

# Provisions to protect the seller in a purchase agreement

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In a transaction involving the sale of commercial real estate, the purchase agreement is key. It sets out the road map that governs and regulates the rights and obligations of the parties leading up to the closing and at the closing table.

This article will suggest various provisions that protect the interests of the seller in some key areas where there is room for negotiation — seller warranties, due diligence, closing and default. Overall, the seller wants to minimize its potential liability and maintain clear guardrails on the buyer's ability to terminate or extend the closing process.

## Seller warranties

Seller warranties are absolute promises about the existence or non-existence of various matters relating to the property or the seller itself. The seller will be liable for any inaccuracies in its warranties, and this exposure lasts beyond the closing date.

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If the seller is an entity, then the entire organization is responsible for the promises that are made in the seller's warranties. If any fact is known by any member of the organization, that knowledge will be imputed to the organization, even if the people in charge of the organization are not aware of it. For that reason, it is advisable to specify in the purchase agreement that the seller's warranties are limited to the facts that are known by certain specific individuals, usually the managers of the organization who are preparing the contract. That way, the people in charge of the organization can be more in control of the information that they are making promises about.

Next, the seller does not want its potential liability on its warranties to continue well into the future. Therefore, the seller should try to insert into the contract a fairly short time period after which the warranties expire and the buyer has no further rights with regard to them. Six months or one year is typical.

## Due diligence

Due diligence is central to any purchase agreement. The buyer is allowed a period of time to conduct various investigations and examinations, and if the buyer is not satisfied, the buyer has the right to terminate the contract. A prudent seller will want to put limits on the scope of the buyer's investigations and on the buyer's ability to terminate the contract.

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One important area is the buyer's right to engage in "invasive" testing, such as taking samples of soil or water or drilling into interior walls or foundations. These can result in damage to the property. The contract should therefore provide that the buyer is not allowed to engage in any "invasive" testing without the prior permission of the seller, after the seller's review of the scope of the proposed testing.

Often, buyers ask for the right to extend the due diligence period to allow more time for the buyer's investigations. If the seller is willing to allow such an extension, the seller should specifically delineate the matters that may be the subject of further investigations during the extended time period and provide that due diligence is closed with respect to all other matters. That way, the buyer cannot raise an objection with respect to any matter other than the specific items that are still open.

It is advisable for the seller to require additional funding as consideration for any extension of the due diligence period. After all, the seller is now essentially keeping the property off the market for an additional period of time, even though the buyer can terminate the contract at the end of the extended time period. The seller wants some compensation for that. At the very least, this should be an additional contribution to the deposit that the buyer has

provided. Ideally, some or all of this additional funding should be described as “non-refundable,” to serve as direct compensation to the seller for the extension of time and to be returned to the buyer only in the event the seller refuses to consummate the closing.

A contract may provide that a buyer has the right to terminate the contract during due diligence “for any reason or no reason.” That is a large loophole that simply allows the buyer to change its mind on a whim. That clause should be replaced by a provision that (a) only allows the buyer to terminate if it finds the property to be “unsuitable for its purposes” but (b) requires the buyer to identify the due diligence matter(s) upon which the buyer is terminating the contract and to provide the seller with a copy of any written material that relates to such matter(s).

### Closing

The purpose of the purchase agreement is to guide the process whereby the parties consummate the transaction at a closing. The purchase agreement specifies what the closing documents will say and what kinds of liabilities will be created under them.

It is very important to the seller that the purchase agreement provide that to the maximum extent permitted by law, the sale is “as is, where is,” without any warranties whatsoever, except for those affirmatively required by applicable law. Most states create a set of legal warranties that will apply to the seller unless excluded

### About the author



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by contract. That is why the purchase agreement should specifically exclude these warranties to the maximum possible extent. Make sure to use the specific waiver-of-warranty language that is required under applicable law.

### Default

The purchase agreement also governs what constitutes a default by either party and what the non-defaulting party’s rights and remedies are. The seller wants to minimize its exposure but maximize its remedies on account of a default by the buyer.

In case of a default by the seller, limit the buyer’s remedy to the return of the deposit or the ability to obtain specific performance, as the buyer’s exclusive remedies. Specifically exclude the right to recover damages.

Also, make sure that the buyer’s deposit is substantial and will adequately compensate the seller if the buyer walks away from the purchase.

### In conclusion

The above list is not exhaustive, of course. But, the above provisions do close some of the most important loopholes, from the seller’s perspective.

*Robert M. Steeg is a regular contributing columnist on real estate for Reuters Legal News and Westlaw Today.*

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