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A Parable About Lawyers And Deals

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"Just this one time, we are really in a big hurry," the purchaser told his lawyer. "We need you to look at the contract quickly and get it out right away. Please just look for anything really big. We don't have time for a whole lot of details and negotiations."

The lawyer complied, giving the contract a quick look for anything that jumped out as horribly egregious. If something was annoying but "standard," he let it by. In an hour, he marked up the contract with a handful of suggestions or comments, and sent it to the seller's lawyer. The purchaser, his client, was happy.

The seller appreciated the light markup, postured about a few of the changes, but accepted almost all of them. The parties signed the contract and felt they had really accomplished something. The purchaser was under contract, had tied up the property and had done it quickly. The lawyers didn't stand in the way of the deal.

The purchaser had a good feeling about the seller: he seemed practical, businesslike and cooperative. Things would be okay. Who wants to waste a lot of time and legal fees on lots of iterations of the contract? It's more important to get site control, as quickly as possible.

Time passed. The purchaser got nervous about something involving the property. What did the contract say about it? Not much.

It was a bare-bones contract, with minimal representations and warranties of any kind. We all know that representations and warranties can take forever to negotiate. If you are trying to cut down on negotiations, get the contract signed on an emergency basis – the representations and warranties are a great place to start cutting. They aren't worth much anyway. Or so one hears.

Soon the time came to prepare for the closing. The seller was supposed to deliver the property vacant. "No problem," he had said all along. But the contract didn't say how that was supposed to happen; it was just the seller's obligation. The purchaser wanted to know how it was going; was the seller going to be able to close on schedule? The seller wouldn't say. The seller wouldn't provide copies of anything evidencing that the tenant would move out. The contract didn't require it. The purchaser hadn't wanted to make a fuss about any of this in negotiating the contract. The purchaser had wanted to get the contract signed quickly.

When was the transaction supposed to close? Three or four parts of the contract talked about that. In one of the first few paragraphs, the contract provided for a closing date. Other sections discussed the closing date without even referring to the first discussion. It wasn't clear whether the purchaser could define a specific closing date and know with certainty that the seller would have to close on that date. Different sections of the contract pointed in different directions. It was a mess.

As the closing drew closer, the purchaser assumed that the practicality the seller displayed at the time of contract signing would help get the job done. But the seller didn't return phone calls. The seller's lawyer insisted on communicating only through demand letters – "just to keep the record straight," he kept saying.

Did the transaction ultimately close in a satisfactory way? Did it go into litigation? Maybe.

Most of the time, these situations work out. Maybe the purchaser and the purchaser's lawyer were right to save time, legal fees and distraction by signing a contract that wasn't "perfect." Maybe if they had fully negotiated everything out, the contract would have just contained different and more complicated imperfections; or the purchaser might have lost the deal. It certainly would have cost more.

As a business matter, perhaps the purchaser has found that over the broad range of transactions that he enters into, it makes more sense to bear the risks of imperfect legal documents – one deals with them and moves on – rather than to incur the costs, delays and possible lost deals involved in negotiating documents to the point of perfection.

Lawyers, in contrast, hate stories like the one in this article. Those stories don't always end well. So a lawyer will "overlawyer" something so no one can say later that they "underlawyered" it. From this viewpoint, the best deal is (perversely) the one that doesn't happen at all – the client doesn't incur risks, and the lawyer knows with certainty that he will never be blamed for some problem in the papers.

What's the right approach? Probably somewhere in the middle. Keep deals simple and practical. Keep clients and lawyers on the same page about what's expected, and then remember. Keep in mind what's important, what tends to get screwed up and what doesn't matter. Proceed accordingly.

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