



LAW ADVOCATE GROUP, LLP

9701 Wilshire Blvd. Suite 1000 Beverly Hills, CA 90212

Phone: 310-651-3065 Fax: 310-601-7110

www.LawAdvocateGroup.com

Doron F. Eghbali Real Estate Law

[Why and How Are Condition Precedents Salient in Real Estate Contracts?](#)

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Condition precedents play an integral role in protecting disparate parties in contractual transactions. Such salience comes to the fore, especially, in real estate transactions where parties do not have substantive control over financing or other requirements laid out in the contract. In the absence of well-drafted enforceable condition precedents, parties are left bereft of real protection. Let us explore, to some extent, such salient building block of contractual transactions.

SOME BACKGROUND

Condition precedent is referred to a condition which must take place before a party to a contract has to perform. If a condition precedent does not take place, no duty of performance arises and no tender is required AND the party protected by the condition precedent is not in breach, if the party does not perform. In other words, in a real estate sales contract, if the contract encompasses a condition precedent specifying the buyer must first acquire a bank loan, and then the buyer is obligated to pay the seller, if the bank does not approve the buyer or the loan process takes longer, the buyer is not in breach, if the seller does not buy the property, with the proviso the condition precedent is enforceable.

Condition precedents in real estate contracts are not only limited to buyers. Sellers also insert a variety of condition precedents to ensure they are not bound to perform if certain conditions do not occur. For instance, sellers might need a way out of the contract without incurring any unreasonable costs, if the buyer's credit references are not satisfactory for the seller OR if the seller cannot find real estate for 1031 tax exchange, living or other reasonable reasons.



DRAFTING AND ENFORCING CONDITION PRECEDENTS IN REAL ESTATE CONTRACTS

There are several points to consider while drafting enforceable condition precedents. The following are just a few of such considerations:

1. LENDER'S APPROVAL: "GOOD FAITH" AND "REASONABLE EFFORTS"

It is incumbent on attorneys and clients alike, to include in real estate contracts a condition precedent, i.e. conditioning the sale upon LENDER'S APPROVAL. This point seems to be easy, but often overlooked.

CAVEATS ON LENDER'S APPROVAL CONDITION PRECEDENTS

- The condition precedent cannot be entirely in control of one party without no qualifiers. In such circumstances, there is no mutuality of obligation and **NO PARTY CAN ENFORCE THE CONTRACT**. Usually, the courts dislike this result and often construe the contract as to deny the party with unfettered discretion to perform the contract. A party who has failed to make a good faith effort to obtain financing, is found **LIABLE** even though the obligation to perform the contract as a whole has not arisen. Such breach is typically treated as a total or material breach as though the defaulting party had refused to consummate the sale itself.
- To avoid the problems just set forth, contract should contain "GOOD FAITH" and "REASONABLE EFFORTS". Nonetheless, it is insufficient if the defaulting party only invokes such principle without putting in any good faith or reasonable efforts to obtain financing.

2. VAGUENESS OF "GOOD FAITH" AND "REASONABLE EFFORTS"

Understandably, the problem arises when it comes to interpretation or construction of "good faith" or "reasonable efforts". The reality is that how hard the defaulting party should seek financing before such efforts are deemed reasonable or in good faith. Courts are, to some extent, divided on this issue. Nonetheless, most of the courts follow **SOME** of the following guidelines:

- Most courts are willing to fill in the missing terms by referring to reasonable expectations and practices in the locality.
- The actual behavior of the parties might provide additional information even if the terms are indefinite or ambiguous.
- A party may waive the indefinite provision. However, such waiver is effective only if the provision was inserted for the benefit of the waiving party. For financing conditions, the buyer is often deemed to be the benefiting party. Such construction might prove more problematic in non-financing condition precedent circumstance.



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SALIENT NOTE

This article in no way supplants a thorough investigation of the facts and the law pertinent to the situation at hand. In fact, this article provides ONLY a small portion of this salient topic.

***DORON EGHBALI** is a Partner at the Beverly Hills Offices of Law Advocate Group, LLP. He Primarily Practices Business, Real Estate and Entertainment Law. Doron Can Be Reached at: 310-651-3065. For More Information, Please, Visit: HERE.*