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Streamlining The Real Estate Purchase And Sale Process

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Real Estate

I write about commercial real estate negotiations, deals and legal issues.

Simplify unnecessarily detailed contracts by painting with a broad brush. (Photo by Mark Mainz/Getty Images) [-]

A buyer trades money for commercial real estate. A seller trades commercial real estate for money. It's as simple as that. Why, then, do commercial

purchase and sale transactions become so complicated and entail so much negotiation?

To begin with, commercial real estate assets are complex, often involving many leases and other documents related to the property. Buyers need to understand just what they're buying, and look for minefields and surprises. The seller is the one who has that information.

When a buyer investigates a property, the due diligence process will work best if the seller delivers everything all at once, not in bits and pieces. If the seller gives the buyer piecemeal information, the buyer will be distracted and delayed by having to keep track of what has and hasn't yet arrived. The buyer may lose confidence in the seller, triggering especially close scrutiny of any last-minute additions to the due diligence deliveries. All of this will, among other things, delay the process.

The seller should collect and organize all due diligence documentation early in the selling process, to present it to buyers when the time is right. Typically, that right time comes after the parties have signed their contract. If the seller starts to provide property documentation before paperwork is signed, the buyer and its counsel will likely delve into it immediately, and begin finding and raising issues that will drag out the contract negotiations.

In the interest of efficiency, buyers might also reconsider whether they really need every bit of documentation they request during these exercises.

Buyers will always want to see title and survey work. Usually, contracts require buyers to order this work after they've signed the contract, which creates needless time pressure and can complicate negotiations. A seller who wants to streamline the process should, long before choosing a buyer, obtain complete title and survey work, then make it available along with the first draft contract. Doing so will enable the parties to tie down the condition of title the seller needs to deliver – the most important issue in the contract

after the purchase price – and thus remove potential excitement from the negotiation and closing process.

Life was much easier in the era of caveat emptor. Today, purchase and sale contracts often exceed 50 pages. A meaningful chunk of that verbiage describes representations and warranties: assurances about the property from the seller. The parties can save time by limiting these sections of the contract to matters in which the seller has knowledge that the buyer cannot otherwise obtain. The seller should also limit property-related assurances to what they actually know about the property and have in their possession.

Purchase and sale contracts often go into extreme detail about circumstances that rarely occur. One can simplify this language by instead painting with a broad brush.

Many contracts treat the buyer as a worthless supplicant, lucky to have the opportunity to acquire the seller's property. They set unrealistically tight deadlines, and threaten draconian consequences should the buyer fail to meet them. They preclude the buyer from performing on-site investigations, even if an environmental adviser recommends them. If a seller's first draft contract were to approach these and similar issues in a more even-handed way, negotiations might move faster.

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Some of the oppressiveness in purchase and sale contracts comes from the belief that buyers default more than sellers do. Careful sellers understandably don't want to give buyers any openings for litigation against them, which could tie up the property for years. Sellers can mitigate their fears of default by dealing with high quality buyers (who, unfortunately, aren't always the buyers paying the highest prices) and by keeping their contracts simple and clear so as to prevent theories, interpretations, and arguments.

Circling back to the beginning of the contract negotiation process, the parties will save time if they can first negotiate a short, nonbinding letter of intent before turning to definitive documents. A letter of intent offers an opportunity to work out major issues before they get baked into multi-page contracts.

If the property has issues that would concern a reasonable buyer, the seller should assume the buyer will discover them. Today's buyers aren't stupid and don't miss much. Ideally, the seller would have identified and solved all such problems long before placing the property on the market. If the seller hasn't, usually it will make sense to be transparent with the buyer about the problem. But any problem or "hair" on a property will tend to create complexity, contingencies, and excessive negotiations. A seller should try to

avoid them by solving the problem before taking the property to market, if at all possible.

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I help buyers, sellers, borrowers, lenders, tenants, property owners, and other commercial real estate market participants identify and achieve their business goals. To do that, I need to understand risk, security, numbers, value, financeability, flexibility, and exit strategy. Some legal issues matter a lot and many don't. It's important to know the difference. I write extensively on commercial real estate law and practice – over 300 articles and five books on leasing, lending, and other areas, with some emphasis on ground leases. I occasionally serve as an arbitrator or expert witness in complex real estate disputes. That lets me see how transactions go wrong. Often, the problems could have been avoided by keeping it simple and following the money, but everyone got sidetracked. As a Forbes contributor, I try to tell stories that teach worthwhile lessons for real estate deals. **Read Less**

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