

## AVOIDING MALPRACTICE – MORTGAGE CONTINGENCY

by Harold I. Levine

The mortgage contingency clause is one of the biggest problems for lawyers. The standard clause is as follows:

Mortgage contingency. This contract is contingent upon:

A) Buyer making formal application for and securing within \_\_\_ days after the date of acceptance, a written commitment for a \_\_\_\_\_ loan of \$ \_\_\_\_\_ with interest at not more than \_\_\_% per annum amortized over not less than \_\_\_\_\_ years with the loan service charge (exclusive of appraisal and credit investigation fees) not to exceed \_\_\_\_\_%, and with deposits for taxes and insurance if required by lender. If Buyer fails to obtain such commitment, Buyer shall notify Seller in writing within said number of day. If said notice is not given, Buyer shall for all purposes be deemed to have waived this contingency.

This seemingly innocent clause imposes two duties on the buyer. One to get a mortgage within a certain time, and two to notify the seller within that time if he or she cannot. It is basically unfair because that is not what the buyer bargained for. The buyer bargained for a transaction where he or she would agree to get a mortgage, and if not, the earnest money would be returned. The buyer did not bargain for a clause where the failure to notify as opposed to the failure to get a mortgage, will put the buyer at risk and cause the buyer to forfeit the earnest money. What is the lawyer's liability in this? First of all, every purchaser's lawyer should delete this from the contract, that is, if the lawyer ever gets to see the contract. The contract should provide that if the buyer can't get a mortgage with a good faith effort, the buyer gets the money back. It's that simple.

Further, whose responsibility is it to police this clause? Assume a lawyer has some 40 real estate deals in the office. Is the lawyer responsible to calendar, docket, and notify the client every time that the contingency is running out? Assume further that half of these so-called deals are on their second or third extension. The client assumes that it is the lawyer's job. If the mortgage contingency expires and the seller is not notified, the deal becomes a cash deal. The earnest money is likely to be lost and the buyer will blame the lawyer. The appellate court has upheld this clause and so what does the lawyer do?

1. If at all possible, remove the offending language.
2. Write the buyer a letter and clearly state that it is the buyer's obligation to police the mortgage contingency. The letter should state that the lawyer is not responsible for the expiration of the mortgage contingency. And further that if the buyer calls or notifies the lawyer within 5 (five) days of the end of the contingency, the buyer's lawyer will prepare the necessary extension agreement or notice of cancellation, but only if notified.

If you don't do this, you are stuck and the contingency becomes the lawyer's problem.

The next problem with the mortgage contingency clause is that no lawyer representing a purchaser should accept less than 45 days to get a mortgage. A lawyer representing a purchaser is doing the client a great disservice when agreeing to a contract allowing the buyer 30 days or less to get a mortgage. By Spring, panic will set in in this area and most lenders will suffer a great deal. It is going to take 45-60 days to process a mortgage loan, and if you don't protect your client, three things will happen:

1. Where the contingency expires, the seller will not want to give you an extension because the market is rising and the purchaser will lose the deal.

2. The purchaser will not notify the seller in time and everyone will be at risk on a cash deal.
3. In any event, the buyer tries to blame the lawyer, so get a 60-day mortgage contingency.