8 Contract Law

Outline

I. Contract Classifications
   A. Express vs. implied
   B. Executed vs. executory
   C. Valid, void, voidable, or unenforceable
II. Contract Formation
   A. Capacity
   B. Mutual consent
      1. Offer
      2. Termination
      3. Acceptance
      4. Consent freely given
         a. Fraud
         b. Undue influence
         c. Duress
         d. Mistake
      5. Trusts, estates, and other entities
   C. Consideration
   D. Lawful purpose
   E. Statute of frauds
   F. Promissory estoppel
III. Modification of a Contract
   A. Assignment or novation
   B. Accord and satisfaction
   C. Release
IV. Breach of Contract
   A. Substantial performance vs. material breach
   B. Conditions
   C. Tendering performance
V. Remedies for Breach
   A. Arbitration
   B. Lawsuit
   C. Damages
      1. Certainty requirement
      2. Mitigation requirement
      3. Liquidated damages
   D. Equitable remedies
      1. Injunctions
      2. Rescission
      3. Specific performance
   E. Interference with contract

VI. Real Estate Contracts
  A. Licensee affiliation agreements
  B. Listing agreements
    1. Types of listing agreements
    2. Basic elements
  C. Purchase and sale agreements
    1. Parties, property, and terms of sale
    2. Contingencies
    3. Other common provisions
    4. Acceptance or counteroffer
  D. Options
    1. Consideration for an option
    2. Relation back
    3. Assignment
    4. Termination
    5. Right of first refusal

Key Terms

- Express/implied contract
- Executory/executed contract
- Valid contract
- Void
- Voidable
- Unenforceable
- Disaffirm
- Capacity
- Emancipated minor
- Offer
- Acceptance
- Objective intent
- Revocation
- Mailbox rule
- Counteroffer
- Fraud
- Undue influence
- Duress
- Business compulsion
- Unilateral mistake
- Consideration
- Severable
- Statute of frauds
- Promissory estoppel
- Detrimental reliance
- Assignment
- Novation
- Accord and satisfaction
- Material breach
- Substantial performance
- Time is of the essence
- Contingency clause
- Tender offer
- Anticipatory repudiation
- Mandatory arbitration
- Contractual arbitration
- Statute of limitations
- Parol evidence rule
- Damages
- Mitigation
- Liquidated damages
- Equitable remedies
- Injunction
- Rescission
- Cancellation
- Specific performance
- Integration clause
- Extender clause
- Bump clause
- Option
- Relation back
- Right of first refusal

Chapter Overview

A **contract** is an agreement to do (or not do) a certain thing. It doesn't have to be a legal document; a spoken promise, a bus pass, and a movie ticket are all examples of contracts. To be enforced by a court, a contract must be made according to the rules of contract law. These rules are designed to protect the parties against misunderstandings and false claims.

A typical real estate sales transaction involves a number of contracts: a listing agreement; a purchase and sale agreement; a title insurance policy; an escrow agreement; and a

security instrument, such as a deed of trust. Because contracts are such an integral part of real estate transactions, it's essential for real estate agents to understand basic contract law.

This chapter discusses forming and modifying a contract, the remedies available when a contract is breached, and several specific types of contracts used in real estate transactions.

Contract Classifications

There are several fundamental ways of classifying all contracts. Every contract is:

- express or implied,
- executory or executed, and
- valid, voidable, void, or unenforceable.

Express vs. Implied. An **express** contract is an agreement that has been expressed in words, either spoken or written. If Miller asks Simpson, "Will you cut my hair for $10?" and Simpson says, "OK," they have an express contract. An **implied** contract, on the other hand, hasn't been put into words. Instead, the agreement is implied by the actions of the parties.

> **Example:** Ferris offers to mow George's lawn for $25. George accepts and is pleased with the work. Without being asked, Ferris begins coming on the first Saturday of every month to mow George's lawn. George pays Ferris in cash after each job is finished.
>
> One Saturday Ferris shows up to mow the lawn and is greeted by a housesitter who says George is on vacation for a few days. Ferris goes ahead and mows the lawn anyway. Under their implied contract, George is obligated to pay for the mowing job.

Some contracts are partly express and partly implied. When you order a meal in a restaurant, it's understood that you agree to pay the price on the menu, although you don't actually say that to the waiter.

Executed vs. Executory. An **executed** contract is one that has been fully performed—both parties have done what they promised to do. An **executory** contract has not yet been fully performed. One or both of the parties have not begun to carry out their promises, or are in the process of carrying them out. Contracts start out executory and end up executed.

Valid, Void, Voidable, or Unenforceable. A **valid** contract is an agreement that meets all the legal requirements for contract formation outlined in the next section of this chapter. If one of the parties doesn't fulfill his side of the bargain (**breaches** the contract), the other can sue to have the contract enforced.

But many agreements don't meet one or more of the requirements for contract formation. These agreements are usually considered legally void. In the eyes of the law, a **void** contract is actually not a contract at all; it can't be enforced in court. If both parties fulfill

Fig. 8.1 Agreements may or may not be legally binding

Status of Contract	Legal Effect	Example
Void	No contract at all	An agreement for which there is no consideration
Voidable	Valid until rescinded by one party	A contract with a minor
Unenforceable	Party may not sue for performance	A contract after the limitations period has expired
Valid	Binding and enforceable	An agreement with all the requirements for a valid contract

their promises, all is fine. But if one breaches and the other sues, the judge will rule that no contract was formed, and will refuse to enforce the agreement.

In certain situations, an agreement that is missing a legal requirement is not void, but rather **voidable** by one party. This generally occurs when one party has taken advantage of the other in some way. For example, if someone has signed a contract as a result of undue influence exerted by the other party, the injured party can choose whether or not to go through with the contract. The injured party can **disaffirm** the contract—that is, ask a court to terminate it. If the injured party chooses not to disaffirm, the agreement will be enforceable. In the next section, we'll cover the various situations in which a contract is voidable rather than void.

Finally, some contracts are **unenforceable** even when they are not void or voidable. For example, a valid contract becomes unenforceable when the statute of limitations runs out. Or maybe all the requirements for contract formation were met, but there isn't proper evidence to prove that in court. (This problem often occurs with oral contracts.) A contract is also likely to be unenforceable if it is vaguely worded.

Contract Formation

A valid contract must have these four elements:

- capacity to contract,
- mutual consent,
- consideration, and
- a lawful purpose.

These requirements apply to all contracts. In addition, certain contracts (especially real estate contracts) must be in writing and signed to be enforceable.

Capacity

To enter into a valid contract, a person must be at least **18 years old** and must also be legally **competent**. This requirement protects minors and the mentally disabled, who otherwise might enter into contracts without understanding the consequences. Only the legal guardian can enter into a valid, binding contract on behalf of a minor or an incompetent person.

Minority. If a minor enters into a contract, the contract is voidable, but only by the minor. The minor can decide whether he wants to go through with the transaction. If not, the minor can go to court to disaffirm the contract. But if the minor does want to go through with it, the other party is bound.

> **Example:** Martinson, who is only 17, signs a contract to buy some property from Stuart. A week later, Stuart decides it wasn't a very good deal. However, only Martinson can disaffirm the contract. Stuart must fulfill the terms of the contract if Martinson chooses to go through with it.

A minor must disaffirm a voidable contract before he turns 18, or within a reasonable time after turning 18.

Note, however, that a contract with an emancipated minor is valid. An **emancipated minor** is a person under 18 who:

- is or has been married,
- is on active duty in the armed forces, or
- has a declaration of emancipation from a court.

Incompetence. A person who is entirely without understanding cannot make a contract. After a person has been declared incompetent by a court (because of mental disability or senility), any contract she enters into is void. If the person made a contract before the declaration of incompetence but while of unsound mind, the court-appointed guardian can ask the court to have that contract set aside.

In a few cases, if a person was under the influence of alcohol or other drugs at the time of entering into a contract, it will be voidable. But to disaffirm the contract, the person will usually have to prove that he was involuntarily intoxicated.

Necessities Exception. An exception to these capacity rules applies to a minor or an incompetent person who contracts to buy necessities (such as food, clothing, shelter or medicine). In this situation, the contract is not voidable and she must pay the reasonable value of those items.

Note that this exception applies only to necessities and not to items such as a car, a video game system, or sports equipment.

Example: Jenelle, who is 16, goes on a spending spree at the mall. She buys a $900 stereo system, paying $100 cash and signing a contract agreeing to pay the balance over the next six months. When she goes home, her parents take one look at the stereo and tell her to take it back. Because Jenelle is a minor, she can return the stereo, disaffirm the contract, and get her money back.

Mutual Consent

For a contract to be a binding obligation, all the parties must consent to its terms. This mutual consent is sometimes referred to as a "meeting of the minds." It is achieved through **offer and acceptance**.

Offer. The process of forming a contract begins when one person (the **offeror**) makes an offer to another (the **offeree**). To be the basis for a contract, an offer must:

- express an intent to contract, and
- have definite terms.

The intent to contract must be **objective intent** (what the offeror says and does) rather than **subjective intent** (what the offeror is actually thinking). If you say or do something that a reasonable person could interpret as a serious expression of the intention to make a contract ("I'll sell you a dozen roses for $15"), that may be a legally binding offer even if you don't have any roses and never really intended to come up with them.

On the other hand, a casual remark or a joke is not a binding offer. Because of the nature of the remark, the tone of voice, or the situation, a reasonable person should not interpret the statement as a serious offer.

Example: Rico has just paid $65,000 for a sports car. After it breaks down for the second time in a week, Rico tells Paulson, "I'm so tired of this piece of junk I'd sell it for ten bucks." Paulson pulls out her wallet and hands Rico a ten-dollar bill.

Rico is not required to sell Paulson the car for ten dollars, because his statement was not a binding offer. A reasonable person would not have interpreted his remark as a serious expression of an intent to contract.

Here's how this issue played out in one Washington court case.

Case Example:

Warren Treece, vice president of Vend-A-Win (a corporation that distributed punchboards), spoke before the Washington State Gambling Commission in support of punchboards. During his speech, Treece offered to pay $100,000 to anyone who could find a crooked punchboard. His statement brought laughter from the audience.

Vernon Barnes heard a news report of Treece's statement. Several years earlier, Barnes had purchased two fraudulent punchboards. Barnes telephoned Treece, told him that he had two crooked punchboards and asked if Treece's offer was serious. Treece told Barnes the offer was serious, that the money was being held in escrow, and asked Barnes to bring in the punchboards for inspection.

The punchboards were inspected and found to be rigged and dishonest. However, Treece refused to pay Barnes the $100,000. Barnes brought a breach of contract action against Treece.

In his defense, Treece argued that his statement was made in jest, and could not be construed as an offer that could be accepted to form a contract.

The court found that although the original statement drew laughter from the audience, Treece's subsequent statements and conduct showed a serious intent.

The court found that there was a binding contract: Treece had promised to pay $100,000 to anyone who found a crooked board, and Barnes had found two crooked boards. The court awarded judgment for Barnes in the amount of $100,000. *Barnes v. Treece*, 15 Wn. App. 437, 549 P.2d 1152 (1976).

An offer must have **definite terms**—it won't be binding if it is too vague. It should state at least such basic terms as the subject matter, the time for performance, and the price. In some cases, a court will fill in the blanks with a reasonable time or a reasonable price.

Example: A waiter describes the day's "Seafood Special" without stating the dish's price. A restaurant diner orders and eats the dish without knowing its price. Unless the restaurant charges an unreasonably high price for the dish, a contract has been formed and the diner is obligated to pay for his meal.

However, if too many terms are left unspecified (for example, during preliminary negotiations for a contract), no contract has been formed.

If an offer to purchase involves financing, terms such as the interest rate or length of the loan term must be included in the offer.

Case Example:

The Setterlunds signed a purchase and sale agreement to buy some commercial real estate from the Firestones. The agreement provided that the sellers were to accept a promissory note and deed of trust as security for the $205,000 balance of the purchase price. However, a note and deed of trust were never attached to the agreement.

The Firestones did not go through with the sale and the Setterlunds sued for specific performance of the purchase contract. In other words, the Setterlunds asked the court to order the Firestones to complete the sale and transfer title to them.

The Firestones argued that the purchase and sale agreement was too indefinite to permit specific performance because the note and deed of trust were not attached. Thus, essential terms and conditions were missing. Since no note was attached, the parties had never agreed on an interest rate (a very important point with a balance of $205,000).

Preliminary agreements (such as purchase and sale agreements) must be definite enough to allow the court to enforce the agreement without having to supply important missing terms. In this case, the court would have needed to supply the missing interest rate.

The court found that the purchase and sale agreement was not definite enough to be enforced by specific performance. The Firestones could not be forced to go through with the sale. *Setterlund v. Firestone*, 104 Wn.2d 24, 700 P.2d 745 (1985).

Using pre-printed forms for real estate contracts such as listing agreements and purchase and sale agreements helps eliminate the possibility of vagueness. The pre-printed forms have spaces to fill in the contract's essential terms, making it less likely that a term will be overlooked.

Termination. An offer is not legally binding until it is accepted by the offeree. It can be accepted at any time before it terminates. An offer can be terminated by one of four events:

- lapse of time,
- death or incapacity of one of the parties,
- revocation by the offeror, or
- rejection by the offeree.

Lapse of time. Many offers state that they will expire at a certain time, such as "after five days" or "on March 30." When an offer doesn't specify an expiration date, a court will generally rule that it expired after a reasonable time. But even when an offer includes an expiration date, it may end sooner, through one of the other methods of termination.

Death or incapacity. An offer is terminated if either of the parties dies or becomes incompetent before it is accepted. A party's bankruptcy may also have this effect.

Revocation. If an offeror revokes the offer before the offeree accepts it, it is terminated—the offeree has lost the chance to accept it. This is true even if the offer stated that it was irrevocable, or that it would not expire until a particular date.

Case Example:

In July 1975, Seattle First National Bank foreclosed against the Knights' property. On December 16, 1976, the Knights learned that the bank was negotiating with Johnston to buy the property. At a meeting with the bank's attorney, Mrs. Knight was told that the bank would sell the property back to the Knights for the amount then owing (approximately $22,000). Mrs. Knight claimed that the bank told her it would not conclude the sale with Johnston for two or three weeks.

On December 22, with Johnston's approval, the bank entered into an agreement to sell the property to Patrick.

The Knights brought a lawsuit against the bank and argued that the offer by the bank to sell to them was an oral agreement to extend the time for redemption and that it was a binding agreement.

The court held that the bank's offer to Mrs. Knight was an offer that could be revoked or withdrawn any time before acceptance. The bank withdrew its offer when it sold to Patrick. *Knight v. Seattle First National Bank*, 22 Wn. App. 493, 589 P.2d 1279 (1979).

Note that the result would have been different if the Knights had paid the bank to keep the offer open for a few weeks. When an offeree pays or gives something to the offeror in exchange for holding an offer open, the offer cannot be revoked during the specified period. (See the discussion of options at the end of this chapter.) But without such a payment, an offer can be revoked at any time before it is accepted.

A revocation is effective as soon as it is communicated to the offeree. When it is not communicated directly (in person or over the telephone), the revocation is effective at the time it is received by the offeree. So if a notice of revocation is mailed to the offeree, the offer is not revoked until the revocation is delivered.

Rejection. An offer is also terminated when it is rejected by the offeree. If I reject your offer on Monday, I can't change my mind and call back on Tuesday to accept it. If you're still interested in the deal, we can start the process of offer and acceptance over again. But your original offer was terminated by my rejection, and if you've lost interest, I can no longer hold you to your offer.

Acceptance. When an offer is accepted, a contract is formed. At that point, the parties are legally bound. Neither party can back out unless the other is willing to call off the contract.

There are four basic requirements for acceptance:

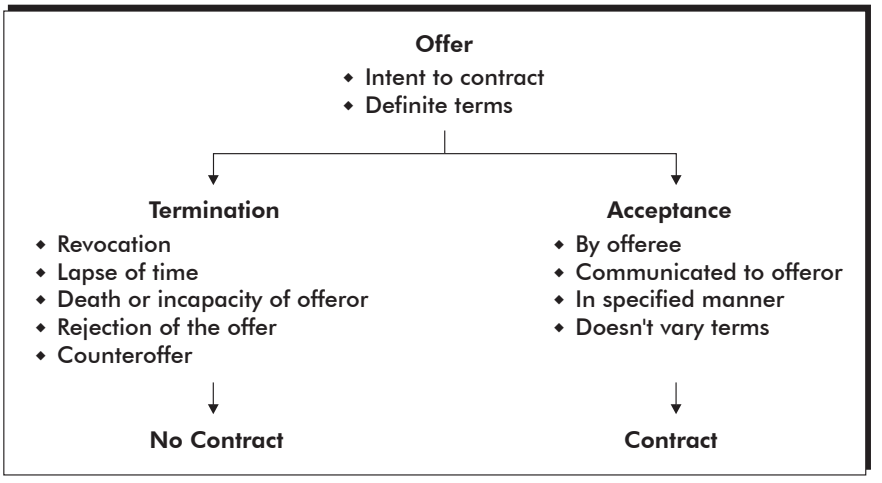
- an offer can only be accepted by the offeree,
- an acceptance must be communicated to the offeror,
- an acceptance must be made in the manner specified, and
- an acceptance must not vary the terms of the offer.

