Ready, Set, GO with the 2017 Forms!

A new year always brings changes to the GAR Forms. This year is no different except that more changes were made to the Purchase and Sale Agreement than in previous years. This article will explain the thinking behind some of the major changes.

Changes to the Purchase and Sale Agreement (F20)

1. Survey Section Deleted. (Sections A2 and B2). The GAR Purchase and Sale Agreement has long had a provision allowing: a) the parties to attach a survey as an exhibit to the contract; b) the buyer to then get his or her own survey; and c) the buyer to then be able to terminate the contract if the new survey is materially different from the survey attached to the contract. This entire section was deleted from the GAR Purchase and Sale Agreement because few listing agents were encouraging their sellers to attach a survey to the contract and as such, this provision was rarely being used.

If you are someone who always uses this provision, the same survey language that was previously in the GAR Purchase and Sale Agreement will be included in the special stipulations section going forward and therefore can still be added to the contract. While the survey section has been deleted, it does not mean that the buyer cannot get a survey. This right will still be provided to buyers as part of their rights to inspect the property. Of course, the best time to get this done is during the due diligence period when the buyer can terminate the contract for any reason whatsoever if the buyer is not satisfied with the survey.

Should buyers be getting surveys? My answer has always been yes (except with a condominium unit) because it is the only way to determine the physical boundaries of the property being purchased. Every year, we see numerous unhappy buyers and some claims being brought when buyers discover that the actual boundaries of properties they just bought are different than what they thought they were buying. Buyers cannot win a fraud claim against a seller if a survey would have revealed the fraud and the buyer chose not to get a survey.

2. Change in Possession Date. The previous version of the possession date section simply provided that, "Seller Retains Possession of Property Through: _____". The intent of this provision was that people would always fill in this provision with either "closing" or "___ days after closing". Unfortunately, some people chose to fill in the date of possession with a specific date such as, for example, May 1, 2017. The problem with using a specific date is that if one of the parties unilaterally extended the date of closing, the transfer of possession was technically before the actual closing. The revised section is written so that it essentially requires the possession date to be filled in as either the closing date or within so

many days after the closing at a specific time. Therefore, if the date of closing changes, the date of possession automatically changes along with it. This should solve the problem of the possession date inadvertently ending up prior to the date of closing.

3. Modification to the Prorations Section. Under the old GAR Purchase and Sale Agreement, any pending property tax appeal was assigned to the Seller at closing. Under the new GAR Purchase and Sale Agreement, only pending tax appeals for the year in which the property is sold "are assigned to Buyer at closing." This change was made so that if a property owner had property tax appeals ongoing for multiple tax years, the one for the year in which the property was sold would be transferred to the buyer, but not the tax appeals for previous years. This was a logical change because the only beneficiary for the tax appeals in years prior to the sale of the property is the seller rather than the buyer.

4. Clarification of the Right to Unilaterally Extend the Closing. The "Closing and Possession" section has always given a buyer or seller the right to unilaterally extend the closing date for eight days for certain reasons, including the buyer's mortgage lender not being ready. This is the case even if the transaction started out as an "all cash" transaction and the buyer later decided to obtain a loan. A couple of small changes were made to clarify that the intent of this section is to allow buyers who purchase the property for "all cash" to get a mortgage loan and be able to unilaterally extend the closing date if the mortgage lender is not ready.

There was much discussion among the members of the GAR Forms Committee this year as to whether this section should be changed. Some committee members argued that if a buyer agreed to buy a property for "all cash", the buyer should not have the right to unilaterally extend the closing date if the buyer then obtained a mortgage loan and the mortgage lender was not ready to close for some reason. Others argued that in cases in which the buyer contractually agreed to pay "all cash," the buyers should not be able to unilaterally extend the closing date for eight days for the loan not being ready unless the buyer had given the seller some advance notice that a loan was now being obtained. For now, the GAR Forms Committee voted to preserve the approach presently set forth in the Purchase and Sale Agreement. The rationale for doing this was that the minor inconvenience to the seller of having an occasional "all cash" buyer extend the closing date for eight days (because the buyer decided to get a loan which was now not ready) was outweighed by the benefit of allowing buyers to extend the contract and thus not have transactions fall apart.

