

FEDERAL STANDARD ABSTRACT

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What Contract Provisions Survive Closing?

It is often said that contracts of sale merge with the closing deed, which means, in broad terms, that contract representations and warranties become void after closing. This is usually of great concern to purchasers, who fear sellers may be hiding something, and of great relief to sellers, who feel scot free of all contract provisions after closing. While it is true that much of the contract merges with the deed, there are covenants that survive without need to stipulate their express survival.

To begin with, it is important to differentiate among representations, warranties, closing conditions and collateral undertakings. *Representations* are statements of fact made at the time of contract by one party intended for the other party to rely on. *Warranties* are assurances or undertakings as to future events; they affirm that something will remain “as is” through the closing, or that the seller will do or refrain from doing something prior to closing. *Closing conditions* are circumstances that must be met before a party may be obligated to close under the contract. For example, in the typical residential contract, that the premises is a legal single family residence is usually a closing condition and not a representation. Closing conditions, being something intended to be completed and

checked prior to closing, never survive closing. *Collateral undertakings* are covenants that may have been negotiated together with the sale of property, but are not tied to the closing. For example, The seller’s promise, especially if he is a builder, to build a garage, without specifying when, is a collateral undertaking that may or may not be performed by the time of closing. Collateral undertakings always survive closing.

If a buyer discovers (or in due diligence should have discovered) a misrepresentation prior to closing, the buyer may call default. If the buyer, instead, agrees to close, then he has accepted the misrepresentation. If the misrepresentation was not discovered prior to closing (e.g. the amount of rents and tenant deposits), then the seller may be liable for fraud after the closing. The six years statute of limitations would run from the time the misrepresentation was made (i.e. the contract date; not the closing date).

The rule for warranties is similar: If the buyer discovers or should have discovered noncompliance, the warranty merges with the deed. If it is not so discoverable (e.g. “work will be free of material defects”, but cannot be checked prior to closing), the warranty may survive closing and may be the basis of fraud claims (if the allegation is that the seller never intended

to comply), or negligent contract performance (if the allegation is that the seller did not perform as required).

To illustrate the difference between representation and warranties, the statement that there are no violations is a representation, if made as of the time of contract, or a warranty, if made as of the time of closing. Notice the difference in the remedies. A breached representation is an instance of default and may excuse a buyer from the contract. A warranty, on the other hand, may not result in a default *until a closing is scheduled and the seller fails to perform*. This also means that statutes of limitations being running at different times: the former at contract, the latter at closing.

Collateral undertakings may be confused with warranties. They both are promises regarding future events. The difference lies only in the intention of the timing to perform. If the seller promises to do work “prior to closing” or the wording of the

contract creates the impression that the work will be completed by the time of closing, then such promise is a warranty or simple undertaking. If the buyer closes on title, he has waived it. But a promise that may not be intended to be completed by the time of closing is a collateral undertaking and survives closing. Examples include a developer’s promise to build a street or other common area, or the sharing with the seller of future refunds of tax credits or condominium common charges. If the wording makes it clear that a covenant may or may not be performed by the time of closing, there is no need to stipulate that it will survive the closing.

To summarize, closing conditions never survive closing. Representations and warranties only survive if the buyer is not in a position to detect noncompliance prior to closing. Collateral undertakings, if clear that they are not tied to the closing, survive the closing.

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