Accepted by the offeree. The first of these requirements—that an offer can be accepted only by the offeree—may sound obvious. But it means that if Jeremy makes an offer to Arthur and Arthur decides not to accept it, Amy can't accept the offer and force Jeremy to deal with her. Of course, Jeremy may be willing to work with Amy, but in legal terms any contract between Jeremy and Amy is based on a new offer, not on the offer Jeremy made to Arthur.

Communicated to the offeror. An acceptance must be communicated to the offeror. You may already have decided to accept my offer, but until you let me know that you've accepted it, I can still revoke it.

> **Example:** Seller is selling waterfront property. Seller's agent tells Buyer that the frontage is about 800 feet. Buyer signs a purchase and sale agreement offering to buy the property and the agent delivers it to Seller. In the meantime, Buyer discovers that the frontage is only 700 feet. Buyer notifies Seller that he will not go through with the purchase.
>
> Seller sues. Seller claims that he signed the purchase and sale agreement the day he received it. But since he hadn't sent it back to Buyer yet, the acceptance was not communicated and Buyer still had the right to revoke.

Fig. 8.2 Offer and acceptance



Mailbox rule. When an acceptance is not communicated directly (in person or over the telephone), it is effective as soon as the message is sent, even though the offeror may not receive it immediately. This is called the **mailbox rule**: the acceptance creates a binding contract when the offeree drops it in the mailbox. The mailbox rule may also be applied to communication of an acceptance by fax or email.

Manner of acceptance. As mentioned earlier, certain types of contracts (including most contracts concerning real property) are required by law to be in writing and signed. For those contracts, only a written, signed acceptance will bind the offeree.

> **Example:** Adams writes Bing a letter offering to sell him her house for $250,000. It's an excellent offer, so Bing calls Adams on the phone and says he's accepting it.
>
> Two hours later, Bing changes his mind. He can call Adams back and withdraw his acceptance, because it wasn't in writing.

However, other types of contracts do not necessarily require a written acceptance. Any reasonable method of acceptance will usually be effective, unless the offer specifies how it is to be accepted. If the offer specifies a particular method (such as "in writing," "by registered mail," or "by delivering a cashier's check"), the acceptance will not bind the offeror unless those instructions are followed.

> **Example:** Wallace offers to sell his antique car to Savala. The offer states it is to be accepted by registered mail. Savala drops by Wallace's office and tells him that she's accepting the offer. Wallace can still revoke the offer, because Savala did not accept the offer in the manner specified.

Of course, an offeror can waive this requirement. If Wallace chooses to treat Savala's spoken acceptance as effective, a contract is formed.

Note that generally, silence cannot be the specified manner of acceptance.

> **Example:** Xavier writes Zigler a letter offering to buy her sailboat for $2,000. The letter says, "If you have not rejected this offer by Saturday, I will consider it accepted." Zigler receives the letter but never replies.
>
> Xavier goes to Zigler's house with $2,000 and demands the boat. Zigler is not required to let him have it. Her silence in response to Xavier's letter was not an acceptance, and no contract was formed.

But if the offeree accepts the benefits of the offer, silence may be construed as acceptance. If Xavier had enclosed a $2,000 check with his letter and Zigler cashed it, she would be deemed to have accepted his offer and would be required to let him have the boat.

Acceptance must not vary terms of offer. To create a contract, the offeree must accept the terms exactly as offered. The offeree can't modify the terms of the offer or add any new terms.

Case Example:

The Flerchingers listed their ranch for sale with a brokerage and the listing expired without a sale. Koller, an agent at the brokerage, later went into business for himself and continued to seek a buyer for the Flerchinger property without the owners' knowledge.

Koller contacted Watson, who offered $150,000 for the property. Koller then attempted to get the Flerchingers to sign a purchase and sale agreement under which Koller would receive a $7,000 commission upon closing.

The Flerchingers signed the purchase and sale agreement, but only after the price was raised to $155,000 and a provision was added giving them the buildings and pasture for their cattle until October and possession of the current hay crop. After the Flerchingers signed the agreement, Koller edited out the new clause.

Koller never obtained Watson's signature to this agreement and after May 26, all parties treated the agreement as terminated.

The next month, Watson approached the Flerchingers directly and they reached a new agreement. Upon learning of the sale, Koller sued for a commission and lost. Although the Flerchingers eventually sold to Watson, it was not an acceptance of the original offer. Each change constituted a new offer or counteroffer. *Koller v. Flerchinger*, 73 Wn.2d 857, 441 P.2d 126 (1968).

Because the Flerchingers added terms (the additional $5,000 and retention of hay and pasture until October), they technically did not accept Watson's offer. Instead, they made a counteroffer. A **counteroffer** is essentially a new offer, so the Flerchingers became the offerors, and Watson became the offeree. To create a binding contract, Watson would have had to accept the Flerchingers' counteroffer (which he didn't do). Further negotiations took place before an agreement was finally reached.

A counteroffer terminates the original offer, just as a rejection would. If your counteroffer is rejected, it's too late to go back and accept the original offer. You can start again with a new offer identical to the original offer. But if the original offeror has had a change of heart, you can no longer hold him to the original offer. It's important to keep this in mind, since a real estate transaction often involves a series of offers and counteroffers. Each counteroffer terminates the previous offer.

Consent Freely Given. Offer and acceptance are the expression of mutual consent to the terms of an offer. But to create a binding contract, consent must be freely given. It is not freely given when it is the result of one of these negative influences:

- fraud,
- undue influence,
- duress, or
- mistake.

Any of these makes a contract voidable by the party who was harmed. The injured party may choose to go ahead with the contract or disaffirm it. To disaffirm, the victim must be able to show that the negative influence was the key to his consent.

Fraud. A victim of fraud must prove that she would not have entered into the contract if the other party had not misrepresented the effect of the agreement or made false promises. Recall from our discussion of fraud in Chapter 7 that fraud may be actual or constructive. For example, a seller who intentionally hides cracks in the basement and assures the buyer the foundation is sound is committing actual fraud. A seller who innocently points out incorrect lot boundaries may be committing constructive fraud.

It's also important to distinguish between fraud in the inducement and fraud in the execution of the contract. When **fraud in the inducement** occurs, a party understands what he is signing, but his signature is induced by fraud. The contract is voidable by the defrauded party.

> **Example:** A real estate agent convinces an owner to sign a listing agreement by falsely claiming the house is worth $100,000 more than its true value. This is fraud in the inducement.

When **fraud in the execution** is committed, the defrauded party does not know what he is signing and did not intend to enter into such a contract at all.

> **Example:** Two days before a sale closes, the listing agent hands his client a stack of papers, telling him that his signature is needed on each document for closing purposes. The client signs the documents, without realizing that one of the documents is actually a deed granting his property to the agent. This is fraud in the execution.

Undue influence. Taking unfair advantage of another person by using your influence over them is considered **undue influence**. A contract is voidable if you persuade someone to sign it by taking advantage of her trust in you, her weakness of mind (due to senility or

exhaustion, for example), or her necessities or distress (drug addiction, for example). Undue influence often involves telling the victim that documents must be signed immediately, and that there's no time to consult a lawyer.

Case Example:

In 1972, John F. Jeanes was a Christian Science practitioner who met Nancy Ferguson when she was considering making a full commitment to Christian Science. They fell in love and began considering marriage. During their relationship, Nancy received treatment from John several times a week. At trial, she testified that she exalted practitioners in her mind and that she trusted John because of her affection for him and because of his role as a practitioner.

When Nancy decided to purchase an apartment building, John helped her locate some suitable property and began to encourage Nancy to take him on as a partner in the purchase. When Nancy declined, John became angry, telling her she was ungrateful and that her refusal violated the tenets of Christian Science. He also told her she was financially, intellectually, and emotionally incapable of buying and operating the property alone.

Nancy finally agreed to accept John as an equal partner. Nancy advanced nearly $13,000, while John provided less than $3,000, saying he had other immediate obligations and would pay more later. John later paid another $500 but never made any more payments. Whenever Nancy brought up the subject, he would assure her that he would pay later, and frequently became angry with her for bringing it up. Because of their close relationship, Nancy tolerated the delay and was confident that John would ultimately pay.

The relationship between Nancy and John ended in 1975. John subsequently refused to help pay an upcoming balloon payment on the apartment building's mortgage. Nancy also unsuccessfully attempted to secure a quitclaim deed from John. Nancy attempted to buy John out, but he refused to respond.

In 1978, Nancy filed an action to quiet title. The court found that John's performance as a practitioner had an immense influence upon Nancy, causing her to have an extraordinary amount of trust and confidence in him. It further found that John's emotional and spiritual influence over Nancy made her particularly susceptible to his influence. Where one party is under the domination of another, a transaction induced by unfair persuasion is the result of undue influence and is voidable.

The court found that the partnership agreement in the apartment house between Nancy and John was subject to rescission for undue influence. John was awarded the amount of his contribution plus interest, and title to the apartment house was quieted in Nancy's name alone. *Ferguson v. Jeanes*, 27 Wn. App. 558, 619 P.2d 369 (1980).

Duress. Illegal imprisonment or confinement, threats of bodily harm, threats of injury to a person's reputation, or the use of other means to coerce a person into doing what she otherwise would not do are all examples of **duress**. Any contract that is signed under duress is voidable by the injured party. This is true even if the actions or threats are taken against a third party, such as the person's spouse, child, or parent.

Washington courts have extended the concept of duress to include business compulsion. **Business compulsion** is a form of duress in which a person is threatened with a serious business loss. Entering into a disadvantageous contract because of financial necessity does not constitute business compulsion. For the doctrine to apply, the victim must prove that the offending party caused or contributed to the problem and exerted the pressure that brought about the decision to enter into the agreement.

For example, it is a form of business compulsion to coerce someone into signing a contract by threatening to take some action that will be financially disastrous for the victim, such as withholding a payment owed to the victim, or starting a groundless lawsuit in bad faith. However, the acts or threats of one party cannot amount to duress if there is a legal right to do the threatened act. For instance, threatening to bring a valid lawsuit is not duress.

Mistake. Unlike the other negative forces that can make a contract voidable, mistake does not usually involve any bad faith or villainy. If both parties are mistaken about some fact or law that is important to their contract, either of them may disaffirm the contract. This is known as **mutual mistake**.

Case Example:

Simonson and Teeter formed Northwest Furnace & Equipment Company. Teeter supplied the business expertise and Simonson supplied the capital. Fendell was hired as the general manager.

Simonson became disenchanted with the business and offered to sell his interest to Teeter and Fendell. Fendell wanted proof of the business's financial condition before negotiating to buy out Simonson. The parties conducted a complete inventory and the company accountant prepared a financial statement. The statement indicated the business was solvent and operating at a profit; all three believed this to be accurate.

The parties signed a contract in which Fendell and Teeter agreed to buy Simonson's interest for $75,000 by December 30, 1978.

In mid-December Fendell and Teeter discovered that $48,000 in accounts payable had been mistakenly omitted from the financial statement. The business was not making a profit and was actually insolvent.

Simonson brought a lawsuit seeking enforcement of the contract. Fendell and Teeter argued for rescission of the contract due to mutual mistake.

The court found that all parties believed the business was solvent and operating at a profit when the contract was signed. Since the contract would not have been formed but for the mutual mistake, Fendell and Teeter were entitled to rescission and the contract was not enforceable. *Simonson v. Fendell*, 101 Wn.2d 88, 675 P.2d 1218 (1984).

When only one of the parties to a contract is mistaken (**unilateral mistake**), the contract is not voidable unless the other party knew about the mistake and did nothing to correct it.

Trusts, Estates, and Other Entities as Parties. To conclude our discussion of the mutual consent element of contract formation, let's consider how a trust, estate, or other entity (e.g., a corporation or LLC) indicates consent to a contract. Specifically, if your client or customer is an entity instead of an individual, who exactly has authority to sign real estate agreements and related documents—such as deeds and promissory notes—on behalf of the entity?

Someone signing a document on behalf of an entity must be authorized to do so. For example, the executor of an estate in probate who wants to sell the deceased's home will have court papers showing that he is, in fact, the executor and that the sale has been authorized by the court (wills and probate are discussed further in Chapter 9).

> **Example:** Alan, an agent at Barrow Brokerage, makes a practice of scouring the obituaries for listing leads. Alan finds an executor named Sheila who is willing to sell a probate property through Barrow Brokerage.
>
> Alan's designated broker reviews a court-certified copy of the court order naming Sheila as the executor and any paperwork authorizing this specific sale. The designated broker also has the brokerage attorney examine these documents. (Note that brokerage policies may vary and may be a good deal more complex than this.)

Similarly, you may encounter a trustee who wants to sell the real estate of a deceased person ("living trusts" are often used as an alternative to a will and probate). The typical living trust provides that on the death of whoever created the trust, the trustee (essentially, the equivalent of the executor of a will) may sell or distribute the trust property. Again, your brokerage's practices will vary, but basically the trustee will have to produce the trust document that names her as trustee and grants her the power to sell, and also provide a copy of the death certificate to prove that the trust's creator is actually dead.

Finally, let's very briefly discuss how corporations and other business entities delegate authority to execute real estate transactions. Usually a corporate officer, often the president, will sign real estate agreements and related documents on behalf of the corporation. As a general rule, the officer must have specific written authorization for the transaction from the corporation's board of directors. A partnership is similar. While generally any partner has authority to enter into contracts on behalf of the partnership, for a major transaction like the sale or purchase of real estate, a document signed by all the partners authorizing the particular partner to carry out the transaction is usually required.

Consideration

Even after an offer has been accepted, there is no valid contract unless it is supported by consideration. **Consideration** is something of value exchanged by the parties. A contract can't be a one-way street: each party must give something to the other. The exchange of consideration is what distinguishes a contractual promise from the promise of a gift.

Example: If Alan promises Barry his sweater in exchange for Barry's wheelbarrow, they have a contract. Each has given the other some consideration: Alan gave Barry a promise, and Barry gave Alan a promise.

But if Alan promises Barry his sweater and Barry promises Alan nothing in return, there is no contract. The sweater is a gift.

The distinction becomes important if, after making the promise, Alan fails to give Barry the sweater. In the first case, where Alan received consideration for his promise (Barry's promise to give him the wheelbarrow) Barry can sue Alan to enforce the promise.

But in the second case, Barry can't sue Alan. The courts will not enforce a promise that is not supported by consideration. It wasn't nice of Alan to break his promise, but since the sweater was a gift instead of a contractual obligation, the law won't get involved.

Consideration can be anything of value—a sweater, $10, or a split-level ranch house. The consideration for most contracts is a promise to give something of value, as in the example above. For this reason, the parties to a contract are sometimes referred to as the **promisor** (the party making a promise) and the **promisee** (the party who is to receive the benefit of a promise).

In a typical real estate contract, the buyer promises to pay the seller money, and the seller promises to transfer title to the buyer. By exchanging promises they create an executory contract; when they fulfill their promises (when the buyer actually pays the seller and the seller actually gives the buyer the deed) the contract is executed.

To provide consideration for a contract, a promisor must either do something that benefits the promisee, or give something up. Promising to not do something can be consideration—for example, promising to stop smoking. Or if you don't smoke, promising never to start can be consideration.

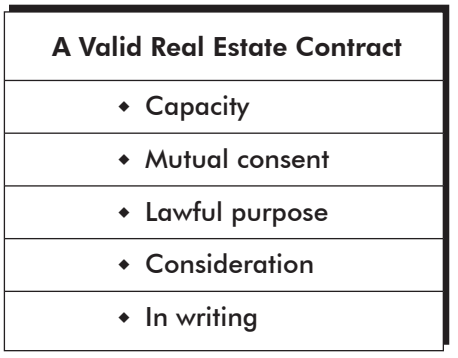
But an empty promise is not consideration for a contract: if you've never smoked, promising to quit can't be consideration. And something that you've already done can't be consideration.

Example: Andrew quit smoking, and Aunt Bernice is very pleased. Aunt Bernice says to Andrew, "Because you quit smoking, I'm going to buy you a yacht." This is not a contract; since Andrew had already quit smoking, he didn't really give Aunt Bernice anything (or give up anything) in exchange for Aunt Bernice's promise.

Also, promising to do something that you're already legally obligated to do (or promising to refrain from doing something that you're obligated to refrain from doing) is not consideration.

Example: Williams agrees to build a house for Kessner for $200,000. When the house is over halfway done, Williams says, "You're going to have to pay me another $30,000 if you want me to finish this project." Kessner meekly agrees. This is not an enforceable contract; Williams can't sue Kessner for the additional $30,000, because Williams was already obligated to finish the house for $200,000.

Fig. 8.3. Requirements for a valid real estate contract



Adequacy. It's important to understand that the value of the consideration one party gives doesn't have to equal the value of what the other gives. In other words, even though one party struck a bad bargain, the contract is still enforceable.

> **Example:** Peterson's house was appraised at $300,000. He's anxious to sell it very quickly, because he thinks he may have to leave the country in a hurry. When Marshall offers $215,000 for the house, Peterson accepts, and they execute a written contract.
>
> As it turns out, Peterson won't have to leave the country. He wants to back out of the sale, but Marshall wants to go through with it. Although Peterson's consideration is worth much more than what Marshall is giving, their contract is binding.

Of course, when the consideration is grossly unequal, that may be a sign that there was fraud, undue influence, duress, or mistake involved in the contract negotiations. But unless one of those negative forces is proven, the contract is enforceable.

