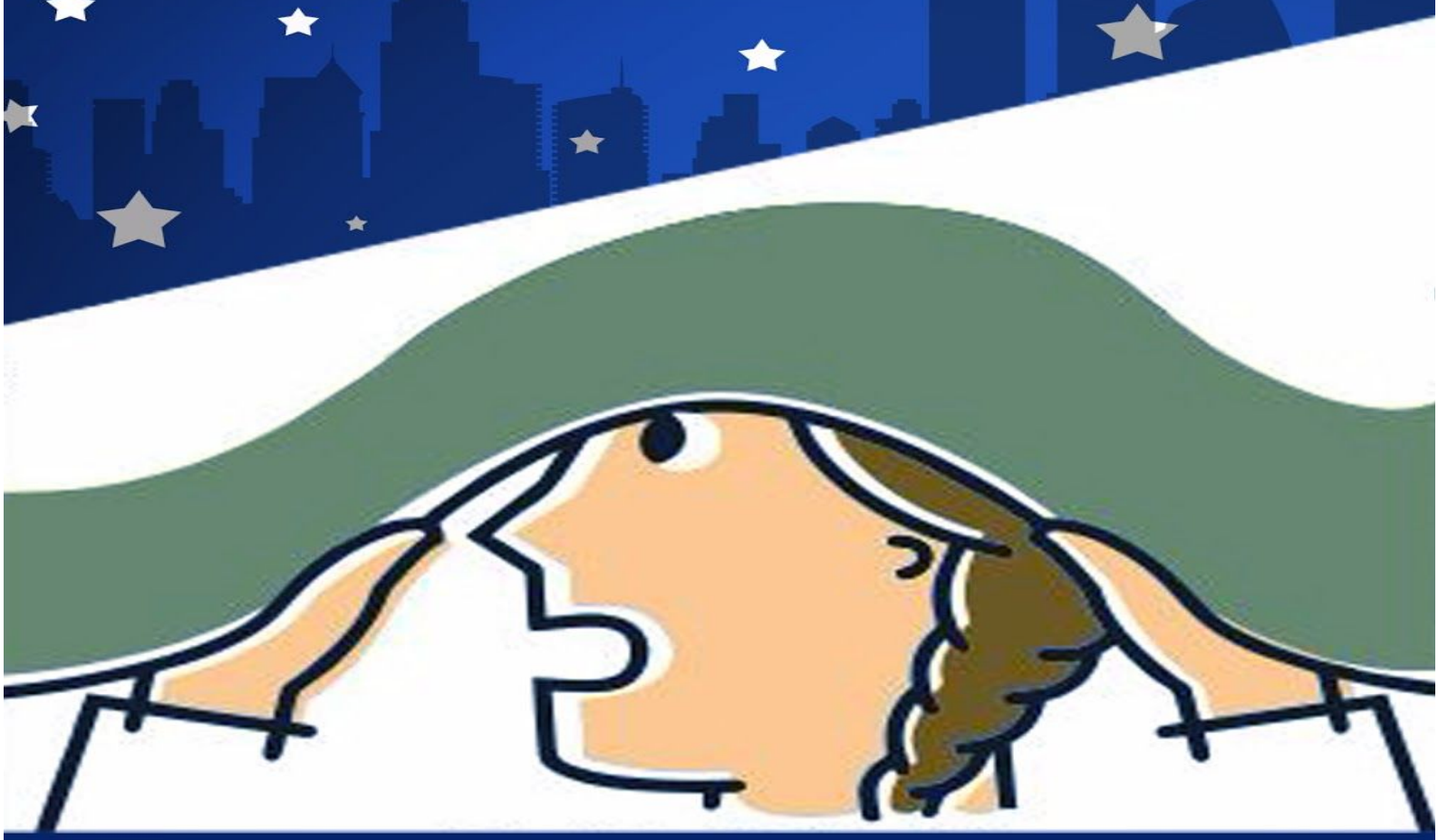
WHAT'S KEEPING YOU Up At Night?

An Attorney's Practical Approach to Resolving Real Estate Nightmares



DAVID SOBLE, ESQ.

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By: David Soble, Esq.

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Introduction

Back in 1987, I can remember my law school contracts professor commenting that "the practice of law is essentially having people come into your office and get sick all over your desk. Your job is to clean it up." It doesn't sound very appealing, but when it comes to career advice, no truer words have ever been spoken. In those days, with few exceptions, the only way to access legal information or legal forms was by engaging the services of an attorney or delving deep into volumes of law books at a law library. The internet didn't come 'online' until the early 1990s, and it is only in the past decade that access to online legal information is fairly commonplace.

