Contracts and Leases

Lesson 4

LA Residential Agreement to Buy or Sell Part II

45 Hour Louisiana Post-Licensing

I. Louisiana Residential Agreement to Buy or Sell – Part II

A. THE CONTRACT CONTINUED:

1. **Lines 149 - 152 – New Home Construction**. This section requires the licensee to make an election. If the property to be sold is completed new construction, under construction or to be constructed, you must check one of the two boxes. First, the election notes that a new home construction addendum with additional terms and conditions is attached. The new construction addendum is an approved document and is available at the LREC web site. It requires further elections. It requires the parties to elect that the construction is completed, under construction, or new construction or to be constructed options. If the home is under construction, the addendum requires the parties to make a list of items to be completed, and changes for selections allowed by the builder for Buyer's selection, all of which shall be attached to the addendum. If the home is new constructed, or to be constructed, there is a requirement to note whether the floor plan is attached and whether specifications are attached. Further, there is a date of completion clause which must be established in the addendum. The addendum then provides for inspection and final walk through of new construction. This should be carefully reviewed with the Buyer. Anyone in the real estate business will tell you that construction is the highest risk in real estate contracting. Therefore, careful review with your client is important. It would not be inappropriate to encourage outside consultation by your client with an attorney knowledgeable in the construction field.

2. **Lines 154 - 191 – Inspection and Due Diligence Period**. The terms in lines 151-156 do a couple of things. First, the Buyer acknowledges that the sales price has been negotiated on the current condition of the property. This is to establish by contract that the Seller is not obligated to make any repairs unless there is further agreement to do so. Second, it requires the Seller to maintain the property in substantially the same, or better condition than it was when the agreement was fully executed. This clause is essentially establishing a base line for the condition of the property.

3. **Lines 174 - 191 – Inspection Process**. In this portion of the agreement, the Buyer is given a time period which must be elected to make inspections. It is to be noted that this time period is in calendar days, that is, it includes, weekends, holidays, etc. The time period elected will be controlled by the extent to which a Buyer may want to make inspections. You will note that the inspections include just about anything that the Buyer may want to research, or have researched on their behalf. It includes not only the property condition, but also items such as school districts, flood zone classifications and zoning and subdivision restrictive covenants, as well as any items addressed in the Seller's property disclosure document. Testing shall be non-destructive. While there is no precise science to the definition "non-destructive," it is a common sense definition. There may be occasions when an inspector will recommend an invasive procedure, for example, removal of a portion of sheet rock or brick work and, if this is the case, it is recommended that advance clearance be obtained from the Seller.

   If the Buyer is not satisfied with the condition of the property, they have two options. Under our law, whenever the word "satisfaction" is used, in this case to the Buyer's satisfaction, it means just that - that the Buyer can be dissatisfied with that item for any reason. It does not have to be reasonable or accurate. The Buyer can just merely be dissatisfied. In the event that the Buyer is dissatisfied with any item, the Buyer: under option 1, may elect to terminate the agreement and declare it null and void; or under option 2, the Buyer may indicate in writing the deficiencies and desired remedies. Seller will then have seventy-two (72) hours to respond in writing as to Seller's willingness to remedy those deficiencies. This time period is defined in the agreement as "Seller's response."

If the Seller in the Seller's response refuses to remedy any or all of the deficiencies listed by Buyer, it is now the Buyer's turn to make an election. The Buyer has seventy-two (72) hours from:

1. The date of Seller's response; or

2. Seventy-two (72) hours from the date that Seller's response was due, whichever is earlier to (a) accept the Seller's response; or (b) accept the property in its current condition; or (c) elect to terminate the agreement. Buyer's response must be in writing. Upon Buyer's failure to respond to the Seller's response within the time specified, or Buyer electing in writing to terminate the agreement, the agreement shall automatically ,with no further action, required by either party be null and void except for return of the deposit.

   Example: Parties enter into Purchase Agreement which contains special provisions clause that states: "any single mechanical item repair that exceeds $2,000.00, the Seller has the option to repair, or the contract will be null and void." Inspector found over $25,000.00 in required repairs. Seller refused to make repairs. Parties argued over who had the option to terminate the contract. The court said neither party had that right because the clause contained a condition, not an option, and once the condition was fulfilled (repair over $2,000.00 that Seller would not fix), the contract automatically became null. *Campbell v. Melton*, 2001-2578 (La. 5/14/02), 817 So.2d 69.

