

# PUBLICATION

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## Key Points in Commercial Real Estate Purchase and Sale Contracts: Negotiating Representations and Warranties

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**In a multipart series, we're examining important points to consider when negotiating commercial real estate purchase and sale contracts from the perspectives of buyers and sellers. Our prior posts addressed negotiating contract terms regarding payment of the purchase price and deposit, the due diligence period, and title and survey matters. In this post, we will focus on negotiating terms regarding representations and warranties.**

These provisions are key tools for allocating risk between the parties, and a strong understanding of them is essential for any party to a transaction. They are factual statements about the property that the buyer relies on, and because a breach can create significant liability for the seller, they are often one of the most heavily negotiated sections of a commercial real estate purchase and sale contract (the contract).

### **Seller's Representations and Warranties**

Common seller representations and warranties often include statements regarding: the seller's authority and formation; its ownership of the property; the accuracy and completeness of rent rolls; the disclosure of all contracts impacting the property; the status of any employees; the payment of taxes; the absence of pending or threatened litigation or bankruptcy proceedings; the absence of brokerage commissions; and compliance with all applicable laws, including environmental laws.

Sellers will want to limit the scope of representations and warranties to matters within their actual knowledge and by using materiality qualifiers – such as those tied to a "material adverse effect," specific dollar thresholds (e.g., "exceeding \$10,000"), or other objective criteria – in order to avoid open-ended liability. Buyers should push for sellers' representations to broadly detail the condition of the property, without knowledge and materiality qualifiers. Buyers should narrowly define any "knowledge" qualifier to the actual knowledge of a named individual, without a duty to investigate, to limit any seller excuses for inaccurate representations.

Buyers will also want to resist any materiality qualifiers, since they can be subjective and undermine the buyers' ability to hold the sellers accountable for inaccurate representations. If a buyer must compromise on materiality qualifiers, that same concession should apply only to specific categories, such as minor contract defaults or compliance issues. Key representations, such as title, leases, and litigation, should remain unqualified.

### **Buyer's Representations and Warranties**

Common buyer representations often include the buyer's due formation and good standing, authority to enter into the contract, financial capacity, the absence of any pending or threatened litigation or bankruptcy that could impair its performance under the contract, and that the buyer is not acting on behalf of a sanctioned entity. To avoid post-closing disputes, sellers should push for a representation that the buyer accepts the property as-is and is relying on its own due diligence. However, buyers will want to ensure that the as-is language does not override any representations the seller expressly states in the contract and does not waive claims for fraud or intentional misrepresentation.

## Survival Periods

From the sellers' perspective, representations and warranties should survive for a short period after closing (usually six to 12 months), after which the buyer can no longer bring a claim. A buyer will want a much longer survival period to give the buyer sufficient time to discover any hidden issues. The parties may agree to tiered survival periods, such as six months for business-related representations and two years for title and environmental representations.

## Disclosure Schedules

Representations and warranties often reference disclosure schedules listing exceptions and disclosures with respect to the statements made in the contract. Buyers should review the disclosure schedules for limitations on what the seller is actually representing and should also require that any material changes to the disclosure schedules between signing and closing be grounds for termination of the contract. Sellers should list any known issues in the disclosure schedules in order to avoid potential breaches.

## Remedies for Breach

The contract should clearly provide remedies in the event of misrepresentation. Sellers will want to limit the buyer's remedies to the return of the deposit or a capped indemnity amount. Buyers will want to allow for indemnification or offset rights and carve out intentional misrepresentation and fraud from any caps. Typically, the parties will agree to a capped indemnity and the exclusion of claims below a basket amount, with carve-outs for intentional misrepresentation and fraud.

## What's Next: Negotiating Covenants Between Signing and Closing and Negotiating Closing Costs

In our next post, we will examine the importance of negotiating covenants between contract signing and closing, as well as negotiating closing costs. We will offer recommendations for buyers and sellers to consider.

If you have any questions about drafting and negotiating commercial real estate purchase and sale contracts or handling any aspects of transactional real estate matters, such as commercial leasing, acquisitions and dispositions, title matters, diligence, and financing, contact [Allison S. Mercantini](#) and [Zlata Fayer](#).