Lawful Purpose

The purpose of a contract (sometimes called the objective or the object of the contract) must be lawful at the time the contract is made. If one person promises to pay another for committing an illegal act, their contract is void and cannot be enforced by a court. This may seem obvious; a hit man is unlikely to take his employer to court to collect his fee, and the employer is unlikely to sue him for failing to carry out the murder. But the requirement has a considerably broader application. Even when a contract's purpose does not violate an express provision of the law, a court may refuse to enforce it if it is contrary to public policy or accepted morals.

> **Example:** Lara asks Kerr, a contractor, to remodel her basement. Lara wants the job completed as soon as possible and Kerr offers to do the work without obtaining the required construction permits. Lara agrees and they sign a contract. This contract is void for lack of a lawful purpose.

Many contracts have more than one purpose, and they are often **severable**—it's possible to enforce one part without the rest. When one part of a contract is legal and another part is illegal, a court may set aside the illegal part and enforce the remaining provisions. But when a contract has a single purpose and that purpose is unlawful, then the entire contract is void.

The Statute of Frauds

The law that requires certain contracts to be in writing and signed is commonly known as the **statute of frauds**. As the name suggests, the writing requirement is intended to prevent fraudulent claims. The parties to an unwritten contract are likely to disagree later about what each agreed to do or whether they agreed to do anything. Putting a contract in writing helps eliminate that kind of dispute, because the document is solid evidence of the existence of an agreement and its essential terms.

The statute of frauds applies to any agreement that, by its terms, will not be performed within one year from the time it is made. It also applies to a promise to pay another's debt, or guarantee payment of another's debt.

Most importantly for licensees, the statute of frauds applies to any agreement authorizing or employing an agent to sell or purchase real estate for a commission or other compensation, and to any agreement for the purchase and sale of real estate. To be enforceable, these contracts must be in writing and signed.

The statute of frauds does not apply to a commission-splitting agreement between two brokerages. If a designated broker orally agrees to share a commission with another brokerage, there is a valid contract even if this agreement is never written down. The cooperating agent can sue the listing agent to collect his share.

The writing required by the statute of frauds doesn't have to be a formal legal document. A note or memorandum is enough, if it indicates there is an agreement between the parties and it is signed.

Case Example:

Seck, a real estate agent, had known Foulks for a long time. Foulks asked Seck to help him sell his ranch in Sacramento County, and Seck agreed.

However, Foulks refused to give Seck a formal listing agreement. "You know doggone well, you know me, I'm not going to cheat you out of a commission," Foulks said. But Seck took out one of his business cards and jotted down the basic terms of the listing on the back of the card. It looked like this:

310 M/L
2000 per acre
½ down
bal. 5 years
5% int
quarterly with int

keep taxes up to date
½ mineral rights
6% comm
10/1/65

Seck then asked Foulks to initial and date the card. Foulks wrote, "3/24/65 GWF."

Seck found a buyer for the ranch, but Foulks refused to pay Seck a commission. When Seck sued, Foulks argued that the notes on the business card weren't enough to comply with the statute of frauds. But the court disagreed. The court said that all Seck needed was a written, signed memorandum indicating the fact of employment. This requirement was fulfilled by "6% comm" and Foulks's initials on the business card. *Seck v. Foulks*, 25 Cal. App. 3d 556, 102 Cal. Rptr. 170 (1972).

This case clearly shows that in order to satisfy the statute of frauds, the writing doesn't have to be very formal. Although this is a California case, Washington also follows the rule that a writing is sufficient to satisfy the statute of frauds if it clearly indicates the agreement between the parties and is signed.

To comply with the statute of frauds, a contract only needs to be signed by "the party to be charged"—that is, the one who's being sued. For example, it didn't matter that Seck hadn't signed the business card, as long as Foulks had. A full signature is unnecessary; initials are enough. In fact, anything that the signer intends as a signature will do. But it may be difficult to prove that a wavy line or an "X" was someone's signature if that person later denies it.

Once you've signed a contract, you're bound by its terms, even if you claim you never read it. An illiterate person should ask someone trustworthy to explain all the terms of a written agreement before signing it. The same is true for a person signing a document written in a foreign language. Of course, if someone convinces another person to sign a document by misrepresenting its contents, fraud has occurred and the contract is voidable.

Here's another point about written contracts. Many standard contract forms include a paragraph stating that the document represents the entire agreement between the parties. This is called an **integration clause**. When a contract contains an integration clause, neither party can rely on any oral promises or side agreements that the other makes. Any terms that are not included in the written document are unenforceable.

Promissory Estoppel

Many people don't know what the requirements for a valid contract are, and as a result they are surprised to discover that a promise someone made to them is unenforceable. The outcomes of some contract lawsuits can seem very unfair.

To prevent unfairness in at least some cases, the courts have developed the doctrine of **promissory estoppel** (also called the doctrine of **detrimental reliance**). Under this doctrine, a court may enforce a promise that is lacking consideration, a signed writing, or some other contract requirement.

A party attempting to enforce a promise under the theory of promissory estoppel must show the court that the following type of situation exists:

1. Able made a promise to Brown;
2. Able should have expected that his promise would cause Brown to take some action;
3. Brown did take action, in reasonable reliance on Able's promise; and
4. as a result, Brown will be harmed if Able's promise is not enforced.

In such a case, a court may decide to enforce the promise, even though no valid contract exists.

> **Example:** Martha, Stan's mother, bought a large tract of land and promised to give it to Stan. Stan cleared and fenced the land, built a house on it, and moved in with his wife.
>
> Two years later, Martha and Stan have a fight. Martha tells Stan and his wife to get off her property, but they refuse to leave. Martha sues to regain possession of her land.
>
> Martha's promise to Stan was not originally enforceable, since Stan did not give Martha any consideration in exchange for her promise, and there was no signed writing. But the court uses the doctrine of promissory estoppel to rule in Stan's favor. Martha should have realized that her promise would induce action by Stan, and she was in fact aware of all his work on the property. Stan's reliance on Martha's promise was reasonable, so the court rules that Stan and his wife are entitled to possession of the property.

Note that the doctrine of promissory estoppel will be applied only when the promisee's reliance on the promise was reasonable. For example, a real estate agent who does not have a written listing cannot use promissory estoppel to collect a commission. The agent should know that a written agreement is necessary—it is not reasonable for the agent to rely on a client's oral promise.

Modification of a Contract

When both parties agree that their written contract contains an error or omission, they can simply correct it. But to make a more substantial change in the contract, they usually must exchange additional consideration. In effect, the modification is a separate contract; like any other contract, it must be supported by consideration or it is unenforceable.

Assignment or Novation

When one party transfers his rights and duties under a contract to another person, it is either an **assignment** or a **novation**.

As a general rule, either party to a contract may **assign** her contractual rights to another party. But this right may be limited by the contract itself: a contract often provides that one party can't assign it without the other party's consent.

Example: Lightfoot and Tanner sign a two-year residential lease. It provides that Tanner, the tenant, cannot assign her rights under the lease (the right to live on the property) to anyone else without Lightfoot's permission.

However, the contract doesn't prevent Lightfoot from assigning his rights to someone else without Tanner's permission. Lightfoot assigns the lease to Clarke; Lightfoot is the assignor and Clarke is the assignee. Now Tanner is required to pay rent to Clarke.

Even without a provision prohibiting assignment, a contract for personal services, such as a listing agreement, cannot be assigned without consent. If I contract to have you play the piano at a party, you can't send your sister over instead of showing up yourself. A contract also can't be assigned without consent if the assignment would significantly change the other party's duties or increase her risks.

It's important to keep in mind that an assignor isn't relieved of all liability under the contract. Suppose the assignee doesn't carry out his contractual duties. The other party sues, but the assignee turns out to be judgment-proof (has no money or assets). The assignor is **secondarily liable**, and can be required to pay the other party if the assignee doesn't.

To avoid secondary liability, a party who wants to withdraw from a contract should request a novation instead of an assignment. In a **novation**, a new person takes the place of one of the parties, and the withdrawing party is completely relieved of liability connected with the contract.

But a novation can be arranged only with the other original party's consent. A novation is essentially a new contract, so it must comply with all the rules for contract formation, including the mutual consent requirement.

Note that the term "novation" doesn't necessarily refer to the substitution of a new party. It can also refer to the substitution of a new obligation in place of the original one. If the original parties tear up a two-year lease and execute a five-year lease, a novation has occurred.

Accord and Satisfaction

Sometimes a promisee agrees to accept something different or less than what the original contract required the promisor to provide. This kind of agreement is called an **accord**; it does not have to be supported by separate consideration. To extinguish the promisor's original obligation, the promisee executes a **satisfaction**—a document expressly stating that the promisor's performance has been accepted in satisfaction of the obligation.

Release

A contractual obligation can be eliminated altogether if the promisee grants the promisor a release. An oral release is valid if the promisee receives some new consideration; a written release doesn't have to be supported by new consideration. If the contract had to be in writing because of the statute of frauds, the release should also be in writing.

Breach of Contract

Now that you are familiar with how contracts are created and modified, let's take a look at what happens when a contract is breached.

If one party to a contract performs his side of the bargain, the other party is required to perform, too. But if one party fails to perform (**breaches** the contract), the other is not required to perform. If I agree to build you a house for $250,000 and I don't build the house, you don't owe me $250,000.

Substantial Performance vs. Material Breach

In most cases, each party carries out the promised performance to the other's satisfaction. And in certain cases, one party clearly fails to do what she promised. But sometimes it's not so clear-cut.

> **Example:** One party to a contract, Abernathy, does everything he promised, but the other party, Bono, feels that the quality of Abernathy's work was substandard. Or Abernathy does nearly everything promised, but some details are overlooked. Or Abernathy does everything promised, but takes longer to do it than agreed. In these cases, there is room for argument about whether or not the contract was breached. Is Bono required to perform his side of the bargain?

The answer to that question depends on whether there has been substantial performance or a material breach. If Abernathy hasn't fulfilled every detail of the contract but has carried out its main objectives, that may be treated as **substantial performance**. Although Bono may be able to sue for damages because of the unfulfilled details, they don't excuse Bono from performing his side of the bargain.

If Abernathy fails to perform some important part of the contract, or performs very badly, that will be treated as a **material breach**. If Abernathy commits a material breach, Bono is excused from fulfilling his promises. If Bono doesn't perform, he won't be liable to Abernathy for breach of their contract, because Abernathy already breached it. (If Bono has already fully performed, Abernathy will be required to pay him damages for breach of contract.)

What provisions of a contract are so important that failure to fulfill them amounts to a material breach? That depends on all the circumstances of each case. If the promisee emphasized to the promisor that a particular detail of the contract was especially important, failure to comply with that detail may be a material breach. On the other hand, if the promisee acted as though a detail was unimportant, failure to comply with it isn't a material breach.

> **Example:** Grace hires Jorgen to build her a house based on her design. According to the plans, the hallways are to be a standard three feet wide. After construction is completed, Grace inspects the house and determines that the hallways are a half inch too wide. She is angry and withholds her final payment to Jorgen, who in turn sues for payment on their contract. A court would likely find that Jorgen has substantially performed and no material breach has occurred.

Time is of the Essence. Many standard contract forms state that "time is of the essence of this agreement." The purpose of including that phrase is to emphasize that timely performance is crucial. That makes failure to meet a deadline a material breach. Otherwise, a delay isn't a material breach, as long as performance is completed within a reasonable time after the deadline. However, note that the phrase often doesn't have any real effect. Unless the parties actually insist on timely performance, a court is likely to hold that the "time is of the essence" clause has been waived. Don't let deadlines slip by if timely completion of the transaction is important to you.

Conditions

Contracts often include one or more **conditions** (sometimes called **contingency clauses**). A **condition** makes the promisor's obligation depend on the occurrence of a particular event. If the event does not occur, the promisor can withdraw without liability for breach of contract. For example, many purchase and sale agreements are contingent on the buyers qualifying for financing, or on the results of an appraisal, termite inspection, or soil test.

When a contract is conditional, the promisor must make a good faith effort to fulfill the condition. He can't deliberately prevent its fulfillment in order to get out of the contract.

Case Example:

The Egberts agreed to buy a 98-acre field from Mrs. Way. The offer to purchase was conditional on Mrs. Way clearing flaws in the title within one year. Encumbrances on the title included state inheritance tax and federal estate tax liens.

Within the next year, Mrs. Way failed to file tax returns necessary to release the encumbrances on the property. The Egberts filed suit for specific performance.

The court found that Mrs. Way had an obligation to make a good faith effort to clear the tax liens on the property. By her own admission, she had done nothing to pay these taxes. The court ordered Mrs. Way to perform her part of the contract. *Egbert v. Way*, 15 Wn. App. 76, 546 P.2d 1246 (1976).

A condition can be waived by the party it was intended to benefit or protect.

Example: A purchase and sale agreement is contingent on a satisfactory termite inspection. If the results of the inspection are unsatisfactory, the buyer can withdraw from the purchase unless the seller corrects the problems revealed.

The inspection shows that the house is infested with termites. The seller informs the buyer that she is not going to correct the problem, but the buyer decides to go ahead with the purchase. The buyer has a right to waive the condition, because it was included in the contract for his protection.

When a condition is included for the benefit of both parties, however, neither one can waive it without the other's consent.

Tendering Performance

In many cases, Party A has reason to believe that Party B is not going to fulfill the contract. The time for performance has arrived, and Party B hasn't taken any steps toward carrying out her side of the bargain. Before Party A can sue Party B for breach of contract, Party A must offer to perform his side of the bargain. This offer of performance is called a **tender offer** or simply a **tender**.

> **Example:** Lin contracted to buy Maxwell's house, but Maxwell suspects Lin doesn't plan to go through with the purchase. Maxwell must offer to deliver the deed to Lin as promised in their contract. If Lin refuses to pay Maxwell and accept the deed, Lin is in default, and Maxwell may sue.

A tender must be made in good faith. In other words, the tendering party must be willing and able to perform everything he promised, fully and immediately. The tender must be unconditional, unless the contract contained a condition that the other party hasn't fulfilled yet.

It is not necessary to tender performance when there has been an **anticipatory repudiation**. If Lin repudiates the contract by notifying Maxwell that she won't perform, Maxwell can file suit for breach without making a tender. The tender would be a waste of time. But an anticipatory repudiation must be a clear, unequivocal statement. Maxwell can't infer repudiation from Lin's behavior or from a vague remark.

Remedies for Breach

When a promisor has performed badly, or has refused to perform at all (either by anticipatory repudiation or by rejecting the tender offer), she has breached the contract. Then the promisee can turn to the legal system for help in enforcing the contract.

Arbitration

As we discussed in Chapter 1, it can take many months for a case to get to trial. The complexity of a trial also increases legal costs. To expedite dispute resolution and lower the cost, more and more contracts include an arbitration provision.

Arbitration is an alternative to the court system. An arbitrator performs the functions of a judge, reviewing the evidence and resolving the dispute. Arbitration is usually much more informal than a trial; the discovery process is limited and the rules of evidence are relaxed. Thus, arbitration is typically faster and less expensive than a trial.

Arbitration is generally required by Washington law if the amount of damages is less than a certain amount (between $15,000 and $50,000, depending on the county) and the only relief sought is money damages. This is called **mandatory arbitration** and is designed to ease court congestion. In other cases, parties to a dispute can agree to submit to arbitration instead of going to court. Parties to a contract may include an arbitration provision in the

contract, agreeing in advance to arbitrate if a dispute arises. This is called **contractual arbitration** and is intended to save the parties time and money.

Unless otherwise agreed, the arbitrator's decision will be legally binding on the parties—the loser can't just shrug it off. The results of mandatory arbitration may be appealed in superior court. But parties agreeing to contractual arbitration typically give up the appeal right, in the effort to save time and money.

As you can see, an arbitration provision in a contract has a significant effect on the parties' rights in the event of a breach. An arbitration clause should be clearly explained to any party signing a contract. Otherwise, parties to a real estate transaction might sign a contract containing an arbitration provision without truly understanding the legal consequences.

Lawsuit

A breach of contract often is the first step towards a lawsuit. A lawsuit must be brought within a certain specified time period. The laws that set forth the time period requirements are known as **statutes of limitations**. In Washington, a lawsuit based on a written contract must be filed within six years after the breach occurred. An action based on an oral contract generally must be brought within three years.

The parties to a contract can agree to a shorter limitation period than the one prescribed by statute, but the period must not be unreasonably short.

These limitation periods apply even when the suing party was not aware of the breach at the time it occurred. But there's an exception for cases involving fraud or mistake: time doesn't start to run until the injured party discovers the fraud or mistake.

Interpretation of the Contract. In order to decide whether a contract has been breached (and if it has, what the plaintiff's remedy should be), the court must interpret the parties' agreement. In doing so, the court tries to determine (and enforce) what the parties intended at the time they entered the contract.

When the contract is in writing, the court is supposed to determine the parties' intention from the written document alone. If the language in the document is clear and unambiguous, the court will not hear evidence about the contract negotiations or any oral agreements that contradict the terms of the written agreement.

> **Example:** Tiokasin is going to lease a townhouse from Lane for nine months. The written lease form clearly states that rent is due on the first of each month. Before signing the lease, Tiokasin asks Lane if she can pay the rent on the fifteenth of each month instead, and Lane agrees. However, they don't change the lease form to reflect this agreement.
>
> Later Tiokasin and Lane wind up in court. Tiokasin wants to testify that Lane agreed to accept the rent on the fifteenth of each month. But this testimony will not be allowed, because it contradicts the written agreement between the parties.