   If the Buyer fails to make any inspections or fails to give written notice of deficiencies and desired remedies to Seller (or Seller's designated agent) within the inspection period, it should be deemed as acceptance by the Buyer of the property's current condition.

4. **Lines 193 - 200 – Private Water/Sewerage**. This section of the Purchase Agreement puts the burden on the Seller to do a number of things. If either a private water and/or sewerage systems services a home site, the Seller must provide, at Seller's expense, evidence of approval of either of these systems by the appropriate governmental entity. The governmental entity could be any number of governmental agencies that would have jurisdiction over these systems. Further, an approved sewerage and/or water inspection report must be issued within thirty (30) days prior to the act of sale by the appropriate governmental agency. Last, the Seller must provide an approved inspection and test on the water and/or sewerage system. Any repairs necessary to obtain the approved inspection certificate are to be paid for by the Seller.

5. **Lines 202 - 211 – Home Service/Warranty**. This section of the Purchase Agreement requires an election of whether a home service warranty plan will be purchased or not purchased at the closing of the sale. This section also provides a price that is a not to exceed price. The home service warranty plan can be paid by the Buyer, the Seller or neither. In any event, an election must be made as to who is paying for it. Last, it must be clearly stated who is ordering the home service warranty plan. Beginning at line 203, the parties are advised that the warranty plan does not cover pre-existing defects and does not supersede any other inspection clause or responsibilities. This is to alert the parties to the contract that the home service warranty plan should not be viewed as a substitute for appropriate inspections. Lines 206 thru 211 are for the licensee/broker protection. First, the parties acknowledge that the agent/broker may receive compensation from the home warranty company for actual services performed. The clause further requires the parties to acknowledge that if a plan is not chosen, they have been aware of it and further, hold the broker and agents harmless from responsibility or liability due to their rejection to such a plan.

6. **Lines 212 – 229 - Warranty or As Is Clause with Waiver of Right of Redhibition** (Check one only). This portion requires an election to be made. To understand these clauses, there must first be a discussion of what Louisiana law is as to warranty in a sale. These general rules have an exception, that is the new home warranties, and that will be discussed below.

   In every sale in Louisiana, including sale of real estate, the Seller by default, and unless changed by contract, warrants two things regarding condition of the Property:

   1. That the thing sold is free from redhibitory defects; and

   2. That the thing is fit for its intended use.

   Redhibitory defects are defects that are (a) not apparent or visible or (b) cannot be discovered with simple inspections. Stated another way, Louisiana law is to the effect that if a defect is observable or could have been discovered upon simple inspection, it is not a redhibitory defect, and the Buyer buys the property with those defects, and they are the Buyer's problem. (If the Seller knows of the defects and conceals them, other problems arise which are beyond the scope of this course.) So the law on redhibitory defects assumes that there is a defect that cannot be discovered easily or is not readily observable so that neither the Buyer nor the Seller knows about them. If such defects are discovered after the sale within the time period set by law, then the Buyer has recourse against the Seller for a reduction in the purchase price (generally the amount to cure the defect), or, if the defects are monumental, then Buyer may in fact be entitled to rescind the sale, that is, transfer the property back in return for a full refund of the full purchase price. Instances of the latter are very rare, but the right does exist. The warranty of fitness for intended use does not arise very often in the residential real estate context since the intended use is "residential" and whether the property is fit for that use is generally readily apparent. With that background in mind, a review of the choices are in order.

   Election (A) Sale with Warranties: If this election is made, the Seller is selling the property with all the warranties discussed above. To restate, there is no warranty by the Seller as to apparent or easily discoverable defects. The warranty applies only to those that are hidden or, as the law calls them, redhibitory defects.

   Election (B) Sale "As Is" Without Warranties. Electing this clause will relieve the Seller of the warranty against redhibitory defects. If this election is made, the Buyer's inspections now become much more important and Buyers should be alerted that if this election is made that the Seller will not be liable for any hidden or redhibitory defects.

   Election (C) New Home Warranties. The New Home Warranty Act supersedes the general rules of warranty that apply to elections A and B. The New Home Warranty Act sets forth in very specific detail what warranties are made, the time periods for liability of the Seller and the time period that those warranties last. This course will not go into the details and nuances of the New Home Warranty Act, as that is a seminar in itself. However, there are some basic rules that need to be understood to see if this election applies.

   The three important definitions are that of "Builder," "Home," and "Initial Purchaser." Under the statute, a Builder is a person or business organization which constructs a home or an addition, thereto including a home occupied initially by the builder as his residence. A person is a Builder under the statute whether they build the home on the property owned by the builder, or build it on property owned by another. For example, a lot owner who contracts for construction on their own lot will be contracting with a "Builder" under the statute.

