

# Expert Tips about Contingency Sale Clauses

By ANTHONY MARGULEAS  
*Special to the Palisadian-Post*

In the past few months, we have seen a sharp rise in the use of contingency sale clauses when buying or selling a home. These clauses can be contingent on the sale of your home or contingent on you finding a replacement property. For the previous 10 years the contingency sale clause was rarely needed since homes sold relatively quickly with fewer homes on the market and people relied less on using the equity in their homes. Now, with the stock market and retirement accounts dropping in value, the last large asset with cash is your home.

Your realtor should use the Contingency for Sale or Purchase of Other Property (COP), which is the proper form for both of these scenarios. Obviously, your realtor should be familiar with this form, because otherwise you could be stuck with two mortgages. Make sure to ask how many times the realtor has used the form.

In the past, sellers were rarely worried about their home not selling. In today's real estate market, where the Average Days on Market is six months, many buyers are writing their purchase offers contingent on the sale of their property. This COP clause is typically good for 17 days, meaning that the Seller can give the Buyer notice to remove this contingency if, for example, another offer comes in on the property. This is a delicate balancing act because while a buyer may really want to buy this home, they also do not want to get stuck owning two homes.

If you are making your purchase contingent on the sale of your house, you need to let the other agent know as much information about your home as possible, so the agent and the seller will feel more comfortable. Let them know the address of the home, why it is priced well, the local comparables, the appraised value (if available), broker price opinion (an evaluation of the home's value by local top realtors), what upgrades were done and what special marketing you are doing to make sure it will sell quickly. You do not want to use the

COP if your home is not even on the market, as your offer will not be taken as seriously.

Even if you use the clause that it is contingent on the sale of your home, it should not be open-ended but rather have a timetable. The seller should remove it once the buyer of their home has removed all their contingencies. We refer to this as "going hard on your money." Once a buyer has released all their contingencies, their 3 percent of the purchase price (i.e., their liquidated damages deposit) is in jeopardy. If the buyer backs out once all their contingencies have been released, they could lose their 3 percent deposit. So if the buyer of your home backs out of escrow after their contingencies have all been removed, you (as the seller) would then take the buyer's 3% deposit and you would most likely lose the deposit on the home you are buying assuming you also had removed all contingencies. I agree, this can be a confusing process!

Likewise, many sellers are putting in their counteroffers to the buyers that the sale of their home is contingent on their finding a replacement property. The time period to remove this contingency is 17 days as well. If the seller is looking to move to a lease rather than purchase a home, this 17-day time period is less of an issue since leases typically can be negotiated quickly.

As a seller, ideally you want to have as much time as possible to find a replacement property. You would ask the buyer to do a 45-day escrow, the quickest time an escrow can close when a buyer is getting a loan. It used to be 30 days, but lenders are taking much longer now to underwrite the files and lend the money. Then you write in the counter back to the buyer, a seller lease back of your own home for 30 days after it closes so you as the seller now become the tenant. Typically, the seller will pay the buyer's PITI (Principle, Interest, Taxes and Insurance) during the term the seller is leasing back their home. We also put wording in that the seller will pay buyer's PITI, not to exceed a certain amount. As a seller you do not want an open-ended PITI since what if the buyer decides to put less down payment, get a 15-year fixed loan as compared to a 30-year amortized loan, has

11/12/09  
bad credit or decides they want earthquake insurance or a very expensive insurance coverage? All these variables together can practically double someone's PITI.

So with a 45-day escrow and a 30-day leaseback, the seller now has 75 days to find a replacement property. Also, if you try and extend the leaseback past 30 days, you may have an obstacle with the buyer's lender because they only consider the buyer's loan owner-occupied if the leaseback does not go past 30 days.

Since being in limbo selling one's home and finding another can be a very stressful situation, it is important to make sure your realtor is experienced and stays calm. Also make sure you give your realtor as much time as needed to see the available homes on the market in as short of time possible. If you have seen all the available homes on the market and still have not found what you like, have your realtor contact all the leases on the market as well as any homes that may have been taken off the market in the past six months to see if they may be interested in selling. Have your realtor network with all the top realtors in town to locate any "pocket listings" (i.e., homes that are not in the MLS but agents know the seller may be interested in selling).

If you want to see a copy of what the Contingency for Sale or Purchase of Other Property looks like, please e-mail me at [am@LAestatehomes.com](mailto:am@LAestatehomes.com) and I will be happy to send it to you.

Please have all real estate contracts reviewed by a real estate attorney because all situations are not the same and the laws are continually changing.

*Anthony Marguleas is founder and president of Amalfi Estates in Pacific Palisades. Contact: (310) 573-4245, ext. 100.*