This is known as the **parol evidence rule**. ("Parol" is a legal term that means "spoken.") This rule, like the statute of frauds, is intended to cut down on false claims and prevent people from weaseling out of what they agreed to do.

If the written contract is ambiguous, the judge will let the parties testify about their contract negotiations to shed light on the meaning of the document. Often the evidence presented doesn't clear up the ambiguity. In that case, the court will interpret the contract against the party that was responsible for the ambiguity—usually the one that drafted the document. If neither party is to blame, the court will interpret the provision in favor of the promisor: at the time the contract was made, what did the person making the promise believe that the other person understood?

Damages

Once the court has concluded that a breach of contract has occurred, it must decide on a remedy. The most common remedy for breach of contract is a **damages** award: the breaching party is ordered to pay a sum of money to the nonbreaching party. How much? The award is supposed to be the amount that will put the nonbreaching party in the position she would have been in if the other party had fulfilled the contract.

> **Example:** Perkins contracted to clear Hanawalt's property for $10,000, but he quit the project soon after starting. So Hanawalt hired Lopez to carry out the job. Lopez charged her $12,000.
>
> Hanawalt sues Perkins for breach of contract, and Perkins is ordered to pay her $2,000. If Perkins had not breached the contract, it would have cost Hanawalt only $10,000 (rather than $12,000) to have her property cleared. The $2,000 judgment against Perkins represents the difference between what the job actually cost Hanawalt and what it would have cost her if Perkins hadn't breached: $12,000 – $10,000 = $2,000.

However, if Lopez had charged Hanawalt only $9,000 to clear the property, Hanawalt would actually have been better off as a result of Perkins's breach. The job would have cost her $1,000 less than it would have if Perkins had fulfilled their contract. In that case, Hanawalt would not be entitled to a judgment against Perkins, because she wasn't damaged by his breach. The purpose of a contract lawsuit is to compensate the promisee for actual damages, not to punish the promisor for breaching.

Certainty Requirement. To be the basis for a damages award, a loss resulting from breach of contract must be proven with certainty. Occasionally a damages award includes lost profits: "If Harrison hadn't breached the contract, I could have opened my store a month earlier, and I would have made at least $1,000 in profit during that month." But in most cases, lost profits are considered too uncertain to be included in the judgment. Who knows whether the store would have turned a profit if it had been open that month? It might even have lost money. Unless the evidence proves that there would have been a profit, and that it would have been at least a certain amount, lost profits are not awarded.

Mitigation Requirement. The nonbreaching party in a contract dispute is required to **mitigate** damages. That means the nonbreaching party must do what he can to reduce losses resulting from the other party's breach.

Example: Hernandez leases an apartment to Tyler for one year; Tyler has agreed to pay $1,000 a month. Two months later, Tyler decides she doesn't like the place, so she moves out and doesn't make any further rent payments. That's clearly a breach of contract.

But Hernandez can't simply sue Tyler and expect a judgment for $10,000 (the additional amount she would have received if Tyler had honored the lease). Hernandez is required to mitigate her damages by trying to rent the apartment again.

If Hernandez immediately finds a new tenant for $1,000 a month, Tyler will not be liable for any of her unpaid rent. However, Tyler might be required to reimburse Hernandez for expenses incurred in renting the apartment again, such as any leasing fee and the cost of cleaning, painting, advertising, etc.

Suppose no one will rent the apartment for $1,000 a month, but someone rents it for $900 a month. Then Tyler will be liable to Hernandez for the difference between what Hernandez actually collects and what she would have collected if Tyler hadn't breached: $100 per month, for 10 months. The damages award would be $1,000 ($100 × 10 = $1,000), plus any expenses Hernandez incurred in renting the apartment.

Liquidated Damages. To lessen the possibility of expensive litigation, some contracts include a **liquidated damages** provision. The parties agree in advance that if there is a breach, the damages will be set at a specified sum or calculated according to a specified formula. The nonbreaching party will accept the liquidated damages instead of suing for actual damages.

As a general rule, a court will enforce a liquidated damages provision if the amount is reasonable and does not constitute a penalty, and the type of harm is such that it is difficult to ascertain or estimate the actual damages accurately.

There are restrictions on liquidated damages for certain types of contracts. In the case of a residential lease, a liquidated damages clause is void unless it would be extremely difficult to calculate the actual damages after a breach of the contract. The same rule applies to a consumer loan for the purchase of personal property. That standard is hard to meet, so a liquidated damages provision in a residential lease or a consumer loan contract is rarely enforceable.

In a real estate purchase and sale agreement, the parties typically agree that all or a portion of the buyer's earnest money deposit will be treated as liquidated damages if the buyer defaults. Under Washington law, the amount that can be forfeited is limited to no more than 5% of the purchase price. In other words, although the earnest money deposit may be any amount that the parties agree to, no more than 5% of the price may be treated as liquidated damages.

Example: The buyer agrees to purchase the property for $300,000 and gives the seller an earnest money deposit of $18,000 (6% of the price). Under the terms of their contract, the entire deposit will serve as liquidated damages if the buyer backs out of the transaction.

Three weeks after the contract is signed, the buyer defaults. Washington law allows the seller to keep only $15,000 (5% of the price) as liquidated damages. Even though the contract provided for the entire deposit to be forfeited, the seller is required to refund $3,000 to the buyer.

Note that the 5% limit on liquidated damages in purchase and sale agreements applies to both residential and nonresidential transactions.

Equitable Remedies

A damages award—a sum of money intended to compensate the nonbreaching party—is the standard remedy in a contract dispute. But money doesn't always do the trick. In some cases, alternative remedies are available.

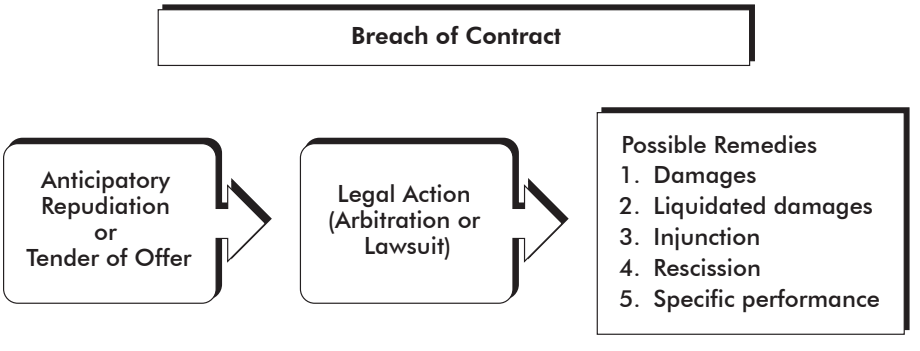
Injunctions. An **injunction** is a court order directing a person to do something or refrain from doing something (see Chapter 1). Sometimes one party to a contract can obtain an injunction to prevent the other party from breaching.

To get an injunction, it's usually necessary to convince the court that the other party is about to breach the contract, and that the breach will cause **irreparable harm**. That doesn't actually mean it has to cause harm that could never be fixed; it simply must be harm that can't be adequately redressed by a damages award.

> **Example:** A restrictive covenant in Nelson's deed protects the enormous oak tree that has stood for 150 years on the boundary between her property and Locke's property. Locke learns that Nelson is planning to chop down the tree in spite of the restrictive covenant. He obtains an injunction to prevent Nelson from breaching the covenant.
>
> An injunction is an appropriate remedy because a damages award would not compensate Locke for the loss of a tree that took 150 years to grow.

Rescission. Sometimes one party to a contract doesn't want to enforce the other party's promise. Instead, he just wants to undo the contract completely, as if it never happened. In that case, he may ask a court to **rescind** the contract. When a contract is rescinded, each party returns any consideration the other has given. All of their contractual obligations are terminated.

Fig. 8.4 Suing for breach of contract



Rescission is available under a variety of circumstances. Whenever a voidable contract is disaffirmed—because of lack of capacity, fraud, undue influence, duress, or mistake—the court will rescind it. A contract can also be rescinded without going to court, if both parties agree. One party can request court-ordered rescission if the other party failed to provide the promised consideration, or if that consideration turned out to be void. A court will also rescind an unlawful contract (unless the unlawfulness was clear from the contract's terms and the parties were equally at fault—then a court will refuse to become involved in any way).

In some situations, the parties may prefer to **cancel** their contract instead of rescinding it. When a contract is canceled, all further obligations are terminated, but the parties aren't required to return what they've already received under the contract.

Specific Performance. Sometimes the nonbreaching party to a contract doesn't want to be compensated for the harm that resulted from the other's breach. Instead, the nonbreaching party wants to make the other party do what he or she promised to do. This is called **specific performance**: the court orders the breaching party to carry out the performance she promised in the contract.

Specific performance is generally not granted when a damages award will be just as effective. For example, a car dealer won't be ordered to sell you a particular car when you could get an identical one from another dealer. (If you have to pay more at the second dealer, the first dealer will be ordered to pay you the difference as a damages award.) But if the subject of a contract is unique, then specific performance is an appropriate remedy. A damages award won't enable you to buy an identical item, because there isn't another just like it.

Specific performance is most often used in enforcing real estate contracts, because a piece of real property is generally unique. A damages award may not be sufficient compensation for breach of an agreement to transfer real property.

A preference in favor of specific performance exists where the agreement is in writing, is certain in its terms, is fair and just, is for valuable consideration, and is capable of being enforced without hardship to either party.

In many circumstances, a court cannot grant specific performance. For example, it can never be a remedy for breach of a personal services contract, because no one can be forced to work for someone or to employ someone. Specific performance also can't be ordered for an agreement to procure the act or consent of another person, such as when a husband has agreed to persuade his wife to sign a document.

You can't be ordered to perform a contract if it wasn't just and reasonable, or if you didn't receive legally adequate consideration. For example, if you agreed to sell your $250,000 house for $175,000, the contract is enforceable even though the consideration is inadequate. But although you may be required to pay damages to the buyer, you can't be forced to complete the sale. Furthermore, a buyer can't be ordered to complete a purchase of real property when the seller doesn't have marketable title.

You also can't be ordered to perform if the other party hasn't fulfilled all the conditions he agreed to. And finally, you can't be ordered to perform if your consent to the contract was obtained by misrepresentation or unfair practices, or if your consent was given because of mistake, misapprehension, or surprise.

In spite of all these restrictions, specific performance is a common remedy when a seller breaches a purchase and sale agreement.

Interference with Contract

Sometimes one of the parties to a contract is persuaded to breach it by a third party that is outside the contractual relationship. For example, another real estate agent might convince your client to breach the listing agreement he has with you. Or a real estate agent might persuade a seller to breach a binding sales contract and accept a better offer.

These acts may constitute a tort called **interference with contractual relations**. The nonbreaching party can file a tort lawsuit against the third party, in addition to filing a contract lawsuit against the breaching party. To win the tort suit, the plaintiff must show that the defendant (the third party):

1. was aware of the contract,
2. intentionally interfered with the contract,
3. causing a breach of the contract,
4. that resulted in damages.

A tort called **interference with prospective economic advantage** is similar to interference with contractual relations, but the plaintiff doesn't need to show that he or she had a binding contract with another person. It's only necessary to prove that they had an economic relationship and the defendant was aware of that relationship.

Real Estate Contracts

A real estate agent is expected to be familiar with several different types of contracts. Each of these real estate contracts is simply a particular application of the basic rules of contract law outlined in the first part of this chapter.

As you've seen, the statute of frauds requires most of the contracts used in a real estate transaction to be in writing. Even when a signed written document isn't required by law, it's always wise to have one. The parties to a contract can draft a document for themselves, but it's much safer to use standard forms or to have lawyers do the drafting. A real estate agent preparing a contract must use approved forms, with minimal additions and changes, or risk liability for the unauthorized practice of law.

Whenever a document is executed in the course of a real estate transaction, the agent must see to it that each party receives a copy at the time of signing. That includes copies

of any modifications of the agreements, too. Under the real estate license law, a brokerage must keep copies of all documents pertaining to a transaction for at least three years.

Some of the contracts commonly used in real estate transactions will be discussed in later chapters: title insurance policies (Chapter 9); escrow instructions (Chapter 10); and leases (Chapter 13).

This section examines licensee affiliation agreements, listing agreements, purchase and sale agreements, and options. Forms for each of these types of contracts are published by a number of different companies. Although the forms are standardized in a general sense, their details vary. Keep in mind that the provisions discussed here are not necessarily required by law, and are not necessarily included in every form. Also remember that the parties may choose to alter some of the pre-printed provisions in a form.

Licensee Affiliation Agreements

It's a good business practice for a brokerage to have a written contract with each affiliated licensee who works for the firm. This agreement should be signed by the designated broker or another managing broker representing the firm, and also by the licensee. It should state the main terms of the employment relationship, such as duties, supervision, compensation, and termination.

The Northwest Multiple Listing Service Firm/Associate Agreement form is shown in Figure 8.5 as an example. Like most contracts of this type, it provides that the licensee will work for the firm as an independent contractor, as opposed to an employee (see Chapter 6). It has detailed provisions concerning what resources the firm will provide and which expenses are the licensee's responsibility.

The compensation arrangements appear at the end of the form. Among other things, this agreement provides that the licensee is entitled to receive his share of a commission from the firm only if the firm has actually been paid in the transaction (see paragraph B in the final section of page 3). So if a difficult client refused to pay the commission and the firm decided not to take legal action to collect the money, the licensee would not have a claim against the firm.

Listing Agreements

A **listing agreement** is a contract between a seller (a property owner who wants to list the property for sale) and a brokerage. As we discussed earlier, a brokerage cannot sue for a commission unless the listing is in writing and signed by the client. The listing agreement need not be a formal legal document, but it must indicate the fact of employment—either expressly, with a statement indicating that the signer is employing the brokerage, or by implication, through a reference to the firm's compensation.

Remember that even without an enforceable listing agreement, a real estate licensee may owe agency duties to the client. Those duties are based on agency law, not on contract law.

Fig. 8.5 Licensee affiliation agreement

Form 127A
Firm/Associate Agreement
Rev. 7/10
Page 1 of 3

FIRM / ASSOCIATE AGREEMENT
(Independent Contractor Agreement)

IT IS AGREED by and between _____ ("Firm")

and _____ ("Associate"), as follows:

1. **LICENSES:** Each of the parties hold appropriate real estate licenses issued by the State of Washington.

2. **OFFICE ASSOCIATION:** Associate agrees to use his/her best efforts to promote Firm's and Associate's reputation and business.

3. **INDEPENDENT CONTRACTOR STATUS:** The parties agree that Associate is an independent contractor for federal tax and all other purposes and is not an employee of, or partner with, Firm. Under federal law, remuneration paid Associate must be directly related to sales or other production rather than to salary or the number of hours worked, or the independent contractor status will be lost for federal income tax purposes. Notwithstanding the foregoing, RCW 18.85 requires Firm to supervise associate's real estate activities. Associate agrees to comply with Firm's directions and procedures in this regard.

4. **FIRM TO PROVIDE OFFICE AND OFFICE PROCEDURES:** Firm shall, in common with other Associates of the office, make available office space, office equipment, local telephone service, receptionist, business secretarial assistance, office signs, office advertising, membership in listing and/or referral services selected by Firm, and use of maps and other sales materials. To allow Associate an equal opportunity in the matter of customers, sales and listings, and to promote the image of the Associate and Firm, Firm agrees to maintain rules regarding use of the office: days it will be open; office procedures; floor time; inquiries; leads; and other sales opportunities.

5. **ASSOCIATE RESPONSIBILITY - BUSINESS EXPENSES:** Associate shall be responsible to pay for his/her own license and business fees; automobile and other transportation; long distance phone charges; entertainment; insurance; and other business expenses. From time-to-time, unusual expenses involved in listing and/or sale, such as out-of-town travel, extended long distance charges, and brochures, may, by advance agreement of the parties, be deducted from a commission prior to division between Firm and Associate.

6. **ASSOCIATE'S ADVERTISING:** Associate is responsible to pay for his/her own advertising, over and above general office advertising by Firm. Associate shall abide by RCW 18.85 and WAC 308-124, including, without limitation, restrictions on advertising and signs. Associate agrees not to utilize any advertising, signs, brochures or other solicitation materials without Firm's advance approval thereof.

7. **ASSOCIATE'S AUTO INSURANCE:** Associate agrees to at all times maintain, at Associate's expense, automobile liability and property damage insurance covering Associate's own car and any other car that may be used in conduct of Associate's business. The limits on said policy shall be as approved by Firm. In the absence of such approval the policy limits shall be at least $1,000,000 single limit. Firm shall be named co-insured and a copy of the policy shall be given to Firm.

8. **ASSOCIATE'S TAXES:** Associate shall file and pay quarterly estimated, and annual federal income tax returns; and any other taxes required of an independent contractor. Firm will file any required notices or returns (such as IRS Form 1099) on all monies received by Associate through Firm. Firm shall pay any applicable State, County and/or City Business & Occupation Taxes on the entire commission, and the amount of such tax shall be deducted from the commission prior to division between Firm and Associate. At Firm's request, Associate will pay one-half of the medical aid and supplemental retirement portions of any industrial insurance premiums which Washington law requires Firm to pay on independent contractors.

