

Summary

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Representations Surviving Closings

Title warranty representations (regarding the selling venturer's interest) and possibly due organization, authorization, execution, and delivery representations are usually the only representations made in connection with a buy/sell. But how does a non-managing venturer purchaser protect itself from what the managing venturer may have done to create venture liabilities? Most managing venturers will resist any attempt to increase the obligations they already have under the venture agreement, but they may be willing to include an explicit statement that the closing of the buy/sell will not relieve any venturer from a breach under the venture agreement occurring prior to the closing (Nance, 2003).

There is more to closing a real estate transaction than agreeing to the time and place and delivering or receiving the conveyance documentation. If the closing is part of a larger transaction or calls for the acquisition of multiple properties from one or more sellers or ii consents must be obtained from one or more third parties or governmental agencies, then closing contingencies must be addressed (Nance, 2003).

Although *it* is customary for a seller to represent that building systems and equipment are in working condition. An issue that arises is whether such representation is made only as of the contract date or is to be (re)made as of the closing date. If the seller is required to remake the representation as of the closing date, then, impliedly, there is a maintenance obligation imposed upon the seller. Ideally, the company will conduct a physical inspection of the improvement, making such representation unnecessary. In no event, however, should the company, as a seller, make any representation as to the condition of any structural components of improvements, unless the company intends to assume the risk for latent defects and deficiencies and warrant structural integrity (Nance, 2003). This is because it is rare that anyone in the company will have actual knowledge of any such condition.

Therefore, the representation would be based merely upon the supposition that no latent defects or deficiencies exist, where actual knowledge is the only appropriate basis for such representation.

As important as the selection of representations and warranties to be included, is the consideration of remedies for a breach of any representations. Is adjustment to the purchase price an adequate remedy or would it be more appropriate to reserve the right to cancel the purchase agreement? If it is intended that the company will have a period of time after the closing to determine the accuracy of the representations made by the seller, then the contract must be specific as to the survival of representations after the closing. The law, generally, is that, except where survival is expressly provided in the purchase agreement (Nance, 2003). Real estate representations and warranties ‘merge’ with the conveyance documentation and do not survive, leaving the purchaser with no post-closing remedy for incorrect representations or warranties.

It is customary for purchase agreements to address the issue of risk of loss prior to closing. A loss may arise by reason of casualty or condemnation. It is not unusual the the purchase agreement to require that the property be restored prior to the closing and that the closing date be adjourned in order to allow such restoration. Also, It is not unusual for the purchase agreement to allow the purchase the rigor to cancel the agreement and recover its down payment in the event a casualty or condemnation occurs during the contract period (Nance, 2003). The law, generally, is that, unless the parties agree otherwise or the purchaser takes possession prior to the closing, the seller will bear the risk of loss until the closing. Usually, the seller covers this risk by maintaining its casualty insurance in effect until the closing.

Unless otherwise provided in the purchase agreement, it is assumed that the condition of the property at time of closing will be “as is” at time of closing. Generally, the purchaser

will assume that the seller will deliver the real property and the improvements thereon in the same condition as on the date that the parties agreed upon the purchase price (i.e.. the date that the contract is entered into by the parties). Accordingly, it is prudent to include in the purchase agreement a provision specifying the required condition of the property on the closing date (Nance, 2003). This may be as basic as providing that the property will be in the same condition as on the contract date, reasonable wear and tear excepted.

Seller may continue to show the property

The seller may insist on an escape clause, continue to show clause, or a kick-out. This kick-out clause (also called first right of refusal in some locales) permits the seller to continue to market the property until all the buyer's contingencies have been satisfied or removed. The original buyer usually retains the right to drop his or her contingencies if the seller receives a more favorable offer (Nance, 2003).

A purchaser may make the sales contract contingent on the sale of his or her current home by a certain date. This protects the buyer from owning two homes at the same time and also helps ensure the availability of cash for the purchase. A seller may wish to wait only a few days for the buyer to sell his or her home or may be willing to give the buyer months.

Although TREC Rule 22 TAC §535.156(a) states that the Licensee shall have no duty to submit offers to the principal after the principal has accepted an offer, the contract forms promulgated by TREC on September 22, 1997, provide for the seller to continue to show the property for sale and accept backup offers unless otherwise agreed between the parties. The buyer can object to this provision and attempt to negotiate with the seller to remove the property from the market (Nance, 2003). If the seller continues to offer the property for sale, it is recommended that the agent warn the seller to handle all subsequent offers strictly as secondary contracts to avoid the danger of lawsuits for breach of contract or for interfering

with existing contracts. The buyer has acquired equitable to the property once a contract has been agreed to by all parties. Equitable title is the right of the buyer to expect to complete the sale and receive the title to the property once all the requirements of the contract are met (Nance, 2003).

References

Nance, C. P. (2003). *Modern real estate practice in Texas*. Dearborn Real Estate.