Second, the definition of “Home” means any new structure designed and used only for residential use, together with all attached and unattached structures constructed by the Builder. This definition includes condominiums and other multiple dwelling regimes.

Last, “Initial Purchaser” means any person for whom the home is built, or the first person to whom the home is sold upon the completion of construction.

Therefore, if the property being sold meets this definition, then election (C) is the only one available.

7. **Lines 231 - 240 – Merchantable Title/Curative Work**. “Merchantable Title” under Louisiana law is a legal definition that title is not suggestive of serious litigation. This definition is somewhat elusive, since a determination needs to be made as to whether the potential for litigation is “serious” or not. Under Louisiana law, the Seller always warrants that they are delivering merchantable title, unless the parties agree to a waiver of some or all of this responsibility. The Purchase Agreement does not contain any deviation from this general standard, however, all licensees should be aware that there are other title standards, both higher and lower than merchantable title. In the event that a request is made by either Seller or Buyer for a different standard than merchantable title, an addendum must be used to reflect that standard. It is also to be remembered that the lender is not bound by the merchantability standard. If the title work is being handled by an attorney for the lender, the lender may have in place higher standards than simple merchantability. The lender may turn down the title, not because it is not “merchantable”, but because it does not meet the lender’s standards for title.

   Not surprisingly, the rest of the clause deals with Sellers responsibility if the title defect that makes the title not merchantable is discovered. The Purchase Agreement states that in the event curative work is required under the agreement, OR as a requirement for obtaining the loan upon which the agreement is conditioned, the parties agree to extend the date for closing of the sale. There is a blank here which must be filled in, and at the time the Purchase Agreement is entered into to establish a time period to cure defects. At the time the Purchase Agreement is entered into, this has to be a guess. Some defects are easily cured and others are more difficult and take more time. From the Seller’s standpoint, the Seller wants as much time as possible to cure any defects and have the sale go through. From the Buyer’s standpoint, they want to know that if the matter is going to drag out, they want to be able to cancel the agreement and move on to another property. The agreement further provides that all costs and fees required to make the title merchantable are paid by Seller, and it further requires the Seller to make a good faith effort to deliver merchantable title. Last, the agreement provides that if merchantable title cannot be delivered within the time as extended, then the Purchase Agreement automatically becomes null and void. The Buyer does reserve the right to demand return of the deposit and recover from the Seller actual costs incurred in processing of the sale, as well as legal fees incurred by the Buyer.

8. **Lines 242 - 245 - Final Walk Through**. Within five (5) days prior to the act of sale or occupancy, whichever is first to occur, the Buyer reserves the right to re-inspect the property. This inspection is made for two reasons: first, the Buyer is making sure that the property is in the same condition as when it was first inspected and second, the Buyer gets to make sure that the items that the Seller agreed to repair (see Inspection and Due Diligence clause) have been made. The Seller also obligates himself to provide utilities for the final walk thru and access to the property.

9. **Lines 247 - 256 – Default of Agreement by Seller**. This portion of the Purchase Agreement deals with the consequences to the Seller of the Seller’s default. Lines 244-245 note that the

Seller is not liable for default if the agreement is cancelled for the reasons set forth in Lines 121 - 138 – Return of the Deposit, or Lines 232-234 Failure of Merchantable Title. Except for those exclusions, if the Seller defaults, the Buyer has a number of options. First the Buyer can declare the agreement null and void with no further demand. Next the Buyer reserves the right to demand and/or sue for any of the following:

1. Termination of the Agreement;

2. Specific Performance;

3. Termination of the Agreement in an amount equal to ten (10%) percent of the sales price as stipulated damages.

Number 1 above, "Termination of the Agreement," needs no further discussion. In number 2 above, "Specific Performance," references the right for the Buyer to require the Seller to sell the property under the terms and conditions of the Purchase Agreement. This election is rarely made and the Buyer should make it only with competent legal advice. In number 3 above, as to "stipulated damages," as discussed above, Louisiana law allows the parties, with very little limitation, to set an amount in advance as damages in the event there is a breach. This allows the Buyer to make the demand and, if necessary, sue and not have to prove up any actual damages because the parties have agreed to the amount for damages.

In all circumstances, the Buyer is entitled to return of the deposit. Further, in an important clause, the prevailing party to any litigation brought to enforce the agreement shall be awarded attorney fees and costs. The agreement last declares that the Seller may also be liable for broker fees.