9. **DELIVERY AND OWNERSHIP OF CLIENT PROPERTY AND RECORDS:** Associate shall timely provide to Firm all earnest money or other deposits, transaction documents and correspondence as required by RCW 18.85 and WAC 308-124. All maps, manuals, log books, printed materials, and supplies; client records, customer records, and transaction records, electronic or printed; and any other records, related to or received through the Firm's office (collectively the "Firm's Property") are the exclusive property of and remain owned by Firm. Any amount paid by Associate for the Firm's Property shall be for use of the Firm's Property and shall create no ownership interest therein.

INITIALS: FIRM _____ DATE _____ ASSOCIATE _____DATE _____

FIRM / ASSOCIATE AGREEMENT
(Independent Contractor Agreement)

Continued

10. **ASSOCIATE TO RETURN FIRM'S PROPERTY:** Associate shall return all of Firm's Property described in Paragraph 9, above, to Firm prior to separating from Firm (including transfer to another real estate firm).

11. **MULTIPLE LISTING SERVICE:** Associate shall be responsible for paying all membership fees and costs for joining the multiple listing service (the "MLS") (or other real estate associations). Associate acknowledges that all proprietary information, passwords, keys, keyboxes, forms, and other services and information provided by the MLS are furnished for the use of Associate only and may not be disclosed, loaned, or distributed to anyone except in accordance with MLS Rules and agreements. Associate shall indemnify, defend, and hold Firm harmless from any liability, including MLS fines and damage suits, resulting from violation of MLS rules, misuse of MLS property and disclosure or distribution of passwords or other proprietary information in violation of MLS rules and breach of agreements with third parties, including without limitation moving companies, insurance companies, oil companies, clients, customers, employees, assistants, and licensees, or anyone else.

12. **COMPLIANCE WITH BYLAWS & RULES:** Firm and Associate shall comply with all rules and regulations and agreements of the MLS, Board of Realtors or other real estate associations to which either or both of the parties may belong. Each party hereby agrees to hold the other harmless from violation of any such Rules or Regulations or breach of any agreements each of them may enter with the MLS, Board, or association.

13. **MANDATORY MEMBERSHIP:** If Firm (now or in the future) belongs to any MLS, Board of Realtors, or association which requires that (as a condition of Firm's membership) all of those associated with Firm must belong, then Associate agrees to immediately apply for and maintain membership and pay (when due) all dues or other charges levied. In the event of Associate's failure to do so, Firm may terminate this Agreement and/or deduct required dues or charges from the next commission or other monies due to Associate.

14. **PROPERTY INVESTMENT:** Associate may acquire, for personal investment or residence, property listed with Firm's office or through the MLS, provided that Firm and any other Associate's portion of the commission provided in the listing is paid at closing. Firm or Firm's other Associate(s) may likewise acquire property listed by Associate, provided that the Associate's portion of the commission provided in the listing is paid at closing.

15. **OWNERSHIP - LISTINGS:** All listings, sales and other agreements obtained or negotiated by Associate shall, in accordance with state law, be in the name of and be the property of Firm, subject to Associate's share of any commission. Earnest money, lease deposits and other money; Purchase and Sale Agreements; Listing Agreements; Leases; and any other wholly or partially executed instruments or documents shall be immediately delivered to Firm in accordance with state law. Associate shall be entitled to copies thereof for his/her own records.

16. **TERMINATION:** This Agreement may be terminated, at any time, without cause, by either party giving notice to the other. If Associate contemplates termination of this Agreement, Associate will make reasonable efforts to close any pending sales in which Associate is interested. In the event that any such sale does not close prior to termination of this Agreement and, in Firm's discretion, it is necessary or appropriate for Firm to assign another broker(s) to attend to any matters concerning the sale (including changes in financing; securing of occupancy agreements; removal of contingencies; and any other usual or unusual matters required to close the sale), then Firm is authorized to deduct up to 50% of the Associate's share of the commission and pay the same to another broker(s) according to their participation in the matters necessary to close the sale. Associate agrees not to, in any way, induce or encourage an owner to terminate a listing (or sale) following termination of this Agreement.

17. **ARBITRATION:** Any and all disputes between Associate and Firm, or between Associate and other Associates in Firm's office, arising from matters occurring, all or in part, prior to termination of this Agreement, shall be resolved by arbitration, rather than suit. Each of the parties shall, within five days of being requested to do so by the other, name one arbitrator. The two arbitrators shall within five days of their appointment, appoint a third arbitrator. The dispute shall be heard within thirty days thereafter, in accordance with state statutes governing arbitration, and the decision of the arbitrators shall be final and binding upon the parties subject only to statutory review by the Superior Court. Alternatively, the parties may agree to submit the dispute to a Board of Realtors, which may offer such arbitration services.

Form No. 127A
Firm/Associate Agreement
Rev. 7/10
Page 3 of 3

FIRM / ASSOCIATE AGREEMENT
(Independent Contractor Agreement)
Continued

18. COMMISSIONS: The parties shall share commissions in accordance with the Addendum attached hereto.

19. ATTORNEY'S FEES AND COSTS: If either party to this Agreement shall bring any action or commence any proceeding to enforce the provisions of this Agreement, the prevailing party in such action or proceeding shall be entitled to recover all reasonably incurred costs and expenses, including attorney fees, incurred by such party in connection with such action or proceeding.

DATED this_____ day of _____, _____.

_____ _____
FIRM SIGNATURE ASSOCIATE SIGNATURE

COMMISSION AGREEMENT ADDENDUM TO FIRM / ASSOCIATE AGREEMENT

IT IS AGREED by and between_____ ("Firm")
and _____ ("Associate").

A. Associate shall not be entitled to any salary, draws or compensation of any nature other than the listing fees and commission shares set forth hereinafter.

B. Associate shall have no claim to a listing fee or commission share except from money actually received by Firm.

C. All commissions and other monies must be paid to Firm alone. State law prohibits Associate from receiving commissions other than from the Firm holding his/her license.

D. MLS dues, listing fees owed Associate or others, Business and Occupation Taxes, Industrial Insurance, and other expenses, shall be deducted from the commission prior to determining Firm's and Associate's shares. In addition, Firm shall be entitled to deduct, from Associate's commission share, unpaid amounts owed Firm or the MLS or Board of Realtors for dues or any other reason. The net amount is the "commission" below.

E. Commissions shall be divided_____ % to the Associate and _____% to the Firm.

F. Associate shall be entitled to the following listing fee (both before and after termination of this Agreement) for each exclusive listing obtained by Associate for Firm and sold by Associate or by others:

DATED this_____day of _____, _____.

_____ _____
FIRM SIGNATURE ASSOCIATE SIGNATURE

And these agency duties are in addition to—and independent of—the contractual duties the brokerage firm takes on in a listing agreement.

Because a listing agreement is a personal services contract, it can be assigned to another brokerage only with the client's consent. The assignment, like the original contract, must be in writing. It should be signed by the assignor and the assignee, as well as the client.

Types of Listing Agreements. A brokerage's right to a commission also depends on the type of listing agreement used. Under an **exclusive right to sell listing**, the owner agrees to list the property with only one brokerage. That brokerage is entitled to a commission if the property sells during the listing term, regardless of who sells it (even if the one who sells it is the owner). Most agents prefer this type of listing. The Northwest Multiple Listing Service form shown in Figure 8.6 is an example of an exclusive right to sell listing agreement.

In an **exclusive agency listing**, the owner agrees to list with only one brokerage but retains the right to sell the property herself without being obligated to pay the brokerage a commission. The brokerage is entitled to a commission if it or any other licensee sells the property, but not if the owner sells it.

Whenever an agent takes an exclusive agency or exclusive right to sell listing, the beginning and ending dates for the listing period should be stated in the listing agreement. (That isn't a legal requirement in Washington, though; a listing agreement without a termination date will expire after a reasonable length of time.)

Under an **open listing** agreement, the owner is only obligated to pay a commission to the agent who sold the property or was the procuring cause of the sale. To be the **procuring cause,** the brokerage must be primarily responsible for the parties' agreement. Since an open listing is a non-exclusive agreement, the seller is free to give listings to other brokerages as well. The sale of the property terminates all open listings.

If two firms contribute to a particular sale, a dispute may arise over which one was the procuring cause. Whether a brokerage was the procuring cause is a question of fact that is determined by examining all of the circumstances surrounding the particular transaction.

> **Example:** The principal gave open listings to agents from three different brokerages, Aimes Realty, Baker Land Co., and Kimoto Realty. Aimes and Baker both showed the property to the same buyer. The Aimes agent brought the buyer to the property for the first time, but it was the Baker agent who successfully negotiated the offer that the principal accepted.
>
> Aimes Realty claims that it should receive at least part of the commission. But the agent who effectuated the sale is considered the procuring cause, so Baker Land Co. is the one entitled to the commission.

Basic Elements. A listing agreement must identify the property to be sold or leased. The street address is generally useful, but is not enough to identify the property with certainty. That usually isn't an issue, but it can become one if the client decides not to sell and tries to avoid paying a commission. It's a good practice to attach a legal description of the property

Fig. 8.6 Listing agreement

Form 1A
Exclusive Sale
Rev. 7/15
Page 1 of 2

EXCLUSIVE SALE AND LISTING AGREEMENT

_____ (“Seller") hereby grants to,
Seller Seller

_____ (“Firm") from date hereof until midnight of

_____ (“Listing Term”), the exclusive right to sell the real property ("the Property")

commonly known as _____, City _____ ,

County _____, WA, Zip _____; and legally described on Exhibit A.

1. **DEFINITIONS.** For purposes of this Agreement: (a) "MLS" means the Northwest Multiple Listing Service; and (b) "sell" includes a contract to sell; an exchange or contract to exchange; an option to purchase; and/or a lease with option to purchase.

2. **AGENCY/DUAL AGENCY.** Seller authorizes Firm to appoint _____ as Seller’s Listing Broker. This Agreement creates an agency relationship with Listing Broker and any of Firm’s brokers who supervise Listing Broker’s performance as Seller’s agent (“Supervising Broker”). No other brokers affiliated with Firm are agents of Seller, except to the extent that Firm, in its discretion, appoints other brokers to act on Seller's behalf as and when needed. If the Property is sold to a buyer represented by one of Firm’s brokers other than Listing Broker (“Buyer’s Broker”), Seller consents to any Supervising Broker, who also supervises Buyer’s Broker, acting as a dual agent. If the Property is sold to a buyer who Listing Broker also represents, Seller consents to Listing Broker and Supervising Broker acting as dual agents. If any of Firm’s brokers act as a dual agent, Firm shall be entitled to the entire commission payable under this Agreement plus any additional compensation Firm may have negotiated with the buyer. Seller acknowledges receipt of the pamphlet entitled “The Law of Real Estate Agency."

3. **LIST DATE.** Firm shall submit this listing, including the Property information on the attached pages and photographs of the Property (collectively, “Listing Data”), to be published by MLS by 5:00 p.m. on _____ (“List Date”), which date shall not be more than 30 days from the effective date of the Agreement. Seller acknowledges that exposure of the Property to the open market through MLS will increase the likelihood that Seller will receive fair market value for the Property. Accordingly, prior to the List Date, Firm and Seller shall not promote or advertise the Property in any manner whatsoever, including, but not limited to yard or other signs, flyers, websites, e-mails, texts, mailers, magazines, newspapers, open houses, previews, showings, or tours.

4. **COMMISSION.** If during the Listing Term (a) Seller sells the Property and the buyer does not terminate the agreement prior to closing; or (b) after reasonable exposure of the Property to the market, Firm procures a buyer who is ready, willing, and able to purchase the Property on the terms in this Agreement, Seller will pay Firm a commission of (fill in one and strike the other) _____% of the sales price, or $ _____ (“Total Commission”). From the Total Commission, Firm will offer a cooperating member of MLS representing a buyer (“Selling Firm”) a commission of (fill in one and strike the other) _____% of the sales price, or $ _____. Further, if Seller shall, within six months after the expiration of the Listing Term, sell the Property to any person to whose attention it was brought through the signs, advertising or other action of Firm, or on information secured directly or indirectly from or through Firm, during the Listing Term, Seller will pay Firm the above commission. Provided, that if Seller pays a commission to a member of MLS or a cooperating MLS in conjunction with a sale, the amount of commission payable to Firm shall be reduced by the amount paid to such other member(s). Provided further, that if Seller cancels this Agreement without legal cause, Seller may be liable for damages incurred by Firm as a result of such cancellation, regardless of whether Seller pays a commission to another MLS member. Selling Firm is an intended third party beneficiary of this Agreement.

5. **SHORT SALE / NO DISTRESSED HOME CONVEYANCE.** If the proceeds from the sale of the Property are insufficient to cover the Seller’s costs at closing, Seller acknowledges that the decision by any beneficiary or mortgagee, or its assignees, to release its interest in the Property, for less than the amount owed, does not automatically relieve Seller of the obligation to pay any debt or costs remaining at closing, including fees such as Firm’s commission. Firm will not represent or assist Seller in a transaction that is a “Distressed Home Conveyance” as defined by Chapter 61.34 RCW unless otherwise agreed in writing. A “Distressed Home Conveyance” is a transaction where a buyer purchases property from a “Distressed Homeowner” (defined by Chapter 61.34 RCW), allows the Distressed Homeowner to continue to occupy the property, and promises to convey the property back to the Distressed Homeowner or promises the Distressed Homeowner an interest in, or portion of, the proceeds from a resale of the property.

6. **KEYBOX.** Firm is authorized to install a keybox on the Property. Such keybox may be opened by a master key held by members of MLS and their brokers. A master key also may be held by affiliated third parties such as inspectors and appraisers who cannot have access to the Property without Firm's prior approval which will not be given without Firm first making reasonable efforts to obtain Seller's approval.

_____ _____ _____ _____
Seller’s Initials Date Seller’s Initials Date

Form 1A
Exclusive Sale
Rev. 7/15
Page 2 of 2

EXCLUSIVE SALE AND LISTING AGREEMENT
Continued

7. SELLER'S WARRANTIES AND REPRESENTATIONS. Seller warrants that Seller has the right to sell the Property on the terms herein and that the Property information on the attached pages to this Agreement is correct. Further, Seller represents that to the best of Seller's knowledge, there are no structures or boundary indicators that either encroach on adjacent property or on the Property. Seller authorizes Firm to provide the information in this Agreement and the attached pages to prospective buyers and to other cooperating members of MLS who do not represent the Seller and, in some instances, may represent the buyer. If Seller provides Firm with any photographs of the Property, Seller warrants that Seller has the necessary rights in the photographs to allow Firm to use them as contemplated by this Agreement. Seller agrees to indemnify and hold Firm and other members of MLS harmless in the event the foregoing warranties and representations are incorrect.

8. CLOSING. Seller shall furnish and pay for a buyer's policy of title insurance showing marketable title to the Property. Seller shall pay real estate excise tax and one-half of any escrow fees or such portion of escrow fees and any other fees or charges as provided by law in the case of a FHA or VA financed sale. Rent, taxes, interest, reserves, assumed encumbrances, homeowner fees and insurance are to be prorated between Seller and the buyer as of the date of closing. Seller shall prepare and execute a certification (NWMLS Form 22E or equivalent) under the Foreign Investment in Real Property Tax Act ("FIRPTA") at closing. If Seller is a foreign person or entity, and the sale is not otherwise exempt from FIRPTA, Seller acknowledges that a percentage of the amount realized from the sale will be withheld for payment to the Internal Revenue Service.

9. MULTIPLE LISTING SERVICE. Seller authorizes Firm and MLS to publish the Listing Data and distribute it to other members of MLS and their affiliates and third parties for public display and other purposes. This authorization shall survive the termination of this Agreement. Firm is authorized to report the sale of the Property (including price and all terms) to MLS and to its members, financial institutions, appraisers, and others related to the sale. Firm may refer this listing to any other cooperating multiple listing service at Firm's discretion. Firm shall cooperate with all other members of MLS, or of a multiple listing service to which this listing is referred, in working toward the sale of the Property. Regardless of whether a cooperating MLS member is the agent of the buyer, Seller, neither or both, such member shall be entitled to receive the selling firm's share of the commission. MLS is an intended third party beneficiary of this agreement and will provide the Listing Data to its members and their affiliates and third parties, without verification and without assuming any responsibility with respect to this agreement.

10. PROPERTY CONDITION AND INSURANCE. Neither Firm, MLS, nor any members of MLS or of any multiple listing service to which this listing is referred shall be responsible for loss, theft, or damage of any nature or kind whatsoever to the Property, any personal property therein, or any personal injury resulting from the condition of the Property, including entry by the master key to the keybox and/or at open houses. Seller is advised to notify Seller's insurance company that the Property is listed for sale and ascertain that the Seller has adequate insurance coverage. If the Property is to be vacant during all or part of the Listing Term, Seller should request that a "vacancy clause" be added to Seller's insurance policy. Seller acknowledges that intercepting or recording conversations of persons in the Property without first obtaining their consent violates RCW 9.73.030.

11. FIRM'S RIGHT TO MARKET THE PROPERTY. Seller shall not commit any act which materially impairs Firm's ability to market and sell the Property under the terms of this Agreement. In the event of breach of the foregoing, Seller shall pay Firm a commission in the above amount, or at the above rate applied to the listing price herein, whichever is applicable. Unless otherwise agreed in writing, Firm and other members of MLS shall be entitled to show the Property at all reasonable times. Firm need not submit to Seller any offers to lease, rent, execute an option to purchase, or enter into any agreement other than for immediate sale of the Property.

