

The Plain & Simple

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Buy/Sell And Forced Sale Mix

The money partner and the operating partner in real estate transactions often negotiate whether the joint venture documents should contain a buy/sell provision and/or a forced sale provision. In many transactions there are both. It is worth taking a moment, however, to think about how these provisions work together if both are included. For example, if A sends a forced sale notice to B, does this stop B from exercising the buy/sell? What if your document is silent on this? What happens? Is there an implication that B cannot exercise the buy/sell while A is pursuing the forced sale?

The whole point of these provisions is to prevent trouble and give a clean and straightforward divorce in the event that the interests of A and B diverge. Accordingly, ambiguity in how the provisions work together can put the parties on a collision course with a dispute or even litigation – an outcome that nobody wants.

You could probably think about how the buy/sell and the forced sale provisions should work together quite a bit; there are arguments in every direction. As we often represent each side on this issue we will not take a position here. However, we do advocate watching out for this issue.

The Sole Order Escrow

There are many different kinds of escrows. In real estate transactions, however, they are mostly either “joint order” (meaning that a written statement from the buyer and the seller is needed to permit the escrow agent to take the money out of escrow) or “sole order” (meaning that one party – usually the buyer – can unilaterally instruct the escrow agent to take the money out of escrow). If you are the buyer and signing up a contract where there is a diligence period with a deposit that goes hard at the end of the diligence period, the question raised is whether the buyer can place the deposit in a sole order escrow pending the end of the diligence period.

Typically the seller does not care that much because, after all, the seller is (usually) giving the buyer a “free look.” The buyer, on the other hand, should care a lot. If the buyer really wants to be able to walk away from the deal, it will not want to have to jump through a hoop to get its money back – it will just want to send a fax to the escrow agent and get the money back, no questions asked. Indeed, if the buyer is terminating the deal there may be some hard feelings from the seller, so the last thing the buyer wants is to have to get the seller’s consent to release the money – who knows what will happen?

By the way, a (sleeper?) issue is to think about what is really going on if the seller strongly resists giving the buyer the sole order escrow – is the seller thinking about zinging the buyer and holding the buyer up from getting its deposit? Being too paranoid may be counterproductive to the deal, but, then again, not being paranoid enough can be expensive.

Firm Facts

Did you know Duval & Stachenfeld started on October 7, 1997 – it all began when Bruce called Pat and said “Pat do you want to start a law firm with me?” Pat responded with one word -- “ok” -- and that was that!

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