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Boilerplate releases deserve some thought

By Curtis Seltzer

Landthink contributor

(This is the eighteenth in a series of articles about issues that sellers and buyers face when negotiating a purchase-offer contract.)

What is a standard real-estate contract? It's a term that's widely used.

When brokers list property for a seller, they provide potential buyers with a purchase-offer contract that was created for members of their local or state Realtors group. The contract reflects the laws governing real-estate sales in each state.

This "standard contract" is not drafted by the buyer, the buyer's counsel or a broker/agent representing the buyer. It's a product of brokers, usually given to a purchaser by an agent of the seller. Often, the buyer fills in his contract in the presence of, and with the help of, the seller's agent. This process usually advantages a seller. The standard broker contract rightly protects the brokers' financial interest in any sale.

A buyer dealing with a FSBO can submit whatever legal contract he wants. With large land and farm transactions, buyers typically will ask their lawyer to draft a contract offer, which they usually complete without the presence of a seller's agent.

The standard contract usually has a boilerplate section called Representations and Releases, with a sentence something like the following:

By signing this Contract, Buyer represents that he has, or will have prior to close of escrow, conducted all independent investigations desired by Buyer of any and all matters concerning this purchase, and by closing accepts the Premises.

This sentence may or may not be followed by one that provides that the buyer explicitly releases the seller from all responsibility and liability regarding the condition of the property and its improvements, acreage, square footage of the residence, boundary lines, representations made to buyer from seller, material defects, environmental issues and compliance with building codes and other regulations.

In many cases, a buyer can agree to a blanket release of this sort and never have reason to think about it again. But circumstances do exist where a narrow release -- rather than a broad Get-Out-Of-Jail-Free release -- is the more prudent approach for a buyer.

The release language quoted above forces the buyer to agree in advance that the "premises" will be completely acceptable at closing, subject only to those contingencies

he writes into his contract when he's making the offer and before he's done his due diligence. Is there something wrong with this picture?

The first problem is that the buyer often has not done enough research at the time that he submits his contract to know what he doesn't know about the seller's property. If he doesn't put in a contingency at the moment of contract conception, he cannot create another contingency on an unforeseen issue that comes up during escrow. The release requires the buyer to accept a problem that he discovers during escrow when it's not covered by a contingency.

The second problem comes about when a seller has not disclosed all material defects, which has been known to happen...just between us. This release language traps a buyer who has been dealing with such a seller, because it sets forth that the buyer has completed all the research he wants to do when, in fact, he doesn't have a fair shot at knowing what contingency research he might need to do with a hide-the-ball seller.

Finally, the release language sets up buyer acceptance of the premises with a presumption of "as is," which may or may not be justified.

Better language in my opinion would be that the buyer accepts the premises after he has either voided all contingencies or after he and the seller have resolved to their mutual satisfaction any issues raised during escrow.

"Boilerplate" is not meaningless language as the term implies.

Buyers should have no objection to signing both a seller release and a broker release. But the wording should protect everyone—seller, broker and buyer.

Curtis Seltzer is a land consultant who works with buyers and helps sellers with marketing plans. He is author of How To Be a DIRT-SMART Buyer of Country Property at !! [HYPERLINK "http://www.curtis-seltzer.com/"](http://www.curtis-seltzer.com/) ¶ www.curtis-seltzer.com¹ where his weekly column, Country Real Estate, is posted. He is a regular contributor to !! [HYPERLINK "http://www.landthink.com/"](http://www.landthink.com/) ¶ www.landthink.com¹ .