12. SELLER DISCLOSURE STATEMENT. Unless Seller is exempt under RCW 64.06, Seller shall provide to Firm as soon as reasonably practicable a completed and signed "Seller Disclosure Statement" (Form 17 (Residential), Form 17C (Unimproved Residential), or Form 17 Commercial). Seller agrees to indemnify, defend and hold Firm harmless from and against any and all claims that the information Seller provides on Form 17, Form 17C, or Form 17 Commercial is inaccurate.

13. DAMAGES IN THE EVENT OF BUYER'S BREACH. In the event Seller retains earnest money as liquidated damages on a buyer's breach, any costs advanced or committed by Firm on Seller's behalf shall be paid therefrom and the balance divided equally between Seller and Firm.

14. ATTORNEYS' FEES. In the event either party employs an attorney to enforce any terms of this Agreement and is successful, the other party agrees to pay reasonable attorneys' fees. In the event of trial, the successful party shall be entitled to an award of attorneys' fees and expenses; the amount of the attorneys' fees and expenses shall be fixed by the court. The venue of any suit shall be the county in which the Property is located.

Are the undersigned the sole owner(s)? ❑ YES ❑ NO

Seller's Signature	Date	Real Estate Firm	
Seller's Signature	Date	Broker's Signature	Date

to the contract as an exhibit. Any pages attached to a contract should be dated and initialed by the parties, to show that the attachments were intended to be part of the agreement.

A provision stating the amount (or rate) of the real estate commission is another key part of every listing agreement. Remember that because the amount or rate is always negotiable as a matter of law, it must not be pre-printed on the listing agreement form. The figure has to be filled in for each transaction.

Provisions affecting the commission. A listing agreement should state the sales price and terms that the client is willing to accept. The client can refuse any offer that doesn't meet these terms without being liable for a commission. Of course, if the agent presents an offer that doesn't meet the listing terms and the client accepts it anyway, he is liable for the commission.

Generally, a brokerage is hired to find a **ready, willing, and able** buyer who meets the specific requirements established by the seller. A buyer is considered ready and willing if the buyer makes an offer that meets the terms stipulated by the seller. A buyer is considered able if she has the financial ability to complete the purchase. This means that the buyer must have one of the following:

1. enough cash to complete the sale;
2. a strong enough credit rating and enough personal assets to ensure that she can complete the sale; or
3. a binding commitment for a loan to finance the purchase.

Under the terms of most listing agreement forms, the brokerage is entitled to a commission even if the transaction never closes, as long as the client and a ready, willing, and able buyer have agreed on the essential terms of a sale. It doesn't have to work that way, however. The seller can add a condition to the listing agreement, making liability for the commission depend on the sale actually closing, or on some other event.

Even under a standard listing agreement, if the contract between the buyer and seller is conditional (contingent on the results of an inspection, for example) the seller isn't liable for a commission unless the condition is either fulfilled or waived by the parties.

Most exclusive listing forms make the client liable for a commission if he withdraws the property from sale or does anything to make it unmarketable.

Extender clause. Exclusive listing forms usually include an extender clause (also called a safety clause or carryover clause). An **extender clause** makes the client liable for a commission during a specified period after the listing expires, if the property is sold to someone an agent from the brokerage dealt with during the listing term. This makes it difficult for a buyer and seller to conspire to deprive the brokerage of a commission by waiting until the listing expires before signing a purchase and sale agreement.

In some forms, the extender clause requires the client to pay the commission if the agent merely introduced the buyer to the property during the listing term. In other forms, the extender clause has a stricter requirement, so that the client has to pay the commission only if the agent was the procuring cause of the sale.

An extender clause often includes some safeguards for the seller. It may require the agent to provide a list of the people she negotiated with, so the seller won't become liable for a commission without realizing it. It may also state that if the seller signs a listing agreement with another brokerage during the carryover period, the seller will not be liable for a commission to the first brokerage. Without that provision, the seller could become liable for two commissions on the same sale, one to the first brokerage and one to the second brokerage. Some forms do not include these safeguards, so a seller should beware.

Purchase and Sale Agreements

The general term for a contract between a buyer and a seller of real property is **purchase and sale agreement**, or something similar. In Washington, purchase and sale agreements are sometimes called **earnest money agreements**. (This is because in most transactions, the buyer commits to making an earnest money deposit at the same time he makes an offer to purchase.)

If the seller decides to accept the offer, she signs the form, and it becomes the parties' contract. A residential purchase and sale agreement form from the Northwest Multiple Listing Service is shown in Figure 8.7 as an example.

The basic elements of a purchase and sale agreement are fairly simple. The agreement must:

- identify the parties and the property,
- state the price and the method of payment, and
- state the time for delivery of title and possession.

Most purchase and sale agreements are quite detailed. It's very important for the contract to state all the terms of the parties' agreement clearly and accurately. The closing of the transaction will follow the terms set forth in the agreement. Who is required to do what and when depends on the purchase and sale agreement. Anything that isn't clear can lead to a dispute.

The Parties. When a purchase and sale agreement is being signed, ask two key questions regarding the parties:

- Does everyone who is signing have the capacity to contract?
- Is everyone with an ownership interest signing?

If any of the parties is underage or incompetent, the contract will be voidable or void.

Property Description. A full legal description of the property should be attached as an exhibit to the contract. Include a reference to the attachment in the space provided for the description (for example, "see Exhibit A"). The parties must initial and date each page of the attachment to incorporate it into their agreement.

Terms of Sale. The purchase and sale agreement should state all the terms of the sale as clearly as possible: what is and isn't included in the sale, the total price, and whether any contingencies are involved (contingencies are discussed below).

Any personal property that will be included in the sale should also be listed. Some forms have a paragraph entitled "Included Items," which lists personal property included in the sale. This list should be reviewed and items deleted or added as necessary. When adding included items, be specific: write in "washer, dryer, refrigerator" rather than "all major appliances."

The seller doesn't warrant the condition of the personal property, but he does promise that it is free of liens. If the seller wants to exclude any fixtures from the sale, they must also be listed.

Contingencies. Most agreements between buyers and sellers are conditional. Any conditions or contingencies must be spelled out in the purchase and sale agreement or in an attached addendum. This section should state exactly what must occur in order to fulfill each condition. It should explain how one party is to notify the other when a condition has been fulfilled or waived. It should also state a time limit; if the condition is not fulfilled by that date, the contract will be void. Finally, it should explain the parties' rights in the event that the condition is not met or waived.

If a real estate agent believes that a contingency clause in a purchase and sale agreement may affect the date of closing or the date that possession will transfer, the agent should explain this to the parties.

Financing. Nearly all residential transactions are contingent on the buyer's ability to obtain financing. The buyer is required to make a diligent, good faith effort to obtain financing on the terms stated in the purchase and sale agreement, but if no lenders are willing to make a loan on those terms, the buyer can terminate the agreement without forfeiting the deposit. That's why it's particularly important to describe the financing arrangements in detail in a payment terms addendum. If the buyer must obtain financing within a specific time period, he must notify the seller in a timely manner of the failure to obtain the financing or risk losing the deposit.

If seller financing is going to be used for part of the purchase price, it is imperative to refer to and attach the appropriate finance documents to the purchase and sale agreement. If the real estate contract or note and deed of trust are not referred to and attached to the agreement, the agreement will not be enforceable.

Sale of buyer's home. Many purchases are contingent on the buyer's ability to sell her current home. In fact, even when that isn't an express condition, it may be a hidden condition. Often a buyer won't have enough money for a downpayment unless the current home is sold. As a result, she can't qualify for the loan described in the financing contingency without selling the current home.

If the buyer will not be able to obtain financing unless her current home is sold, it's best to make the sale of the current home an express condition in the purchase and sale agreement. Otherwise, the seller may be misled into believing that the buyer has a much

Fig. 8.7 Purchase and sale agreement

Residential Purchase & Sale Agreement
Rev. 2/17
Page 1 of 5

Northwest Multiple Listing Service

RESIDENTIAL REAL ESTATE PURCHASE AND SALE AGREEMENT
SPECIFIC TERMS

1. **Date:** _____ **MLS No.:** _____ **Offer Expiration Date:** _____
2. **Buyer:** _____ (Buyer / Buyer / Status)
3. **Seller:** _____ (Seller / Seller)
4. **Property:** Legal Description attached as Exhibit A. Tax Parcel No(s).: _____, _____, _____,
   _____ (Address / City / County / State / Zip)
5. **Included Items**: ❑ stove/range; ❑ refrigerator; ❑ washer; ❑ dryer; ❑ dishwasher; ❑ hot tub; ❑ fireplace insert; ❑ wood stove; ❑ satellite dish; ❑ security system; ❑ attached television(s); ❑ attached speaker(s); ❑microwave; ❑ generator; ❑ other _____
6. **Purchase Price:** $ _____ Dollars
7. **Earnest Money:** $ _____ ❑ Check; ❑ Note; ❑ Other _____ (held by ❑ Selling Firm; ❑ Closing Agent)
8. **Default:** (check only one) ❑ Forfeiture of Earnest Money; ❑ Seller's Election of Remedies
9. **Title Insurance Company:** _____
10. **Closing Agent:** _____ (Company / Individual (optional))
11. **Closing Date:** _____; **Possession Date:** ❑ on Closing; ❑ Other _____
12. **Services of Closing Agent for Payment of Utilities:** ❑ Requested (attach NWMLS Form 22K); ❑ Waived
13. **Charges/Assessments Levied Before but Due After Closing:** ❑ assumed by Buyer; ❑ prepaid in full by Seller at Closing
14. **Seller Citizenship (FIRPTA):** Seller ❑ is; ❑ is not a foreign person for purposes of U.S. income taxation
15. **Agency Disclosure:** Selling Broker represents: ❑ Buyer; ❑ Seller; ❑ both parties; ❑ neither party
    Listing Broker represents: ❑ Seller; ❑ both parties
16. **Addenda:** _____

Buyer's Signature / Date	Seller's Signature / Date
Buyer's Signature / Date	Seller's Signature / Date
Buyer's Address	Seller's Address
City, State, Zip	City, State, Zip
Phone No. / Fax No.	Phone No. / Fax No.
Buyer's E-mail Address	Seller's E-mail Address
Selling Firm / MLS Office No.	Listing Firm / MLS Office No.
Selling Broker (Print) / MLS LAG No.	Listing Broker (Print) / MLS LAG No.
Firm Phone No. / Broker Phone No. / Firm Fax No.	Firm Phone No. / Broker Phone No. / Firm Fax No.
Selling Firm Document E-mail Address	Listing Firm Document E-mail Address
Selling Broker's E-mail Address	Listing Broker's E-mail Address
Selling Broker DOL License No. / Selling Firm DOL License No.	Listing Broker DOL License No. / Listing Firm DOL License No.

Form 21
Residential Purchase & Sale Agreement
Rev. 2/17
Page 2 of 5

RESIDENTIAL REAL ESTATE PURCHASE AND SALE AGREEMENT
GENERAL TERMS
Continued

a. Purchase Price. Buyer shall pay to Seller the Purchase Price, including the Earnest Money, in cash at Closing, unless otherwise specified in this Agreement. Buyer represents that Buyer has sufficient funds to close this sale in accordance with this Agreement and is not relying on any contingent source of funds, including funds from loans, the sale of other property, gifts, retirement, or future earnings, except to the extent otherwise specified in this Agreement.

b. Earnest Money. Buyer shall deliver the Earnest Money within 2 days after mutual acceptance to Selling Broker or to Closing Agent. If Buyer delivers the Earnest Money to Selling Broker, Selling Broker will deposit any check to be held by Selling Firm, or deliver any Earnest Money to be held by Closing Agent, within 3 days of receipt or mutual acceptance, whichever occurs later. If the Earnest Money is held by Selling Firm and is over $10,000.00 it shall be deposited into an interest bearing trust account in Selling Firm's name provided that Buyer completes an IRS Form W-9. Interest, if any, after deduction of bank charges and fees, will be paid to Buyer. Buyer shall reimburse Selling Firm for bank charges and fees in excess of the interest earned, if any. If the Earnest Money held by Selling Firm is over $10,000.00 Buyer has the option to require Selling Firm to deposit the Earnest Money into the Housing Trust Fund Account, with the interest paid to the State Treasurer, if both Seller and Buyer so agree in writing. If the Buyer does not complete an IRS Form W-9 before Selling Firm must deposit the Earnest Money or the Earnest Money is $10,000.00 or less, the Earnest Money shall be deposited into the Housing Trust Fund Account. Selling Firm may transfer the Earnest Money to Closing Agent at Closing. If all or part of the Earnest Money is to be refunded to Buyer and any such costs remain unpaid, the Selling Firm or Closing Agent may deduct and pay them therefrom. The parties instruct Closing Agent to provide written verification of receipt of the Earnest Money and notice of dishonor of any check to the parties and Brokers at the addresses and/or fax numbers provided herein.

Upon termination of this Agreement, a party or the Closing Agent may deliver a form authorizing the release of Earnest Money to the other party or the parties. The party(s) shall execute such form and deliver the same to the Closing Agent. If either party fails to execute the release form, a party may make a written demand to the Closing Agent for the Earnest Money. Pursuant to RCW 64.04, Closing Agent shall deliver notice of the demand to the other party within 15 days. If the other party does not object to the demand within 20 days of Closing Agent's notice, Closing Agent shall disburse the Earnest Money to the party making the demand within 10 days of the expiration of the 20 day period. If Closing Agent timely receives an objection or an inconsistent demand from the other party, Closing Agent shall commence an interpleader action within 60 days of such objection or inconsistent demand, unless the parties provide subsequent consistent instructions to Closing Agent to disburse the earnest money or refrain from commencing an interpleader action for a specified period of time. Pursuant to RCW 4.28.080, the parties consent to service of the summons and complaint for an interpleader action by first class mail, postage prepaid at the party's usual mailing address or the address identified in this Agreement. If the Closing Agent complies with the preceding process, each party shall be deemed to have released Closing Agent from any and all claims or liability related to the disbursal of the Earnest Money. If either party fails to authorize the release of the Earnest Money to the other party when required to do so under this Agreement, that party shall be in breach of this Agreement. For the purposes of this section, the term Closing Agent includes a Selling Firm holding the Earnest Money. The parties authorize the party commencing an interpleader action to deduct up to $500.00 for the costs thereof.

c. Included Items. Any of the following items, including items identified in Specific Term No. 5 if the corresponding box is checked, located in or on the Property are included in the sale: built-in appliances; wall-to-wall carpeting; curtains, drapes and all other window treatments; window and door screens; awnings; storm doors and windows; installed television antennas; ventilating, air conditioning and heating fixtures; trash compactor; fireplace doors, gas logs and gas log lighters; irrigation fixtures; electric garage door openers; water heaters; installed electrical fixtures; lighting fixtures; shrubs, plants and trees planted in the ground; and other fixtures; and all associated operating remote controls. Unless otherwise agreed, if any of the above items are leased or encumbered, Seller shall acquire clear title before Closing.

d. Condition of Title. Unless otherwise specified in this Agreement, title to the Property shall be marketable at Closing. The following shall not cause the title to be unmarketable: rights, reservations, covenants, conditions and restrictions, presently of record and general to the area; easements and encroachments, not materially affecting the value of or unduly interfering with Buyer's reasonable use of the Property; and reserved oil and/or mining rights. Monetary encumbrances or liens not assumed by Buyer, shall be paid or discharged by Seller on or before Closing. Title shall be conveyed by a Statutory Warranty Deed. If this Agreement is for conveyance of a buyer's interest in a Real Estate Contract, the Statutory Warranty Deed shall include a buyer's assignment of the contract sufficient to convey after acquired title.

e. Title Insurance. Seller authorizes Buyer's lender or Closing Agent, at Seller's expense, to apply for the then-current ALTA form of Homeowner's Policy of Title Insurance for One-to-Four Family Residence, from the Title Insurance Company. If Seller previously received a preliminary commitment from a Title Insurance Company that Buyer declines to use, Buyer shall pay any cancellation fees owing to the original Title Insurance Company. Otherwise, the party applying for title insurance shall pay any title cancellation fee, in the event such a fee is assessed. If the Title Insurance Company selected by the parties will not issue a Homeowner's Policy for the Property, the parties agree that the Title Insurance Company shall instead issue the then-current ALTA standard form Owner's Policy, together with homeowner's additional protection and inflation protection endorsements, if available. The Title Insurance Company

RESIDENTIAL REAL ESTATE PURCHASE AND SALE AGREEMENT
GENERAL TERMS
Continued

shall send a copy of the preliminary commitment to Seller, Listing Broker, Buyer and Selling Broker. The preliminary commitment, and the title policy to be issued, shall contain no exceptions other than the General Exclusions and Exceptions in the Policy and Special Exceptions consistent with the Condition of Title herein provided. If title cannot be made so insurable prior to the Closing Date, then as Buyer's sole and exclusive remedy, the Earnest Money shall, unless Buyer elects to waive such defects or encumbrances, be refunded to the Buyer, less any unpaid costs described in this Agreement, and this Agreement shall thereupon be terminated. Buyer shall have no right to specific performance or damages as a consequence of Seller's inability to provide insurable title.

f. Closing and Possession. This sale shall be closed by the Closing Agent on the Closing Date. If the Closing Date falls on a Saturday, Sunday, legal holiday as defined in RCW 1.16.050, or day when the county recording office is closed, the Closing Agent shall close the transaction on the next day that is not a Saturday, Sunday, legal holiday, or day when the county recording office is closed. "Closing" means the date on which all documents are recorded and the sale proceeds are available to Seller. Seller shall deliver keys and garage door remotes to Buyer on the Closing Date or on the Possession Date, whichever occurs first. Buyer shall be entitled to possession at 9:00 p.m. on the Possession Date. Seller shall maintain the Property in its present condition, normal wear and tear excepted, until the Buyer is entitled to possession. Seller shall either repair or replace any system or appliance (including, but not limited to plumbing, heat, electrical, and all Included Items) that becomes inoperative or malfunctions prior to Closing with a system or appliance of at least equal quality. Buyer reserves the right to walk through the Property within 5 days of Closing to verify that Seller has maintained the Property and systems/appliances as required by this paragraph. Seller shall not enter into or modify existing leases or rental agreements, service contracts, or other agreements affecting the Property which have terms extending beyond Closing without first obtaining Buyer's consent, which shall not be unreasonably withheld. If possession transfers at a time other than Closing, the parties shall execute NWMLS Form 65A (Rental Agreement/Occupancy Prior to Closing) or NWMLS Form 65B (Rental Agreement/Seller Occupancy After Closing) (or alternative rental agreements) and are advised of the need to contact their respective insurance companies to assure appropriate hazard and liability insurance policies are in place, as applicable.