5. Inspection and Due Diligence Section. Three changes were made to this section of the GAR Purchase and Sale Agreement. First, a disclaimer was added to this section of the contract stating that, "Even if the Property is sold "as-is", Seller is required under Georgia law to disclose to the Buyer latent or hidden defects in the Property of which Seller is aware and which could not have been discovered by the Buyer upon a reasonable inspection of the Property". This disclaimer was added to try to clear up a common misperception on the part of some sellers that they can avoid disclosing hidden defects of which they are aware by selling a property in "as-is" condition.

The second change was to add to the Purchase and Sale Agreement the location of the website showing whether a house was used for the production of methamphetamine or a dump site for the same. While there are relatively few houses that have this issue, the GAR Forms Committee decided that making this information available to buyers protected both the buyer and the real estate agents involved in the transaction by making this information easily accessible.

The third change was to clarify that the right of buyers to inspect a property is subject to the buyer giving prior notice to the seller and to require that the buyer "promptly restore any portion of the Property damaged or disturbed from testing or other evaluations to a condition equal to or better than the condition it was in prior to such testing or evaluation". These changes were made to: a) ensure that buyers give sellers the courtesy of advance notice before simply showing up at a property; and b) strengthen the buyer's legal duty to repair property damaged as part of the inspection process.

6. Agency and Brokerage. Several changes were also made to the "Agency and Brokerage" section. The first was to clarify that, "The Brokers herein are signing this Agreement to reflect their role in this transaction and consent to act as Holder if either of them are named as such. This Agreement and any amendment thereto shall be enforceable even without the signature of any Broker referenced herein." REALTORS® regularly ask if the Purchase and Sale Agreement is enforceable even without their signatures and this addition to the contract makes it clear that the answer to this question is an unequivocal yes.

The second change was to modify the disclaimer section to try to protect REALTORS® who write special stipulations on behalf of their clients. Specifically, the following language was added to this section:

> "If Broker has written any special stipulations herein, the party for whom such special stipulations were written: a) confirms that each such stipulation reflects the party's complete understanding as to the substance and form of the special stipulations; b) hereby adopts each special stipulation as the original work of the party; and c) hereby agrees to indemnify and hold Broker who prepared the stipulation harmless from any and all claims, causes of action, suits, and damages arising out of or relating to such special stipulation."

While there is no guarantee that this provision will protect the REALTOR®, the GAR Forms Committee decided that trying to offer some protection was better than doing nothing at all.

The third change was to clarify that the term "Broker" in the Purchase and Sale Agreement always includes the Broker's affiliated licensees unless the context would indicate otherwise. This change replaced the previous language which simply stated that the term "Broker" only included the Broker's affiliated licensees where the content would indicate. This minor change in emphasis reflects that the term "Broker" almost always includes the Broker's affiliated licensees when used in the GAR Purchase and Sale Agreement.

7. New Attorney's Fees Provision Added to Default Section. Possibly the most significant change to the GAR Purchase and Sale Agreement is the inclusion of a new "Attorney's Fees" section. This new language provides that:

> "In any litigation or arbitration arising out of this Agreement, including but not limited to, breach of contract claims between Buyer and Seller and commission claims brought by a broker, the non-prevailing party shall be liable to the prevailing party for its reasonable attorney's fees and expenses."

Prior to this change, each party would normally pay their own attorney's fees as is normally the case in breach of contract claims. This made it hard for a party to go after a breaching party because even if they won, the costs of bringing the legal action were often prohibitive. Changing this provision will make it easier for the party who honors the contract to pursue a party who breaches the contract. While this may arguably increase litigation, the hope

is that it will actually decrease litigation by causing parties who are considering breaching the contract to think twice before doing so.

This change will also make it easier for brokers to pursue commission claims because they are now entitled to their attorney's fees if they win the lawsuit.

8. Changes to the "Other Terms and Conditions" Section. Several changes were made to this section of the Purchase and Sale Agreement. First, the "Entire Agreement, Modification and Assignment" section was modified to provide that, "This Agreement may not be assigned by Buyer except with the written approval of Seller which may be withheld for any reason or no reason". The GAR Purchase and Sale Agreement has always provided that the seller's written permission was required before the contract could be assigned. However, the change in this language fixes a loophole created by Georgia case law where sellers were arguably required to act reasonably in denying a request of a buyer to assign the contract. The change in this language accomplishes the goal of the GAR Forms Committee, which was to give the seller an absolute right to approve or disapprove all assignments for any reason or for no reason.