Today, online legal directories, legal form sites and 'do it yourself" legal chat forums are so prevalent that one wonders why there's a need for attorneys at all. I know colleagues who even curse the internet as they see it infringing on their 'legal authority." Yet despite the internet and critics of the legal profession, I am busier now than I have ever been before cleaning up after legal messes. You see, to me, internet legal sites and forums are the "gifts that keeps on giving," especially in the real estate, finance and contract arena, where legal forms and transaction documents abound. This is largely due in part to some people who choose to follow legal advice from an unlicensed person name "Anonymous," or purchase a "simple" boilerplate legal form which, more often than not, exacerbates their problem or issue. Mostly focused on saving money, these good people fail to recognize that they cannot download an element far more crucial for resolving their particular legal circumstance: experience. And it is from this vantage point that I present to my book.

You should note that this book is not about quoting real estate law, statutes or ordinances. It's really less about the law and more about alleviating worry and confusion by taking years of practical legal experience in real estate and finance to address the most common real estate legal concerns facing consumers today. Its meant to serve as a concise reference book on how to better navigate real estate related "landmines." .

This book is supplemented quarterly, so make sure you that provide us with your current contact information at www.ProvenResource.com so that you can continue to receive any edits and necessary additions. Thank you for downloading the book. You made a smart decision.

Part 1 Alleviating Real Estate Terrors

Real Estate "Masters" vs. Everyone Else

"Mastery" means a highly developed skill in or knowledge of something. Some big thinkers believe that one cannot master anything until they have successfully performed a required task over 10,000 times. So it comes as no surprise that successful real estate sales people are those who have "mastered" the art of maneuvering the ever challenging minefields common in the business of selling real estate. A person who buys or sells an average of three homes in their lifetime is at a distinct disadvantage when engaging with a real estate professional.

Five Misconceptions Buyers and Sellers Have When Working with a Real Estate Agent

1. **Feeling Rushed.** They believe the real estate sales process is always "rushed. Some agents will represent that they have a buyer in order to get a listing, and once they secure the listing agreement, the prospect disappears. Don't be tempted by agent statements that have become cliché such as "My prospect is leaving town" or "is in town for only a day" is meant to compel a showing or rush a signature. Odds are that the prospective purchaser does not have a Leer Jet waiting for them on the tarmac. Remember, professional real estate agents are commissioned sales people with an agenda that sometimes causes them to "oversell" their own client. Never feel rushed to sign any documents without understanding the terms and consequences of an agreement.

2. **Experienced Realtors.** They confuse the number of real estate listings with the importance of closings. The number of listings an agent has does not necessarily reflect the agent's experience in getting tough deals closed. Ask a prospective agent how many deals they have closed over the past year. No matter how glitzy the marketing efforts, selling real estate must equate into real estate closings – otherwise what's the point?

3. **Agent Referrals**. The real estate transaction requires a number of services from third-party providers. Title insurance companies insure the legal title to the property for owners. Mortgage applications can be originated in the same office as the real estate company. Federal law requires that any affiliation between a real estate broker and a third party provider to a transaction be disclosed. However, experienced agents have providers that they frequently use and are not required to disclose, such as an on-going business relationship. Take for instance, home inspectors (always have the property inspected) who determine the overall condition of a property for a buyer. They are largely dependent upon referrals from agents. Therefore, buyers should ask the nature of the agent's relationship with their referral, in order to avoid later disappointment should they find an opinion or service was improperly influenced.

4. **Legal Advice.** They accept legal advice from agents. Disclaimer: There are highly experienced agents who are as knowledgeable as some attorneys on how the law treats real estate, but they are smart enough to reserve comments on the law with clients. This is because agents that fail to heed the distinction between advising on real estate marketing and dispensing legal advice sooner or later find themselves in hot water for practicing law without a license. Agent opinions regarding the legal consequences of property title, legal relationships, and legal definitions cannot be relied upon. Don't assume than an agent has any "legal knowledge" just because they handle large amounts of paperwork common in real estate deals. The sure-fired litmus test for when to seek competent legal advice is when an agent or other party to the transaction says "you don't need to get an attorney."

5. **Legal Protection Period.** They feel they're stuck in their agency agreement. Once a seller signs a listing agreement or a buyer hires a buyer's agent, a legal relationship is created. However, in most cases, the relationship can be terminated long before the agency agreement was written to expire. People often confuse an agreement's expiration date with the agent's legal protection period. The protection period is the time where an agent is entitled to their full commission should a seller or buyer close a transaction with someone the agent had found during the existence of the agreement. This prevents people from taking advantage of an agent's hard work and commonly extends 180 days from the date the relationship between the agent and client terminates.

