

FAILURE TO WAIVE CONDITIONS ON TIME

Purpose: This bulletin explains the consequence and best practice when clients do not satisfy or waive conditions in writing, by the agreed date in the purchase contract.

This bulletin applies to real estate professionals.

Real estate contracts and leases typically contain a deadline for conditions to be satisfied or waived. If the conditions are not satisfied or waived by that deadline the contract ends.

Real estate professionals need to make sure their clients understand the consequences of this deadline BEFORE it passes. If the contract expires, make sure you address your client's best interests.

Are purchase and lease agreements clear about condition deadlines?

The contract should clearly state the deadline to waive or satisfy important conditions. Typical language requires one party to deliver written notice that a condition is satisfied or waived to the other party by a deadline.

The contract should clearly state the effect of missing a deadline and if notice must be in writing. If the deadline passes without satisfying or waiving the condition or delivery of the written notice does not occur, language such as "the contract ends immediately" is common.

What if a party misses a deadline?

If the contract says the contract ends if a party misses the deadline, then the contract ends. In that case, neither party is bound to continue with the purchase or lease.

Can you extend a deadline?

The parties can agree to extend a deadline, but neither party can do so unilaterally. The parties must agree to amend the original contract, and the amendment must be in writing and executed BEFORE the contract ends.

Can the contract be "revived" after it ends?

There are cases where parties have "revived" a contract after it ends but there are risks for the client.

First, it may not be in your client's best interest to accept the same deal. Circumstances may have changed since signing the original contract. This is especially true if the buyers failed to obtain financing or some other important assurance.

Your client may believe they are bound to continue with the same terms or the other party may pressure them to keep the same terms, but they don't have to.

You must advise them they have options. They can offer new terms or walk away from the transaction if the original contract is no longer in their best interest.

Second, trying to document a "revival" creates new problems.

If the original contract ended after expiry of a deadline, you are creating a new agreement whether you call it a "revival" or "extension" of the original contract.

If you try to use the original contract, you will add new dates for offer and acceptance; change the condition dates and other dates; get new signatures from the parties and witnesses; add new signing dates; and, initial all changes.

You run the risk of having a messy, confusing, or uncertain contract, which one of the parties may challenge if they decide to try to leave the transaction.

If you use a separate form to extend the condition deadline, you may fail to address other important dates or terms affected by the extension. All of the terms within the contract must work with the new date.

You must ensure you end up with a clear and binding contract. Any uncertainty about the terms of the new contract or the validity of it can lead to litigation.

Best Practices

The best practice is to make sure you address deadlines with your client **BEFORE** they expire.

If your client needs or wants to extend a deadline, get it done BEFORE the deadline expires.

If the contract ends, and the parties want to continue the transaction, write a new contract. Do not resort to risky shortcuts. Take the time to create a professional, clear, and binding contract.

And, if your client does not want to continue the transaction after a contract ends, get a mutual release signed as soon as possible, and avoid any conduct or representations that may lead the other party to think they have an ongoing agreement.

You can meet your professional obligations by giving timely advice and taking timely action:

Give your client timely advice:

- advise your buyer clients that they must use reasonable effort to complete their conditions
- the contract will end if conditions are not satisfied or waived by written notice by the Condition Day
- if the buyer needs more time to satisfy or waive a condition, they must ask the other party for an extension and obtain that extension in writing BEFORE the contract ends
- if the buyer cannot satisfy or waive a condition, they do not have to ask for or agree to an extension, and it may be in their best interests to let the contract end
- if the buyer misses the deadline and the contract ends, explain their options

Take timely action

- select a deadline for the original contract they can reasonably meet
- diarize the deadline to remind you when it is approaching
- monitor how your clients are doing satisfying their conditions and keep them aware of the deadline
- get instructions from your client in time to get an extension executed BEFORE the deadline passes
- if the client is unable to satisfy or waive a condition, give written notice as soon as possible
- draft a new contract if the prior one ends and the parties want to continue the transaction

Do real estate brokers and broker delegates have a role to play?

Brokers and delegates need to ensure real estate professionals provide competent service on behalf of the brokerage.

Brokers can help by providing clear advice to their industry professionals and other brokers representing a party in the transaction about best practices dealing with a Condition Day. Ensure the industry professional takes the necessary steps to protect the brokerage's client's interests.

Related information

Legislation

- *Real Estate Act* Rules – section 41(b)

Information bulletins

- Competent Service

INFORMATION
BULLETINS

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