The second change was made to the "Governing Law and Interpretation" section by adding what is known as a severability provision. This new clause provides that, "If any provision herein is unenforceable, it shall be severed from this Agreement while the remainder of the Agreement shall, to the fullest extent permitted by law, continue to have full force and effect as a binding contract." This language was added with the intent of trying to save a contract where an unenforceable provision might otherwise render the entire contract unenforceable.

The third change was to the "No Authority to Bind" section. This section was modified to clarify that the broker does not have any authority to bind any party hereto "to any contract, provisions herein, amendments hereto or termination hereof". On occasion, a party to a contract will argue that the broker has authority to bind the client of the broker. This language tries to make it clear that no such authority exists on the part of the broker. In addition to this change, language was also added that notwithstanding the above, "if authorized in this Agreement, Broker shall have the right to accept notice on behalf of a party". This section was added to clarify that even though the broker cannot bind a party, they do, in certain circumstances, have the right to accept notice on behalf of a party.

Finally, a new "Condemnation" section was added which provides as follows:

> "Seller shall: (1) immediately notify Buyer if the Property becomes subject to a condemnation proceeding; and (2) provide Buyer with the details of the same. Upon receipt of such notice, Buyer shall have the right, but not the obligation for 7 days thereafter, to terminate this Agreement upon notice to Seller in which event Buyer shall be entitled to a refund of all earnest money and other monies paid by Buyer toward the Property without deduction or penalty. If Buyer does not terminate the Agreement within this time frame, Buyer agrees to accept the Property less any portion taken by the condemnation and if Buyer closes, Buyer shall be entitled to receive any condemnation award or negotiated payment for all or a portion of the Property transferred or conveyed in lieu of condemnation."

As the economy strengthens, we are increasingly seeing issues where properties under contract became subject to a condemnation action. This section protects the buyer by giving the buyer the right to terminate the contract if, prior to closing, a portion of the property becomes

subject to a condemnation proceeding. If the buyer elects not to terminate the contract, the buyer is then entitled to the proceeds from the property which is condemned.

Changes to the Seller's Property Disclosure Form

Several small changes were made to the Seller's Property Disclosure Statement. First, the questions relating to the age of HVAC systems serving the property was restored to the Seller's Property Disclosure Statement upon the request of numerous REALTORS®.

Second, a question regarding the expiration and renewal dates of termite bonds, warranties or termite service contracts was added to the contract.

Third, a question was added (in section 12) regarding whether the property is subject to a threatened or pending condemnation action.

Fourth, the questions relating to plumbing leaks and water intrusion were broadened to also inquire about damage occurring to these things.

Fifth, the question whether there were additions, structural changes, or other major alterations to the original improvements was expanded to include the "Property, including without limitation, pools, carports or storage buildings?" Finally, several blanks were added to the Fixtures Checklist to allow the seller to identify certain unique items that either remain or do not remain with the property.

Changes to the Community Association Disclosure Statement

One of the more significant changes to the GAR Forms was to the Community Association Disclosure. Specifically, the following bold-face language was added to this form:

> "IN THE EVENT SELLER FAILS TO DISCLOSE HEREIN THE FULL AMOUNT OF ANY FEES, ASSESSMENTS OR CHARGES DUE AND PAYABLE TO THE COMMUNITY ASSOCIATION OR ITS MANAGEMENT AGENT ON OR BEFORE THE CLOSING, SELLER SHALL BE RESPONSIBLE FOR PAYING SUCH UNDISCLOSED FEES, ASSESSMENTS AND CHARGES AT THE CLOSING."

This language was added to try to address increasing problem of buyers learning at the closing table of initiation fees, charges and assessments and fighting with sellers over who pays these amounts. The GAR Forms Committee decided that since many community associations will not communicate directly with buyers (since they are not yet the owners of the property) it made sense to shift the burden to the seller of getting accurate information regarding monies to be paid at closing (and making the seller responsible for paying any amounts at closing not disclosed to the buyer).

In conclusion, the GAR Forms Committee continues to work to improve the GAR Forms to solve problems in real estate transactions and protect REALTORS®.

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