Conclusion: Numerous variables affect the successful outcome of a real estate deal. Having an experienced professional tops the list. Good agents know how to usher a deal through completion

with as little friction as possible. But the most satisfying deals are done when all parties to a transaction are kept well-informed and have reasonable expectations about the outcome as set by their advisers.

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How the Statute of Frauds Improves Outcome of a Real Estate Transaction

The Statute of Frauds is based on old English law and requires that certain contracts be in writing in order to be enforceable against the parties to the contract. The statute applies to real estate sales and transfers or leases for more than a year. The Statute of Frauds is a misnomer and instead should be called the statute "against" frauds since its purpose is to memorialize.

But "getting it in writing" is not always easy. Sometimes people become a party to a contract because they feel rushed or simply take "the word" of the other party or agent. Disagreements abound between strangers, professionals and family members alike, when real estate agreements are not reduced to writing.

Six steps that buyers, sellers, landlords, tenants, real estate agents, investors, borrowers, and lenders can take to reduce legal contention when working with a real estate agreement:

1. **Real estate closings**. Reduce surprises at a real estate closing by asking for a preliminary closing package, including a settlement statement, several days before the scheduled closing. Another name for a preliminary closing package is an "attorney's package". A lender, mortgage broker, title company or real estate agent should always comply with the request to provide for advanced documentation.

2. **"Getting it in writing" is not always easy**. Sometimes people become a party to a contract because they feel rushed or simply take "the word" of the other party or agent.

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3. **The walk-through.** A new home buyer should always ask for a final walk-through in advance of a home closing. Likewise, a tenant should do a walk-through with a check list noting any and all repairs or issues with the premises. Never take someone's word that a noted repair will be done. Have the responsible agent state it in writing with a time set for completion. Make sure to retain a copy of the checklist to refer to.

4. **Loans**. When applying for a mortgage, applicants are required to receive a written estimate of their anticipated loan costs. Known as a Good Faith Estimate of Settlement Charges ("GFE"), it must be sent to applicants within 3 days of making an application, and its purpose is to allow the consumer to compare the mortgage fees from different mortgage companies as well as to prevent sticker shock. Unless there are problems with a loan applicant's initial qualifications, the terms of the final loan should be relatively similar to the final loan approval, and the terms of the loan should remain the same at the closing.

5. **Modifications.** Changes to an original loan term, real estate purchase or lease agreement require both parties to sign and agree to the proposed changes. These signed changes are evidenced on an amendment or addendum. Changes to a written contract must be agreed to by both parties and evidenced by their signatures in order for the change to be valid. Sometimes, just a term or date may be changed. In that case, both parties need to initial the changes.

6. **Specificity.** When reviewing a real estate agreement (or any contract for that matter) if there are any ambiguous terms, it's best to take the time up front and get specific with a term or provision so as to reduce headaches and confusion later. For instance, a landlord may provide that a leased apartment is for three tenants. Name each tenant. A home buyer may be unsure if a household item they like in a home will be included in the purchase. They should specify it in the offer. Don't rely on oral promises. Rely on the written word.

Conclusion: Reducing an agreement to writing is important not because people aren't honest, but for when things don't go as planned. When there is a problem, the parties can refer to the contract and what was meant and memorialized in writing. Each day numerous lawsuits are filed on

behalf of parties that dispute the meaning and intent of written contract provisions. So imagine the legal problems and financial angst generated by disagreements surrounding an oral real estate agreement. Taking the steps as discussed above will ensure a smooth outcome to one's real estate transaction.

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Disclose, Disclose: Why a Rushed Real Estate Deal Still Requires Disclosures

With the recent spike in home sales, buyers and sellers alike are feeling the pressure to quickly close on their purchase transaction before mortgage rates go up and demand for new homes slip. But before rushing to "ink the deal," understand that real estate professionals are required to provide written disclosures to their clients on a variety of important items necessary to the transaction, as they directly affect the buying or selling decision.

Eight areas where written disclosure should be or are required:

1. Affiliate Disclosures. These days, it's common for a mortgage company to have a business interest in a title company or a real estate brokerage to also own a mortgage company. These are called "affiliate" relationships, and the relationship must be disclosed to the potential end user of these services. For instance, a mortgage company must disclose in writing, to its loan applicants, that it also owns a title company that will close on the mortgage and purchase transaction. A loan applicant is not required to use the "affiliate" title company and can use another suitable title provider instead. Most importantly, a home seller or buyer cannot be pressured to use an affiliate service or be prevented from seeking a loan or making an offer on a home, just because one chooses to do business with an "unaffiliated" service.