10. **Lines 258 - 262 – Default of Agreement by Buyer**. This portion of the Purchase Agreement is really a mirror image of the rights granted to the Buyer if the Seller defaults. The only difference is, of course, there is no exclusion for the Buyer in the event of failure of merchantable title because the Buyer is not delivering title in any event.

11. **Lines 268 - 271 – Mold Related Hazards Notice**. In this clause, the Buyer acknowledges receipt of the information of access to EPA web site in regard to mold related hazards. This is a Louisiana Real Estate Commission regulation and is found at LREC §3801 in accordance with La. R.S. 37:1470.A(1).

12. **Lines 273 - 278 – Offender Notification**. This again calls the Buyer's attention to resources, including that of the Louisiana Bureau of Criminal Identification and Information and local law enforcement as to the location of registered sex offenders as that is defined under Louisiana law. This is found at La. R.S. 37:1469.

13. **Lines 280 - 281 – Choice of Law**. The parties choose in this clause to have Louisiana law apply to any interpretation of agreement or any dispute. The importance of this clause cannot be over emphasized. The rules on conflicts of law, that is, what states' laws apply to disputes, are very complicated. Just because the property is in Louisiana does not mean that Louisiana law would apply, except that this clause requires that Louisiana law to be applied.

14. **Lines 283 - 285 – Deadlines**. The term "Time is of the Essence" is a legal term that simply means when a clear deadline, for example, a certain number of days or certain date, is agreed to in a contract, the term for performance and the deadlines are final. The Purchase Agreement does note that any modifications, changes and extensions must be made in writing. Any change in any deadline to be effective under Louisiana law must be made in

writing and signed by the parties. This section further notes that "calendar days" shall end at 11:59 pm in Louisiana. According to Black's law dictionary (9th Ed. 2009), a calendar day is a consecutive 24 hour day running from midnight to midnight. "If the last day for passing the act of sale falls on a weekend or a **holiday** on which business is not conducted, the last day for passing the act of sale is automatically extended to the next working day." Transcontinental Development Corp. v. Bruning, 195 So. 2d 430 (La. Ct. App. 4th Cir. 1967).

If a deadline is not a "calendar day," and the Purchase Agreement does not provide for "calendar days", for example, "fifteen (15) days" means fifteen (15) days. If the fifteenth day falls on a Saturday, Sunday or legal holiday, the contract must be performed on that day. In the Purchase Agreement lines 74, 75, preliminary loan approval only says "days." Line 193, Water Inspection Report says thirty days; line 239 Final Walk-Through, only says five days

15. **Lines 287 - 295 – Additional Terms and Conditions**. This area is reserved for any special considerations or conditions that the parties have agreed to. The objective here is that if the parties desire it to be done, then it must be written down. Licensees are sometimes concerned as to whether they are expressing this in appropriate "legal" language. The best rule is to simply write it as clearly as you can. Try to express your thoughts fully. If you run out of room on this form, you may use an addendum to finish expressing the agreement between the parties. Do be careful to use the proper defined terms.

    Example: Remember our example regarding the new washer/dryer set to be transferred to Buyer. The requirement that the washer/dryer set is to be transferred to the Buyer should be included here. The following would likely be sufficient: The Kenmore washing machine and Kenmore dryer located in the laundry room of the property as of November 30, 2012 shall be transferred to Buyer as part of the Sale Price.

16. **Lines 297 - 314 – Roles of Brokers and Designated Agents**. To understand what this clause is really all about, we need to understand what brokers and designated agents are not. Brokers and designated agents are not parties to the agreement. They cannot perform for the Seller nor the Buyer. The Purchase Agreement makes that clear. The brokers and designated agents are not title attorneys or surveyors and, therefore, make no warranties as to items that would be determined by those persons. Brokers and designated agents are normally not experts in mechanical systems as a home inspector would, therefore no warranty is made as to those items. Brokers and designated agents are normally not lawyers, and should not be required to investigate or understand the status of permits, zoning, code compliance, restrictive covenants or insurability. Broker and designated agents are not experts as to flood plains or wetlands, nor are they entomologists to determine the presence of wood destroying insects or damage. Last, a designated agent shall be an independent contractor for the broker if the conditions set forth in La R.S. 37:1446(H) are met: (1) The real estate salesperson or associate broker is a licensee. (2) Substantially, all of the real estate salesperson's or associate broker's remuneration for the services performed is directly related to sales or other output, rather than the number of hours worked. (3) There is a written agreement between the real estate salesperson or associate broker, and the broker that specifies that the real estate salesperson or associate broker will not be treated as an employee.

