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As real estate (e.g., often transactional) lawyers, we tend to spend much time and effort trying to get to the point our clients can sign something. A purchase contract, a lease, a deed of trust, a check for our legal fees, etc. Our careers are marked by a long line of signed documents. While these documents are the backbone of an active real estate practice, care must be taken to avoid signing documents - or parts of documents- that are inconsistent with, or even harmful to, the expectation of our clients. In other words, while executing the right documents is the goal, not executing the wrong documents is also the goal.

This article and the corresponding presentation will highlight some common documents – or provisions in documents – that should be avoided, or at least significantly revised before they are signed.

The key documents in a transaction are not usually the problem. In a sale, the purchase agreement is carefully negotiated, with each provision being read several times. To be sure it is consistent with the business deal, and consistent with the other documents and provisions. Problems can arise, however, when other ancillary documents are created as a part of the closing process. These documents are often created based on forms or precedent, with little or no regard to the specific transaction at hand, and are not negotiated with the same fervor as the key documents. Which leads to inconsistencies and a blurring of the lines that were so carefully drawn in the key documents.

In sum, the goal is to avoid signing documents, as a part of the closing process, that either (a) are inconsistent with the key documents, (b) shift responsibility from the party who should bear a risk to someone else, or (c) create ambiguity or uncertainty. For example, you want to avoid a situation where the purchase agreement allocates liability in a very negotiated manner, but one or more ancillary documents signed at closing allocate the same liability in a different manner.

Let's take a look at a few examples.

1. **The Case of the Overreaching Owner's Affidavit.**

   This is one that comes up more than it doesn't with routine closings. The purchase agreement contains detailed title and survey provisions, a special warranty deed, limited representations and warranties from the seller, and title insurance insuring the purchaser's title. A lot of negotiated provisions protecting the seller against the sort of claims it deems inconsistent with the AS-IS nature of the sale. All good, right?

   Except just before closing, the title company sends around a set of ancillary documents to be executed by the parties. One of them is the "Owner's Affidavit" or "Affidavit of Debts and Liens." In this, apparently standard, innocuous-looking document, you notice some provisions that seem very different from the language in the purchase agreement. Seller representations without any qualifiers or limitations, broad indemnities, and more.

See the marked document attached as Exhibit A. You will note a lot of language protecting the title company- and potentially the buyer- against a lot of risks the seller went to great time and expense to address differently in the purchase agreement.

Language that needs to be revised or deleted.

The effect of these revisions and deletions, which have never been rejected by a title company in any of my deals, is to tell the title company what it needs to know without having the seller become the title company's title company.

Left unchanged, these affidavits potentially expand the seller's liability far beyond what is provided in the purchase agreement.

2. **The Case of the Unmodified Force Majeure Clause.**

In this time of COVID-19, you will hear more about force majeure clauses during this seminar than you likely have in years. So I will leave the general force majeure clause discussion to others. I just want to point out a risk that existed long before COVID-19. The risk that an unattended force majeure clause may completely rewrite the detailed and heavily negotiated timelines and periods set forth in your agreement.

Imagine a purchase agreement that has a defined inspection period, title and survey review period, and closing date. All critical deal points that were a core part of the business deal. And yet near the back of the purchase agreement, nestled between the governing law provision and the severability provision, is the following:

> *"Neither party will be responsible for delays resulting from causes beyond the reasonable control of such party, including, without limitation, any act of God, acts or decrees of governmental or military bodies, fire, casualty, flood, earthquake, war, strike, lockout, epidemic, destruction of production facilities, riot, insurrection, or materials unavailability."*

All of the sudden, all of those important timelines are subject to extension, possibly an infinite extension, based on a very subjective list of reasons. The purchaser can't find a surveyor because of labor shortages? The purchaser's inspector can't fly to the property location because of travel restrictions imposed because of a pandemic? No worries, the time periods in the purchase agreement just get… extended.

Of course, there are plenty of situations in which an extension is appropriate. But not all time periods in all contacts should be subject to infinite extension, without notice. It is important to tailor the force majeure provision to the expectations and requirements of the parties.

> *"If (a) either party (the "Performing Party") is prevented from performing any of its obligations under this Agreement (other than a payment obligation, FOR WHICH THIS PROVISION SHALL NOT APPLY) solely due to any act of God, acts or decrees of governmental or military bodies, fire, casualty, flood, earthquake, war, strike, lockout, epidemic, destruction of production facilities,*

Title search: Don’t Sign Here

Also available as part of the eCourse
Don’t Sign Here: Common Documents in Real Estate Closings

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