2. **Third-party services**. Similar to the above paragraph, a home seller and real estate agent cannot require someone to use a third party service in order to purchase a home. A

third-party could mean a lender, a title company, an appraiser or inspector. However, one can give better pricing to a buyer who uses their services. For example, a lender can waive fees if the buyer uses one of their "affiliates," however, they cannot prevent you from making a loan application or denying a loan for refusing to use their business affiliates.

3. **Real estate agent disclosure.** If a real estate agent is selling a home that they own, they must disclose that they are a licensed real estate agent. Some states limit this disclosure to only an agent's primary residence. Other states require the disclosure for any properties that the agent owns.

4. **Dual agency.** In a real estate transaction, a seller's agent or "listing agent" represents the seller. The seller's agent does not have any professional duty to a buyer who is not represented by their own agent. The buyer should hire their own agent. A dual agent is an agent or real estate broker that represents both parties in the transaction. Agents must provide written disclosures to both parties when they act as dual agents. In theory, this disclosure is supposed to make a dual agent in a transaction neutral. However, a real estate deal is never without some controversy, therefore this writer suggests that a prospective purchaser hire his/her own "buyer's" agent.

5. Title agency. A title company's function is to insure that the ownership to a specific property is valid according to public property records so that a lending institution can provide a mortgage on the property or a purchaser can take proper title from the rightful owner. Title agents represent the insurance companies that provides this coverage. They do not dispense legal advice to buyers or sellers. They do not represent lenders or real estate brokers. Title companies must disclose when they have an affiliate relationship with a real estate service provider, meaning that they are owned by the lender or real estate brokerage. This may include the appraiser.

6. Provide all offers. A real estate agent is required to provide its sellers with all offers. Unless a seller specifically instructs an agent not to bring certain offers, say one below a certain price or time frame, the agent must present the offer. Therefore, if a buyer feels that an offer was not presented, they should contact the agent's broker. In some states, it's customary for a buyer or their agent to present the offer directly to the seller. But nothing prevents an enthusiastic buyer from directly speaking with a seller, it's just not commonplace.

7. Terminating a real estate agent. It is a common misconception among sellers that they cannot fire or terminate their listing agent. They can. However, the best way to continue to market one's property without bad feelings is to approach the agent's broker and have the broker assign a new agent to the listing. Understand that the agent and broker still have a "protection period" that protects them against the seller closing the transaction with a buyer. The period is usually for 180 days, but at the time of listing a property, this period can be negotiated down to 90 or even 60 days. Regardless of the time limits, it is wrong for a seller to take advantage of the agent's efforts and is grounds for legal action.

8. Attorneys. Like a real estate professional, an attorney cannot represent a buyer and a seller in a transaction, unless the attorney discloses the conflict in writing and both parties sign the disclosure. If two parties to a transaction have completely different versions of a transaction, then it's time that one party hires their own attorney.

In a residential real estate transaction written disclosures comprise most of the real estate package. For those new to real estate, hire the right adviser to guide you through a successful transaction. But make sure to read and understand the disclosures and how they apply to your deal, as they are there for the buyer or seller's benefit.

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Misleading "Professional" Titles, Such As "Foreclosure" or "Short Sale" Expert Harm an Unwary Public

When experiencing financial or legal trouble for the first time, be assured that while the poor economy has affected virtually everyone, one's financial or legal fact pattern is unique to each person. And after years of experience working with troubled clients, the following recommendations for a successful outcome remain constant no matter how serious the issue.

Here are three to consider:

1. **Hire a specialist.** Imagine for a moment, having severe chest pains. Should a cardiologist, a general medical practitioner, or a naturopath be consulted? The choice is obvious, a cardiologist of course. The cardiologist specializes in the heart after years of medical training and experience. Now imagine a financial "heart attack". A bank or creditor has secured a judgment and is raiding a bank account or garnishing wages. For some, the nightmare begins with an eviction or foreclosure notice. What type of specialist should be summoned in this matter? A real estate agent, a paralegal, a lawyer who maintains a general practice, or a lawyer who specializes in banking or real estate law. When faced with a serious financial or legal problem, treat your situation like the financial "heart attack" that it is and obtain a legal specialist.