    In summary, the Purchase Agreement is trying to establish, in writing, their role. Brokers and designated agents represent owners of property and potential purchasers.

17. **Lines 316 - 324** – List Addenda to be attached and made a part of this Agreement. There are four printed choices and four blanks for other addenda. Do not hesitate to make your own box, with an additional addendum.

    This list should completely incorporate all addenda attached to the contract. The reason for the list is the same as the reason for initialing each page. This is to insure that all addenda used are captured in the body of the contract to avoid any issues.

    The balance of the Section addresses the relationship between the preprinted portions of the agreement, and any additional or modified terms and blanks or any addendum. It provides that the additional or modified terms in blanks and on addenda control over the preprinted portions of the agreement as discussed above. This is the law in Louisiana on interpretation of contracts, and the Purchase Agreement simply makes it clear to the parties that that is the result.

    Last, be careful to ensure that there are no unintended consequences in use of addenda. For example, an addendum may change a time for performance that is not reconciled with other time periods in the Purchase Agreement.

18. **Lines 326 – 328 - Singular-Plural Use**. This is a traditional contract clause.

19. **Lines 330 – 334** - Going back to the earlier discussion, acceptance occurs when two things happen: first, the party accepting signs the contract and, second, that fact is communicated to the person making the offer. All of this, you will probably remember, must be done within the time given for acceptance, that is, it must be signed and that fact communicated within the time set forth in the offer. The Purchase Agreement does allow the parties to contract that notice of the acceptance may be communicated by fax or electronic signature. The Purchase Agreement then provides that the agreement and any supplemental addenda, modifications, including any photocopy, fax or electronic transmission, may be executed in two or more counterparts, all of which shall constitute one and the same agreement. This simply means that the Seller and the Buyer can sign separate copies of the agreement or any modifications or addenda, and even though those are signed on different pieces of paper, when taken together, they will constitute one whole contract.

20. **Lines 336 – 340 – Notices and Other Communication.** This section sets for the manner in which notice, such as the notice of deficiencies found during the Inspection and Due diligence Period, must be given. Buyer and/or Seller may elect to receive notice by electronic mail. This is an attempt to comply with the Louisiana Uniform Electronic Transactions Act and actual practice. (See II.B.11 for discussion of LUETA). Since it is common practice to deliver notices to the licensees first, it would be best to include both the licensee's email address and the Buyer/Seller's email address, as applicable. This will help establish the time notice as given and conform with actual practice.

21. **Lines 348 – 350 - Contract**. This is simply a statement to the parties to the contract that it is legally binding and has very important consequences. It further states that if they do not understand any portion of the contract, they should seek legal advice, and they should certainly seek legal advice before attempting to enforce any part of the contract.

22. **Lines 352 – 353 - Entire Agreement**. This is a statement of Louisiana Law. Once the parties sign the contract, anything that is not incorporated in it will be ignored by any court. Any modifications not in writing will be ignored by a court.

23. **Lines 354 – 355 - Expiration of Offer**. From the discussion above, you will recall that if an offer is made and it has a time within which it should be accepted, it is "irrevocable" within

that time. The Purchase Agreement restates that fact. In choosing the time within which the offer must be accepted, practical consideration should control. Are the Seller and Buyer in close geographical proximity to each other, or are they in a remote location? Has one of the parties advised you that they will be out of town for a few days? Stated again, choosing the time period within which the offer must be accepted is a practical consideration.

24. **Lines 357 – 391 - The "Signature Lines".** In addition to being there for the signature, ask that all of the very important information be filled out. This is of great assistance to many people including the other licensees you are working with and those trying to close the transaction. Lenders, title attorneys, appraisers and surveyors all, to some degree, rely on the information contained in this Purchase Agreement Section.

25. **Line 374 - The Acceptance, Rejection**. Handling of the Purchase Agreement is governed not only by the tenets of Louisiana law, but by the Louisiana Real Estate Commission Rules **LREC §3900 et seq.** Line 371 contains three choices. First, the agreement is accepted. Second, it is rejected without counter. Third, it is rejected and countered. On this last choice, it is a good time to remember from our discussion above what a counter offer really is. A counter offer is first, a rejection and second, a new offer. The new offer contained in the counter offer must meet all the tests and criteria of an original offer to be valid.