RCW 19.27.530 requires the seller of any owner-occupied single-family residence to equip the residence with a carbon monoxide alarm(s) in accordance with the state building code before a buyer or any other person may legally occupy the residence following the sale. The parties acknowledge that the Brokers are not responsible for ensuring that Seller complies with RCW 19.27.530. Buyer and Seller shall hold the Brokers and their Firms harmless from any claim resulting from Seller's failure to install a carbon monoxide alarm(s) in the Property.

g. Section 1031 Like-Kind Exchange. If either Buyer or Seller intends for this transaction to be a part of a Section 1031 like-kind exchange, then the other party shall cooperate in the completion of the like-kind exchange so long as the cooperating party incurs no additional liability in doing so, and so long as any expenses (including attorneys' fees and costs) incurred by the cooperating party that are related only to the exchange are paid or reimbursed to the cooperating party at or prior to Closing. Notwithstanding the Assignment paragraph of this Agreement, any party completing a Section 1031 like-kind exchange may assign this Agreement to its qualified intermediary or any entity set up for the purposes of completing a reverse exchange.

h. Closing Costs and Prorations and Charges and Assessments. Seller and Buyer shall each pay one-half of the escrow fee unless otherwise required by applicable FHA or VA regulations. Taxes for the current year, rent, interest, and lienable homeowner's association dues shall be prorated as of Closing. Buyer shall pay Buyer's loan costs, including credit report, appraisal charge and lender's title insurance, unless provided otherwise in this Agreement. If any payments are delinquent on encumbrances which will remain after Closing, Closing Agent is instructed to pay such delinquencies at Closing from money due, or to be paid by, Seller. Buyer shall pay for remaining fuel in the fuel tank if, prior to Closing, Seller obtains a written statement from the supplier as to the quantity and current price and provides such statement to the Closing Agent. Seller shall pay all utility charges, including unbilled charges. Unless waived in Specific Term No. 12, Seller and Buyer request the services of Closing Agent in disbursing funds necessary to satisfy unpaid utility charges in accordance with RCW 60.80 and Seller shall provide the names and addresses of all utilities providing service to the Property and having lien rights (attach NWMLS Form 22K Identification of Utilities or equivalent).

Buyer is advised to verify the existence and amount of any local improvement district, capacity or impact charges or other assessments that may be charged against the Property before or after Closing. Seller will pay such charges that are or become due on or before Closing. Charges levied before Closing, but becoming due after Closing shall be paid as agreed in Specific Term No. 13.

i. Sale Information. Listing Broker and Selling Broker are authorized to report this Agreement (including price and all terms) to the Multiple Listing Service that published it and to its members, financing institutions, appraisers, and anyone else related to this sale. Buyer and Seller expressly authorize all Closing Agents, appraisers, title insurance companies, and others related to this Sale, to furnish the Listing Broker and/or Selling Broker, on request, any and all information and copies of documents concerning this sale.

Buyer's Initials	Date	Buyer's Initials	Date	Seller's Initials	Date	Seller's Initials	Date

RESIDENTIAL REAL ESTATE PURCHASE AND SALE AGREEMENT
GENERAL TERMS
Continued

j. Seller Citizenship and FIRPTA. Seller warrants that the identification of Seller's citizenship status for purposes of U.S. income taxation in Specific Term No. 14 is correct. Seller shall execute a certification (NWMLS Form 22E or equivalent) under the Foreign Investment in Real Property Tax Act ("FIRPTA") at Closing and provide the certification to the Closing Agent. If Seller is a foreign person for purposes of U.S. income taxation, and this transaction is not otherwise exempt from FIRPTA, Closing Agent is instructed to withhold and pay the required amount to the Internal Revenue Service.

k. Notices and Delivery of Documents. Any notice related to this Agreement (including revocations of offers or counteroffers) must be in writing. Notices to Seller must be signed by at least one Buyer and shall be deemed delivered only when the notice is received by Seller, by Listing Broker, or at the licensed office of Listing Broker. Notices to Buyer must be signed by at least one Seller and shall be deemed delivered only when the notice is received by Buyer, by Selling Broker, or at the licensed office of Selling Broker. Documents related to this Agreement, such as NWMLS Form 17, Information on Lead-Based Paint and Lead-Based Paint Hazards, Public Offering Statement or Resale Certificate, and all other documents shall be delivered pursuant to this paragraph. Buyer and Seller must keep Selling Broker and Listing Broker advised of their whereabouts in order to receive prompt notification of receipt of a notice.

Facsimile transmission of any notice or document shall constitute delivery. E-mail transmission of any notice or document (or a direct link to such notice or document) shall constitute delivery when: (i) the e-mail is sent to both Selling Broker and Selling Firm or both Listing Broker and Listing Firm at the e-mail addresses specified on page one of this Agreement; or (ii) Selling Broker or Listing Broker provide written acknowledgment of receipt of the e-mail (an automatic e-mail reply does not constitute written acknowledgment). At the request of either party, or the Closing Agent, the parties will confirm facsimile or e-mail transmitted signatures by signing an original document.

l. Computation of Time. Unless otherwise specified in this Agreement, any period of time measured in days and stated in this Agreement shall start on the day following the event commencing the period and shall expire at 9:00 p.m. of the last calendar day of the specified period of time. Except for the Possession Date, if the last day is a Saturday, Sunday or legal holiday as defined in RCW 1.16.050, the specified period of time shall expire on the next day that is not a Saturday, Sunday or legal holiday. Any specified period of 5 days or less, except for any time period relating to the Possession Date, shall not include Saturdays, Sundays or legal holidays. If the parties agree that an event will occur on a specific calendar date, the event shall occur on that date, except for the Closing Date, which, if it falls on a Saturday, Sunday, legal holiday as defined in RCW 1.16.050, or day when the county recording office is closed, shall occur on the next day that is not a Saturday, Sunday, legal holiday, or day when the county recording office is closed. If the parties agree upon and attach a legal description after this Agreement is signed by the offeree and delivered to the offeror, then for the purposes of computing time, mutual acceptance shall be deemed to be on the date of delivery of an accepted offer or counteroffer to the offeror, rather than on the date the legal description is attached. Time is of the essence of this Agreement.

m. Integration and Electronic Signatures. This Agreement constitutes the entire understanding between the parties and supersedes all prior or contemporaneous understandings and representations. No modification of this Agreement shall be effective unless agreed in writing and signed by Buyer and Seller. The parties acknowledge that a signature in electronic form has the same legal effect and validity as a handwritten signature.

n. Assignment. Buyer may not assign this Agreement, or Buyer's rights hereunder, without Seller's prior written consent, unless the parties indicate that assignment is permitted by the addition of "and/or assigns" on the line identifying the Buyer on the first page of this Agreement.

o. Default. In the event Buyer fails, without legal excuse, to complete the purchase of the Property, then the following provision, as identified in Specific Term No. 8, shall apply:

i. Forfeiture of Earnest Money. That portion of the Earnest Money that does not exceed five percent (5%) of the Purchase Price shall be forfeited to the Seller as the sole and exclusive remedy available to Seller for such failure.

ii. Seller's Election of Remedies. Seller may, at Seller's option, (a) keep the Earnest Money as liquidated damages as the sole and exclusive remedy available to Seller for such failure, (b) bring suit against Buyer for Seller's actual damages, (c) bring suit to specifically enforce this Agreement and recover any incidental damages, or (d) pursue any other rights or remedies available at law or equity.

p. Professional Advice and Attorneys' Fees. Buyer and Seller are advised to seek the counsel of an attorney and a certified public accountant to review the terms of this Agreement. Buyer and Seller shall pay their own fees incurred for such review. However, if Buyer or Seller institutes suit against the other concerning this Agreement the prevailing party is entitled to reasonable attorneys' fees and expenses.

q. Offer. Buyer shall purchase the Property under the terms and conditions of this Agreement. Seller shall have until 9:00 p.m. on the Offer Expiration Date to accept this offer, unless sooner withdrawn. Acceptance shall not be effective until a signed copy is received by Buyer, by Selling Broker or at the licensed office of Selling Broker. If this offer is not so accepted, it shall lapse and any Earnest Money shall be refunded to Buyer.

Buyer's Initials	Date	Buyer's Initials	Date	Seller's Initials	Date	Seller's Initials	Date

RESIDENTIAL REAL ESTATE PURCHASE AND SALE AGREEMENT
GENERAL TERMS
Continued

r. Counteroffer. Any change in the terms presented in an offer or counteroffer, other than the insertion of or change to Seller's name and Seller's warranty of citizenship status, shall be considered a counteroffer. If a party makes a counteroffer, then the other party shall have until 9:00 p.m. on the counteroffer expiration date to accept that counteroffer, unless sooner withdrawn. Acceptance shall not be effective until a signed copy is received by the other party, the other party's broker, or at the licensed office of the other party's broker. If the counteroffer is not so accepted, it shall lapse and any Earnest Money shall be refunded to Buyer.

s. Offer and Counteroffer Expiration Date. If no expiration date is specified for an offer/counteroffer, the offer/counteroffer shall expire 2 days after the offer/counteroffer is delivered by the party making the offer/counteroffer, unless sooner withdrawn.

t. Agency Disclosure. Selling Firm, Selling Firm's Designated Broker, Selling Broker's Branch Manager (if any) and Selling Broker's Managing Broker (if any) represent the same party that Selling Broker represents. Listing Firm, Listing Firm's Designated Broker, Listing Broker's Branch Manager (if any), and Listing Broker's Managing Broker (if any) represent the same party that the Listing Broker represents. If Selling Broker and Listing Broker are different persons affiliated with the same Firm, then both Buyer and Seller confirm their consent to Designated Broker, Branch Manager (if any), and Managing Broker (if any) representing both parties as dual agents. If Selling Broker and Listing Broker are the same person representing both parties then both Buyer and Seller confirm their consent to that person and his/her Designated Broker, Branch Manager (if any), and Managing Broker (if any) representing both parties as dual agents. All parties acknowledge receipt of the pamphlet entitled "The Law of Real Estate Agency."

u. Commission. Seller and Buyer shall pay a commission in accordance with any listing or commission agreement to which they are a party. The Listing Firm's commission shall be apportioned between Listing Firm and Selling Firm as specified in the listing. Seller and Buyer hereby consent to Listing Firm or Selling Firm receiving compensation from more than one party. Seller and Buyer hereby assign to Listing Firm and Selling Firm, as applicable, a portion of their funds in escrow equal to such commission(s) and irrevocably instruct the Closing Agent to disburse the commission(s) directly to the Firm(s). In any action by Listing or Selling Firm to enforce this paragraph, the prevailing party is entitled to court costs and reasonable attorneys' fees. Seller and Buyer agree that the Firms are intended third party beneficiaries under this Agreement.

v. Cancellation Rights/Lead-Based Paint. If a residential dwelling was built on the Property prior to 1978, and Buyer receives a Disclosure of Information on Lead-Based Paint and Lead-Based Paint Hazards (NWMLS Form 22J) after mutual acceptance, Buyer may rescind this Agreement at any time up to 3 days thereafter.

w. Information Verification Period. Buyer shall have 10 days after mutual acceptance to verify all information provided from Seller or Listing Firm related to the Property. This contingency shall be deemed satisfied unless Buyer gives notice identifying the materially inaccurate information within 10 days of mutual acceptance. If Buyer gives timely notice under this section, then this Agreement shall terminate and the Earnest Money shall be refunded to Buyer.

x. Property Condition Disclaimer. Buyer and Seller agree, that except as provided in this Agreement, all representations and information regarding the Property and the transaction are solely from the Seller or Buyer, and not from any Broker. The parties acknowledge that the Brokers are not responsible for assuring that the parties perform their obligations under this Agreement and that none of the Brokers has agreed to independently investigate or confirm any matter related to this transaction except as stated in this Agreement, or in a separate writing signed by such Broker. In addition, Brokers do not guarantee the value, quality or condition of the Property and some properties may contain building materials, including siding, roofing, ceiling, insulation, electrical, and plumbing, that have been the subject of lawsuits and/or governmental inquiry because of possible defects or health hazards. Some properties may have other defects arising after construction, such as drainage, leakage, pest, rot and mold problems. Brokers do not have the expertise to identify or assess defective products, materials, or conditions. Buyer is urged to use due diligence to inspect the Property to Buyer's satisfaction and to retain inspectors qualified to identify the presence of defective materials and evaluate the condition of the Property as there may be defects that may only be revealed by careful inspection. Buyer is advised to investigate whether there is a sufficient water supply to meet Buyer's needs. Buyer is advised to investigate the cost of insurance for the Property, including, but not limited to homeowner's, flood, earthquake, landslide, and other available coverage. Buyer and Seller acknowledge that home protection plans may be available which may provide additional protection and benefit to Buyer and Seller. Brokers may assist the parties with locating and selecting third party service providers, such as inspectors or contractors, but Brokers cannot guarantee or be responsible for the services provided by those third parties. The parties shall exercise their own judgment and due diligence regarding third-party service providers.

Buyer's Initials	Date	Buyer's Initials	Date	Seller's Initials	Date	Seller's Initials	Date

better chance of obtaining the necessary loan than she actually has. The contingency clause should state whether it will be fulfilled once the buyer accepts an offer, or whether the sale of the current home must actually close.

Inspections. The transaction will likely be made dependent on one or more satisfactory property inspections, such as a physical inspection, a geological inspection, or a pest control inspection. The lender may require certain inspections before it will fund the loan.

Bump clause. Including a **bump clause** enables the seller to keep the property on the market pending the fulfillment of a condition. While bump clauses are used when there's a good chance that any condition won't be fulfilled on time, they are most often used when a transaction depends on the sale of the buyer's home. If the seller receives another offer before the buyer's home is sold, the seller can demand that the buyer waive the condition or cancel their contract.

Release of contract. When one transaction fails because a condition is not met, the seller may want to enter into another agreement with a second buyer. In this situation, it's advisable for the seller to include an express condition in the second purchase and sale agreement, making it contingent on the failure of the first agreement and on the first buyer's release of all claims. The seller should not proceed with the second transaction without first clearly establishing that the first agreement is terminated and the first buyer has no right to enforce it. The best way to accomplish this is by asking the first buyer to execute a release of contract form in which the parties agree to rescind the contract.

Encumbrances and Condition of Title. A seller generally agrees to provide marketable title, free of undisclosed encumbrances or defects. The seller usually agrees to obtain a title insurance policy for the buyer.

Closing and Date of Possession. The purchase and sale agreement should provide a specific date for closing. Possession of the property is usually transferred to the buyer on the closing date, but the parties can make other arrangements. The seller may want a few extra days for vacating the property. Or the buyer may want to take possession before closing. In either case, the parties should execute a separate rental agreement in addition to the purchase and sale agreement.

Escrow and Closing. Most purchase and sale agreements include arrangements for the escrow. When the parties set the closing date, they should take into account the time needed for fulfilling any conditions. If the closing date is approaching and an inspection report is not yet available, or it looks like some other contingency won't be met on time, the parties may want to move the closing date by executing a written extension agreement.

Deposit. The buyer's deposit is an expression of good faith; it is evidence of a serious intention to buy the property. Instructions for handling the deposit should be specified in the buyer's offer (the purchase and sale agreement). The funds may be immediately deposited in an escrow account, or (if the offer so directs) the brokerage may temporarily hold the deposit check uncashed. Then if the seller rejects the offer, the check can easily be returned to the buyer.

The purchase and sale agreement should also explain the circumstances under which the deposit will be refunded or forfeited. The parties have the option of treating the deposit as liquidated damages. If the buyer defaults, the seller will keep all or part of the deposit as liquidated damages instead of suing for actual damages. (As we discussed earlier, no more than 5% of the purchase price may be forfeited as liquidated damages for breach of a purchase and sale agreement.)

Funds deposited in escrow are not released automatically if there is a dispute. If the seller wants to retain the deposit as liquidated damages, the escrow agent will usually not release that money to the seller without the buyer's consent. It may be necessary to sue or submit the matter to arbitration in order to establish that the buyer is in default and the seller is entitled to liquidated damages. If the brokerage has possession of disputed funds, it may distribute the funds to one or more of the parties after giving a notice of intent to do so.

