forms? No
- When parties want to make changes to the pre-printed sales contract forms, what should a broker do? Refer the parties to an attorney to have the appropriate contract language drafted. Never advise the parties to draft their own language or documents, suggest language to be changed or added, or tell the parties that the changes cannot be done.
- Is the agency disclosure (WWREA Disclosure) date required in any offer and sales contract form? No
- Can the Offer to Purchase and Contract 2-T be assigned? Only with the written mutual consent of all the parties.
- What can happen if the seller breaches the sales contract? If the buyer elects to terminate the contract due to the seller's breach, the Buyer is entitled to return of both the Earnest Money Deposit and the Due Diligence Fee as well as reasonable costs actually incurred by the buyer in connection with the buyer's due diligence. If the buyer elects not to terminate the contract, the buyer could sue the seller for Specific Performance to request a court to force the sale of the property.
- Can a property description be too vague to be enforced? Yes. Example: Seller's house on route 17 between the South Carolina border and the New Hanover border. If seller owns more than one house that would be too vague.

RESPA and TRID

- To what types of loans does RESPA apply? Applies to most (NOT ALL) residential (1-4 unit) transactions involving a federally related mortgage loan.
- To what types of loans does RESPA NOT apply? Mortgage loans for commercial, business or agriculture purposes.
- What are the consumer protections required under RESPA? (1) Disclosure and borrower credit for "yield spread premiums". (2) Loan servicing disclosure. (3) Escrow account restrictions. (4) Prohibits kickbacks or referral fees between settlement service providers. (5) Disclosure of Affiliated Business Arrangements. (6) Required special information booklet for borrowers. (7) Written estimate of settlement service charges
- What limitations does RESPA place on loan escrow amounts? Limits the amount that lenders/servicers may collect from a borrower and maintain in the borrower's escrow account. Maximum amount collected monthly by the lender is 1/12 of annual tax and insurance disbursement. Lender may escrow a cushion amount not to exceed 1/6 of annual tax and insurance disbursement (2 months).
- Does the RESPA restriction on kickbacks apply to referral fees between real estate brokers? No
- How many days does a lender have to provide a written estimate of settlement charges to the borrower? Lender must provide within three business days of loan application.
- What are the penalties for violating RESPA? Imprisonment for up to one year. Criminal fines up to \$10,000 per violation.
- Under the TRID rules, what changes require a new Closing Disclosure (CD) and a new three-day waiting period before closing? Increase of more than 1/8 of a percent in the originally quoted APR for a fixed rate loan (1/4 of a percent for a variable rate loan), change in the loan product, or addition of a prepayment penalty.
- Under the TRID rules, is the lender required to refund any increases in originally quoted fees to the borrower? No

Settlement Meeting Procedures

- Who may attend settlement meetings? **Buyers, buyer's agent, seller, seller's agents, lender representative, closing attorney and/or a nonlawyer assistant supervised by the closing attorney.**
- Who may not attend the settlement meeting? **A broker with an expired or inactive license representing a party to the transaction.**
- Must a licensed attorney attend or conduct the settlement meeting? **No, if no action requiring an attorney occurs.**
- Are the buyer and seller required to attend the settlement meeting in person? **No**
- What functions can a nonlawyer assistant perform at a settlement meeting in NC? **Present and identify documents necessary to complete closing, direct parties where to sign documents, ensure parties have properly executed the documents and receive and disburse closing funds. The nonlawyer assistant should avoid performing unlawful practice of law activities.**
- Who determines where the settlement meeting will be held? **There is no legal dictate. Typically, the buyer decides the location and it is in the buyer's attorney's office.**

Closing Disclosures

- When should a broker review the Closing Disclosure prepared by the lender with their client? **After expiration of the Due Diligence Period and immediately prior to settlement.**
- What are the broker's obligations concerning the settlement statement? **To deliver the closing statement to the broker's client and to review the statement for accuracy and notify the parties of any inaccuracies discovered.**

Prorations and Other Closing Disclosure Charges

- Are confirmed or proposed special assessments prorated? **No**
- Who pays confirmed special assessments? **The seller is responsible for all special assessments approved prior to settlement.**
- Who pays proposed special assessments? **The buyer is responsible for all special assessments approved after settlement.**
- Who is responsible for the costs associated with preparing the deed? **The seller**
- Who is responsible for the costs associated with preparing the Closing Disclosures? **The buyer**
- Who is responsible for paying real estate transfer taxes or excise tax? **The seller**
- Who owns the day of settlement for prorating? **The seller**
- What basis is used for tax proration, calendar year, or fiscal year? **Calendar year**
- Where do the prorated numbers go on the buyer's closing disclosure if they were pre-paid by the seller in advance of the settlement date? **In the "Adjustments for items paid by seller in Advance" section. Enter the amount on both the seller's side and the buyer's sides of the disclosure.**
- Where do the prorated numbers go on the buyer's closing disclosure if they were not pre-paid by the seller but to be paid later by buyer? **In the "Adjustments for items unpaid by seller" section. Enter the amount on both the seller's side and the buyer's sides of the disclosure.**
- Where do the prorated numbers go on the buyer's closing disclosure if they were not pre-paid by the seller but will be paid at closing? **Both seller's and buyer's amounts go in section H in the appropriate column.**
- What entries are made on the closing disclosure when the listing firm keeps the EMD as a partial payment of its commission? **Example: \$200,000 Sales Price with 6% Commission, Earnest Money \$2,000 (Enter EMD on Page 2, Section L1); Commission = \$200,000 x .06 = \$12,000
Page 1, H1 Brokerage Commission will have 2 entries on the Seller side (1) \$10,000 Seller-Paid At Closing (\$12,000-\$2,000). (2) \$2,000 Seller-Paid Before Closing
Page 2, Section N1 Excess Deposit = \$2,000**

Using the actual days in the month/365-day year method, what are the entries on the Closing Disclosure if the unpaid annual property tax is \$4,380 and the closing is scheduled for November 22?

