

Uh-Oh, It Is What It Is

By Judith I. Johannsen

Have you ever agreed to something and then discover that what you thought you agreed to was not the same thing the other party thought he agreed to? That's the "uh-oh" moment and nobody likes it or wants it, especially in a real estate transaction. So, what's the best way to understand what you're agreeing to? Put it in writing, and before you sign it or accept it, *read* it.

This simple concept has been heavily underscored, bolded and highlighted in the recent subprime mortgage mess – some people didn't understand what they were agreeing to when they signed up for a mortgage loan they learned later on they could not afford. Not fully comprehending your agreement can be costly, just ask all those buyers facing foreclosure.

Sometimes, understanding what you have agreed to is really as simple as looking at the document you have signed. For example, in a recent court case, buyers submitted a written offer to the sellers on a form entitled *Real Estate Purchase Contract* for a one hundred acre parcel of land for \$240,000, putting \$500 down, with no property inspection or financing contingency and a closing in 30 days. The form stated that when the document was signed, it would be a legally binding contract and if either party had any questions to consult an attorney.

The sellers signed the agreement (forming a contract) but their attorney wanted two additional things: 1) a larger deposit (\$10,000) from the buyers and 2) the transaction to be an option agreement, not a purchase and sale. The buyers upped their deposit to \$10,000, but despite both parties' best efforts, no option agreement was ever finalized. The buyers asked to schedule the closing but the sellers' attorney said the sellers were unwilling to close and returned the deposit money. There's the "uh-oh" moment. The buyers filed suit for the court to order the sellers to sell as agreed in their contract. Sellers declared they never intended to enter into a contract.

The court wasn't buying the sellers' argument that they didn't know the document they signed was a contract because (duh) the document was entitled ***Real Estate Purchase Contract***, all parties had signed and/or initialed each page, the purchase price and deposit amounts were clearly stated, and the piece of land specifically described. The court held that the sellers' subjective perception of what they signed would not prevail when the contract's language was clear and unambiguous. The court ordered the sellers to convey the property to the buyers.

Another "uh-oh" moment came when "Mr. A" wanted to build an addition onto his property. He had bought his property in 1995 without having a survey done, but did have one done in 2004 before proceeding with the addition. The survey showed that a large portion of Mr. A's neighbor's home, driveway, front walkway, wooden deck and roof drainage system was actually on Mr. A's property, so he submitted a claim to his title insurance company.

The title company declined Mr. A's claim because his policy specifically *excluded from coverage* those title defects arising from any fact(s) an accurate survey *would* show (even if a survey was not done) when the policy was issued – in this case, the neighbor's encroachments in 1995. Uh-oh. Yes, a picture can be worth a thousand words.

Sometimes people change their minds about their agreements, or they don't read and understand what they've agreed to, or they have their own version of what they've agreed to accept. In today's vernacular, "it is what it is" could apply to not only the property owner and the sellers above, but also to buyers looking for mortgage loans. If the property owner and the sellers in the two cases mentioned had actually read and understood the purchase and sale contract and title insurance policy they had agreed to and accepted, it's possible they could have prevented themselves from having their stomach turning "uh-oh" moments and subsequent costs.

Judith I. Johannsen is Assistant Counsel for the Connecticut Association of Realtors®, Inc.

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