

CONTINGENCIES

What is a contingency? Black's Law Dictionary defines a contingency contract as "a contract, part of performance of which at least is dependent on the happening of a contingency." It goes on to define the word contingency as "an event which may occur" and says that the term contingent, when applied to a legal right or interest, "implies that no present interest exists, and that whether such interest or right ever will exist depends upon a future uncertain event."

So, in theory when one makes a contract or one's performance under a contract contingent upon a stated event, then that event must occur else the duty ceases or never becomes operable. Lawyers really refer to contingencies in contracts as conditions precedent or conditions subsequent. There is a distinction between the two in that the duty to perform never arises unless the condition, or contingency, is satisfied in the condition precedent, and in the condition subsequent the duty to perform exists unless it is removed or terminated by the later existence of a condition. In either case, from a legal standpoint, if a contingency or condition *is removed by the parties* then it is as if the contingency never existed in the first place.

For example, I understand it is customary to have a home sale contingency in a contract with a "kick-out" clause. When the Seller exercises the kick-out clause it is quite common to have the Buyer remove the sale of home contingency by producing a bona fide contract on the sale of the Buyer's existing home. While this may be the practice, the net effect of *removing the contingency* is that the Buyer may no longer rely on the sale of the Buyer's home in order to perform or not perform under the contract. I question whether that is really the desired outcome. In order to avoid misunderstandings in this regard, the addendum should define the evidence (ratified contract with approval letter?) necessary to satisfy the kick-out clause, and should state that after production of that evidence the contract will still remain "subject to (contingent upon) closing ..." Do not leave this to chance on the old "but I won't qualify for the loan without selling my house" argument because under the current REIN contract that is expressly excluded as an excuse.

While Virginia law did not previously require a party to a contract to act in good faith (at least in our context), the current REIN contract requires the parties to act in good faith and with due diligence. Accordingly, a party must try to satisfy any contingencies in good faith and with

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due diligence, and a party's failure to do so will cause that party to be in breach of the contract.

As a rule, one should use existing, recommended clauses for contingencies and use the REIN or VPAR addenda designed for that purpose. If you find yourself drafting a contingency from scratch, you should consult with your broker and your attorney, and the general drafting advice is this: state the contingency clearly, detail the circumstances under which the contingency will or will not be satisfied, and outline the ramifications should the contingency not be satisfied. Consider and state time periods carefully.