$\$4,380 / 365 = \$12 / \text{day}$

Seller lived in the house 326 days so $\$12 \times 326 = \$3,912$

Buyer lived in the house 39 days so $\$12 \times 39 = \468

Taxes are unpaid and closing is after September 1.

Debit Buyer \$468 and Debit Seller \$3,912

(Page 1, Section H)

Proration of rents

- What are the entries made to the closing disclosure if the rent is in arrears at closing? **Debit the buyer, credit the seller.**
- What are the entries made to the closing disclosure if the rent has been paid prior to closing? **Debit the seller, credit the buyer.**
- Are rents typically prorated on a yearly or monthly basis? **Monthly**

Seller is selling a duplex that rents for \$1,050 per month for each property. Rent is due on the 1st of each month. Closing is April 20 and April rent has been paid by both of the tenants. What are the entries on the Closing Disclosure?

$\$1,050 \times 2 = \$2,100$ per month rent for both units

$\$2,100 / 30 = \$70 / \text{day}$

Seller collected 30 days of rent so owes buy 10 days of rent.

$\$70 \times 10 = \700

Credit Buyer \$700 and Debit Seller \$700

(Page 2, Sections L and N)

Installment Land Contract

- Who retains legal title to the property in an installment land contract? **The seller retains legal title until the loan is paid in full by the buyer.**
- What sales contract form is used for installment land contracts? **There is none. Have one drawn up by an attorney.**
- The seller must record the installment land contract within how many days of contract execution? **Within 5 business days of execution**
- How many days must a buyer be allowed to cure a default? **30 days**
- How many days does a buyer have to cancel a contract after receipt or executing a contract? **3 business days**
- What are the advantages to the buyer? **Alternative financing in tight money, typically lower down payment, typically lower closing costs, buyer can claim usual tax deductions**
- What are the disadvantages to the buyer? **Remedies for Buyer default are harsh, seller can call Note if one payment is late, buyer's only recourse when in default is "Equity of Redemption" – pay entire balance, buyer can't use the property as collateral for future financing needs**

Option to Purchase

- In an Option to Purchase is an option fee required? **Yes. Without one it is not a binding contract. The option fee is part of the consideration paid to the seller.**
- Does an Option to Purchase have to be recorded? **Yes. It must be recorded within 5 business days of contract execution to be enforceable against claims of third parties per North Carolina Connor Act**
- When does the Statute of Frauds require an Option to Purchase to be recorded? **The Statute of Frauds does not require it to be recorded. The Statute of Frauds requires the contract to be in writing to be enforceable in a court of law.**

- How do negotiations impact the Option to Purchase? **Optionee and owner are free to negotiate after an option to purchase has been created without impact on the option.**
- What title or legal interest does an Option to Purchase give the optionee? **Optionee has the exclusive right to exercise the option and purchase the property during the stated option period.**

Residential Lease with Option to Purchase

- What pre-printed sales contract form should a broker use when assisting a buyer that wishes to lease a property for a period of time before purchasing? **There is none. Have an attorney draft a customized agreement.**
- Can a broker or buyer use or modify any pre-printed sales or lease contracts to create a residential lease with an option to purchase? **No. Neither a broker or buyer can use Standard Form 2-T with a Lease Agreement to complete these transactions.**

Licensing and Education

- What are the postlicensing education requirements? **Three 30-hour postlicensing classes must be completed within 18 months of the broker's date of licensure.**
- What happens to the broker's license if postlicensing education is not completed in a timely manner? **License status will be INACTIVE.**
- Are there any limitations on the number of hours of postlicensing that a broker can take in a 7-day period? **No**
- What are the annual continuing education requirements? **For Brokers and Provisional Brokers: four-hour GENUP class plus four-hour elective by June 10th. For BIC Eligible Brokers and Designated BICs: four-hour BICUP class plus four-hour elective by June 10th. Requirement starts after the broker renews license the first time.**
- When are provisional brokers required to start taking CE? **After their first license renewal / before their second license renewal.**
- Does postlicensing count toward a PBs CE credit? **No**
- Does CE count toward a PBs postlicensing requirements? **No**
- What happens if CE is not completed in a timely manner? **License status will be INACTIVE on July 1st.**
- What happens if a broker does not renew their license in a timely manner? **If a broker does not renew their license by June 30th, the status of the broker's license on July 1st will be EXPIRED.**
- What happens if a broker's license becomes inactive on July 1st? **The broker must stop practicing any brokerage on July 1st. No exceptions, extensions or other arrangements are allowed.**
- Are brokers allowed any extensions of time to complete CE or postlicensing? **No**