Agency Disclosure. An agency disclosure clause must be included in the purchase and sale agreement, unless the parties are also signing a separate disclosure document. The listing agent states which party (or parties) he is representing in the transaction. When there is a selling agent in addition to the listing agent, the selling agent must also indicate which party he represents. By signing the purchase and sale agreement, the seller and buyer accept these characterizations of the agency relationships. (See Chapter 6.)

Other Provisions. Additional provisions may be included, such as what utilities the property is connected to, whether there are any leased fixtures, the condition of a well or septic tank, and type of insulation.

Acceptance. The seller accepts the buyer's offer as set forth in the document. The seller also agrees to compensate the brokerage.

In most cases, the seller's agreement to pay the brokerage is merely a reaffirmation of the commission agreement in an earlier written listing. But if the brokerage has taken the risk of operating under an oral or implied listing agreement, this written provision will satisfy the statute of frauds.

Under the compensation provision of the purchase and sale agreement, if the buyer defaults, the brokerage is usually entitled to half of the damages the seller receives. In practice, this generally means that the brokerage will take half of the forfeited deposit. However, the brokerage is not allowed to receive more in damages than it would have received as a commission if the transaction had closed.

Counteroffers. Often a seller is unwilling to accept the buyer's offer as written, but would accept slightly different terms. Remember that when an offeree varies any terms in an offer, it becomes a counteroffer instead of an acceptance. The original offeror (the buyer) is not bound unless he chooses to accept the seller's counteroffer.

When a seller wants to make a counteroffer, some agents simply cross out the appropriate terms on the buyer's purchase and sale agreement and replace them with the seller's new terms. The seller signs the agreement and initials and dates the changes. Then if the

buyer is willing to accept the counteroffer, she also initials and dates the changes. This approach may work if the changes are minor and there is enough space to indicate them clearly. But the agreement may become difficult to read. Sometimes an agent fails to get every change initialed, so that it isn't clear whether the parties ever reached an agreement on all of the terms.

It's clearer and more professional to write any counteroffer on another form or a separate attachment. There are many forms specifically designed for this purpose.

Options

An **option** is a contract that gives one party the right to do something, but not the obligation to do it. In real estate, the most common type of option is an option to purchase. An option to purchase gives one party (the **optionee**) the right to buy the property of the other (the **optionor**) at a designated price within a specific time period. Within that period, the optionee may choose to exercise the option—that is, enter into a contract to buy the property. But the optionee is under no obligation to exercise the option.

> **Example:** Sullivan is interested in buying Hubbard's house, but hasn't quite made up his mind. He asks Hubbard to grant him an option to purchase the house for $250,000. Hubbard agrees and writes up an option agreement in which Sullivan agrees to pay $250 to keep the option open for two weeks.
>
> A week later, while Sullivan is still making up his mind, he hears that Pirandello is planning to offer Hubbard $275,000 for the house. Sullivan decides he does want to buy the house, so he exercises his option. Hubbard is bound to sell her house to Sullivan for $250,000, instead of selling it to Pirandello for $275,000.

Note that an option to purchase real property must be in writing and signed. The written option agreement should be as specific as possible, identifying the parties and the property, and stating all the terms of the potential sale. The option must also be exercised in writing.

Consideration for an Option. Consideration paid for an option contract is not refundable. If the optionee decides not to exercise the option, she can't demand that the optionor return the consideration. In the previous example, if Sullivan had decided not to buy the house, he would have lost the $250. If consideration is paid for an option, then the option cannot be revoked. Sullivan paid consideration of $250, so Hubbard could not revoke the option.

To make an option irrevocable, very little consideration is necessary. But if the consideration is not legally adequate, the optionee will not be able to sue for specific performance.

> **Example:** Hubbard granted Sullivan an option to purchase her house for $250,000. Sullivan gave Hubbard $15 to keep the option open for two weeks. During that period, Pirandello offers Hubbard $275,000 for the house. Hubbard can't revoke Sullivan's option because he gave her consideration.
>
> However, Hubbard decides to breach the option contract and sell the house to Pirandello. When Sullivan sues Hubbard for breach of contract, the court rules that $15

was not adequate consideration for a two-week option on a $250,000 house. Sullivan is entitled to damages for breach of contract, but not specific performance. The court cannot order Hubbard to sell the house to Sullivan for $250,000.

Relation Back. When an option is exercised, the interest the optionee acquires in the property **relates back** to the time the option was granted. In the eyes of the law, it's as though the optionee purchased the property when the option was granted, rather than when the option was exercised.

Example: Entwhistle gave an exclusive listing on her house to B&D Realty. This listing was to expire on July 15. On May 20, Entwhistle gave Sumner an option to purchase her house for $340,000. Both parties agreed that the option would not be exercised until after B&D's listing expired.

Sumner exercised his option and purchased the house on August 20. B&D Realty sued for its commission. Entwhistle would be required to pay the commission.

Even though the option was not exercised until August, it was entered into in May. When Sumner exercised the option, his interest in the property related back to the time the option was granted. In effect, he is held to have purchased the property in May rather than in August. Since the listing agreement was still in effect in May, B&D is entitled to the commission.

Assignment. An option agreement can generally be assigned, unless the contract states that assignment is prohibited. An option to purchase may be included in a lease. If the lease is assigned, the option is assigned too, even when the assignment doesn't specifically mention the option.

Termination. When an optionee has given consideration for the option, the death of the optionor does not terminate the option. The option contract is binding on the optionor's heirs, and the optionee can still exercise it.

An option terminates automatically if it is not exercised before its expiration date. But if the option agreement was recorded, it can still be a cloud on the title after it has expired. A title insurance company will not simply ignore a recorded option after its expiration date—they can't be sure that the optionor didn't grant an extension. So when a recorded option is no longer effective, a document canceling the option should be recorded. To make absolutely sure that the optionee doesn't have any claim on the property, title insurers often require a quitclaim deed from the optionee to the optionor.

Right of First Refusal. A right of first refusal (sometimes called a **right of preemption**) is not the same thing as an option. Someone who holds a **right of first refusal** has the right to buy the property only when and if the owner decides to sell it. The owner can't be required to sell the property against her will.

Rights of first refusal are sometimes included in leases for office space. If adjacent space on the same floor becomes vacant, the lessor must offer the lessee the chance to expand into that space before it can be offered to a new tenant. Co-owners of property sometimes

grant each other the right of first refusal; if one co-owner decides to sell his share, the other has the right to buy it instead of letting it go to a stranger.

Homeowners associations occasionally use rights of first refusal to maintain some control over who moves into the area. When a homeowner decides to sell, the association can buy the property to prevent its sale to someone the members consider undesirable. In this way, preemption rights have sometimes been used as a tool for racial discrimination. That practice is illegal (see Chapter 12).

Conclusion

Anyone participating in real estate transactions should have a general knowledge of how contracts are formed, and what is required for them to be valid and enforceable. It's also important to know what kinds of things cause a contract to be void, and what actions or problems would be considered a breach of contract.

If you participate in many transactions, you're likely to encounter situations where one party does not fulfill the terms of a contract. It then becomes important to know what the possible solutions are. A contract may be rescinded or canceled. The contract may provide for liquidated damages, or a court (or arbitrator) may order one party to pay the other a certain amount of damages. In some instances, the court may even order specific performance.

Virtually all real estate transactions involve at least one contract of one type or another. An understanding of contract law can help you deal more competently and securely with all of the contracts used in the industry.

Case Problem

The following is a hypothetical case problem. Most of the facts are taken from a real case. Based on what you have learned from this chapter, make a decision on the issues presented and then check to see if your answer matches the court's decision.

The Facts

Kreger entered into a purchase and sale agreement with Hall for the purchase of 15 acres of land, making a $1,000 initial deposit. The agreement provided that upon Hall furnishing title clear of encumbrances, Kreger would pay $11,500 in cash at closing on February 1, 1965. The agreement specified that Hall could use the cash received at closing to pay off encumbrances. The balance of the purchase price was to be paid in annual installments.

The property was encumbered by a $10,000 mortgage. Hall told Kreger he intended to pay off the mortgage with funds he expected to receive in a fire insurance claim settlement.

On January 28, 1965, Hall wrote to Kreger demanding that Kreger deposit the $11,500 downpayment for closing of the sale by February 1. Otherwise, Hall stated that all rights of the purchaser would be terminated.

Kreger responded that he was ready, willing, and able to make the downpayment, upon the furnishing of title clear of encumbrances, and that if the mortgage was not yet satisfied, it should be paid out of the downpayment. In the alternative, Kreger offered to assume the mortgage and remit to Hall any balance remaining over the amount of the encumbrance.

Hall did not want to use the downpayment for this purpose, and intended to satisfy the mortgage from the fire insurance payments. However, payment of the insurance settlement was taking longer than expected.

On January 29, 1965, Hall entered into a purchase and sale agreement for the sale of the property to Parker, upon the same terms as the agreement with Kreger, except that the Parker agreement did not require that the encumbrance be satisfied out of the downpayment.

Upon discovering that Hall had entered into an agreement with someone else, Kreger filed a lawsuit for specific performance of his purchase and sale agreement. Kreger claimed that he was ready, willing, and able to make the downpayment, but that the seller failed to deliver a report showing clear title.

Hall alleged that the contract with Kreger was forfeited, since Kreger failed to pay the sum required on February 1, 1965.

The Questions

Was the purchase and sale agreement forfeited? Was Kreger entitled to specific performance of the agreement? What happens to Parker (the second purchaser)?

The Answer

The trial court found that there was no forfeiture of the agreement by Kreger. The agreement provided for payment on February 1. Kreger was ready, willing, and able to pay on this date, but Hall had not provided clear title. Even though Kreger knew that Hall intended to pay off the mortgage with the fire insurance money, this did not change the terms of the agreement. The contract provided that title was to be free of encumbrances, and Kreger was not required to pay until presented with clear title. Kreger had not forfeited the agreement because he was at all times ready to perform.

Kreger was entitled to specific performance of the agreement. The court directed Kreger to deposit into court the sum of $10,500 ($11,500 minus Kreger's earnest money deposit of $1,000). Payment from this amount was used to satisfy the encumbrance. Hall was then required to execute a contract for the balance of the sales price as provided for in the purchase and sale agreement.

The alleged sale to Parker was junior to the prior rights of Kreger. Hall had no right to sell the property to Parker while there was still an enforceable agreement with Kreger. If Parker was damaged, he might have a cause of action against Hall. *Kreger v. Hall*, 70 Wn.2d 1002, 425 P.2d 638 (1967).

Chapter Summary

- An express contract has been put into words, either spoken or written. An implied contract is not put into words, but rather is implied by the actions of the parties.
- A valid contract meets all legal requirements and therefore is legally binding. If the contract does not meet one or more of the legal requirements, it is void. When a contract is voidable, one of the parties has the right to choose whether to proceed with the agreement or withdraw from it without penalty. Sometimes a contract is simply unenforceable due to lack of evidence or vague or ambiguous wording, or because the statute of limitations has run out.
- The four essential elements for a valid contract are capacity to contract, mutual consent (offer and acceptance), consideration, and lawful purpose.
- An offeree's acceptance must not vary the offer's terms. If it does, it is a counteroffer, not an acceptance of the offer.
- In order to create a binding contract, consent must be given freely. A contract may be voidable if consent was obtained by fraud, undue influence, duress, or mistake.
- The statute of frauds provides that certain contracts must be in writing, such as contracts for the purchase and sale of real estate, real estate agency agreements, contracts which cannot be performed within one year, and agreements to pay another's debt or assume another's obligation.
- There are many remedies for breach of contract. The dispute may be resolved through arbitration or a civil lawsuit. Damages may be ordered, or the breaching party may be required to pay the amount specified in a liquidated damages provision. There are also equitable remedies that might be granted, such as injunctions, rescission, or specific performance.

Checklist of Problem Areas

Real Estate Licensee's Checklist

- ❑ Does the listing agreement or purchase and sale agreement meet all of the requirements for a valid contract?
- ❑ If a party to an agreement is an entity, such as an estate, trust, or business entity, is the individual signing on behalf of the entity legally authorized to do so?
- ❑ If the buyer has made an offer, did the seller accept the offer—or make changes in the acceptance so that it is actually a counteroffer? You are only entitled to a commission if you find a buyer who meets the seller's terms, or whose offer is accepted by the seller.
- ❑ Is the contract, including all of its terms, clear to both parties? Remember that a contract is voidable for mutual mistake.

Seller's Checklist

- ❑ Is the listing agreement, option, or purchase and sale agreement you signed a valid contract?
- ❑ If you breach the contract, what kind of damages could you be liable for? Is there a provision for liquidated damages? Could specific performance be required?

Buyer's Checklist

- ❑ Has there been actual acceptance of your offer, or merely a counteroffer?
- ❑ Does the seller have the capacity to contract? In other words, is she 18 or older and mentally competent?
- ❑ If the seller breached the contract, what kind of damages would you be entitled to?
- ❑ If you breach the contract (refuse to buy after signing a purchase and sale agreement), what kind of damages could you be liable for?

Chapter Quiz

1. Sam tells his teenage neighbor, "I'll pay you $10 if you mow my lawn on Saturday." The teenager mows the lawn. What is the status of the contract?
   a. Incompetent
   b. Executed
   c. Void
   d. Implied

2. On May 15, Sharon offers to sell her property to Bill. The offer provides for acceptance by mail. On May 18, Bill mails a letter to Sharon accepting the offer. On May 19, before receiving Bill's letter, Sharon calls Bill on the phone to tell him that she is revoking the offer. Which of the following is true?
   a. Sharon can still revoke because she notified Bill before she received the acceptance
   b. Sharon can still revoke because Bill should have accepted by telephone
   c. Sharon cannot revoke because acceptance is held to be communicated as soon as it is sent, even though not yet received
   d. Sharon cannot revoke because it has been more than three days since she made the offer

3. Art offers to buy Kevin's house for $235,000. Kevin says "I'll accept your offer, but at $238,000." This is known as a/an:
   a. partial acceptance
   b. unilateral acceptance
   c. implied offer
   d. counteroffer

4. White owns some beautiful beachfront property. He is a reputable businessman with a wife and children. Many years ago, White was involved in a scandal involving drugs. The whole thing was hushed up at the time and White has since mended his ways.

   Johnson was White's roommate in college. He is now a struggling real estate agent. Johnson visits White and tells him that unless White gives him an exclusive listing on the beachfront property, he will tell everyone about White's past. This is an example of:
   a. duress
   b. business compulsion
   c. mutual mistake
   d. unlawful purpose

5. Smith agrees to sell his property to Carlucci. The property is worth approximately $500,000. Smith says he will give it to Carlucci for $250,000 and some cocaine. This contract:
   a. is enforceable
   b. is not entirely void; just the illegal part is void
   c. lacks adequate consideration
   d. is void

6. The statute of frauds requires:
   a. that all contracts be in writing
   b. that certain contracts be in writing
   c. that a contract is not enforceable if it is fraudulent
   d. None of the above

7. Tom and Val have been neighbors for 20 years. Both have five acres of property on which they grow apples and peaches. For the last few years, Val has been severely crippled with arthritis. She promised Tom that if he would work her property and harvest the fruit along with his own for five years, she would sell the property to him for half its market value. Tom works as promised and starts to make arrangements to purchase the property. But Val changes her mind and refuses to sell the property to Tom unless he pays full market value.
   a. Tom has no recourse because there was no written contract
   b. This is still a valid contract even though it is not in writing
   c. Even though no written contract exists, Tom may still have an action against Val based on promissory estoppel
   d. Even though no written contract exists, Tom may still have an action against Val based on accord and satisfaction

8. The purchase and sale agreement contains a clause providing that it will not be binding unless the buyers qualify for financing. This type of clause is known as a:
   a. repudiation clause
   b. contingency clause
   c. declaratory clause
   d. None of the above

9. When comparing arbitration to an action that goes to trial:
   a. arbitration is usually cheaper but takes longer
   b. arbitration is usually faster, but costs much more
   c. arbitration is usually both faster and cheaper
   d. arbitration is usually slower and more expensive

10. In Washington, a lawsuit based on breach of a written contract generally must be filed within how many years after the breach occurred?
    a. Two years
    b. Four years
    c. Six years
    d. Eight years

11. A contract contains a provision stating how much each party will have to pay in the event of a breach. This is called:
    a. a liquidated damages provision
    b. an equitable remedy
    c. a personal injunction
    d. None of the above

12. Krebs breaches a contract to sell his property to Barkley. Barkley decides that he doesn't want to try to enforce the contract. He just wants to undo the contract and get his earnest money deposit back. This is called:
    a. an injunction
    b. rescission
    c. specific performance
    d. mitigation

13. Woods agrees to sell his $200,000 house to Yatz for only $90,000. When the time comes, Woods suddenly refuses to perform. Yatz brings a lawsuit against Woods asking for specific performance.
    a. Specific performance will probably be granted because real property is unique
    b. Specific performance will probably not be granted because the consideration is inadequate
    c. Specific performance will probably be granted because the amount of consideration is irrelevant
    d. Specific performance will probably not be granted because it is hardly ever granted in cases involving real estate

14. Which of the following is not a contract?
    a. A listing agreement
    b. A purchase and sale agreement
    c. An option
    d. None of the above

15. An option:
    a. must be supported by consideration
    b. obligates the optionee to exercise the option
    c. is an implied contract if supported by consideration
    d. is revocable by the optionor