2. Don't go it alone. Using the same analogy above, performing your own "bathroom surgery" instead of seeking a qualified special to perform heart surgery will be messy and ugly. Managing one's own financial or legal crisis instead of retaining an experienced licensed professional is no different. Clients who were initially representing themselves usually come for professional help after spending countless hours compiling vast libraries of documents and have extremely long and complicated stories that are made worse by their own inaction or actions. They relay exhausting stories of disappointment, only after their creditor has divested them of all of their valuable assets. In short, "going it alone" is messy and when a professional has to clean up the mess it gets extremely costly and ugly.

3. Investigate your advocate. Work only with licensed professionals. Each state has their own occupational code and requires a professional to have achieved a core education as well as a demonstrated minimum competency to obtain a license. If your "adviser" does not have a current state or federal license, they shouldn't be your adviser. Avoid someone who calls themselves a "foreclosure specialist" a "short sale" specialist, a bankruptcy consultant or a loan consultant. There are no such licenses for such titles. A licensed real estate agent sells real estate and can obtain numerous professional designations from within their professional organization. They should state they are a licensed agent that has experience in a specific area, and they have a designation earned by having taken classes through their professional organization. Likewise, most people know that an attorney is a legal advocate, but may not be aware that attorneys have their own specialties that can range from health care law to equestrian law. Ask the lawyer what area of practice they specialize in. A bankruptcy attorney practices bankruptcy law, a real estate attorney deals with real estate and foreclosure defense. Understand these specialties and investigate your options. When seeking the best advocate for a legal or financial crisis, remember it is your home, your credit, your mental health that is in jeopardy. Take time to investigate and choose the professional that will specifically address and resolve your need.

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Short Sales

Homeowners who find themselves upside down in their home have several choices to make when confronted with a home value that is substantially less than their mortgage. They can stay and do nothing in hope that the value of their home will appreciate someday. They can try to modify their mortgage with their lender. Finally, if they need to leave the home for financial reasons or otherwise, they can either default on their mortgage which will lead to a foreclosure, or they can short sell their home.

The term "short sale" has become a popular term in recent years and simply means that assuming there is a mortgage on the home, the lender will have to approve the home sale in which the sale proceeds less than what is owed on the home. Real estate agents who market themselves as "short sale" specialist are simply real estate agents who sell your home for less than the mortgage amount. Please note, there is no federal or state licenses for a "short sale" specialist. It is just a title that real estate agents like to use so as to impress less knowledgeable home owners.

Five points for consideration when it comes to "short sales."

1. **Short sale approvals are not automatic**. Despite what your agent may tell you when listing your home, when considering a short sale request, lenders look at an extensive financial statement and hardship application from the homeowner. Lenders also look at the marketing area of a home, assess comparable home values, and then determine your financial ability to repay the current mortgage. Also note: Lenders can allow the short sale to go forward, but still require the homeowner to make payment arrangements on the balance of the loan even after the home sells.

2. **A short sale happens only upon the home sale**. If you are able to do so, do not stop making payments to the lender while the home is being listed. Failure to do so will affect your credit. Don't listen to anyone who tells you to stop making payments. What happens if the home never sells? Now you have a mortgage default and a possible foreclosure. When completed, a short sale will also be reflected upon your credit report and can last anywhere

from 3 -5 years. It is said that a short sale can cause a credit score to decline by 150 points. While a short sale is better than having a foreclosure reported on your credit, it still affects your ability to obtain future new home financing.

3. **Arms-lengths agreements are contacts just like your mortgage agreement**. Some lenders have short sale agreements that restrict the home buyer, in a short sale, from selling the home back to original home owner, called an Arms-Length Sales Agreements. This requires buyers, mortgage brokers, real estate agents and title companies to attest that the short sale is at arms-length. The restrictions usually have a 12 month time frame. Be very careful. This agreement is a valid contract and has the same weight as the original mortgage. Don't be tempted to breach this contract with the lender. Having to pay back the entire balance is but one far-reaching consequence of breaking your arms-length agreement.

4. **Deal directly with the bank.** Your success at obtaining a short sale may depend on the representative you work with. It is rumored that some major lenders would rather have the homeowner contact them directly; that they give borrowers better short sale deals than if they go through a real estate agent. I can see real estate agents scoff at this because in many cases without the agent's assistance, the process, already lengthy, would take even longer without an agent. In summation, the jury is still out on this matter.

5. **Choose the right professional.** A consistent theme in my articles is that a home or business owner should always retain a competent professional. Don't let anyone tell you to cut corners. There is a reason for the adage: "Measure twice, cut once." When it comes to a short sale, consult with a qualified real estate attorney to discuss the consequences of the short sale. Legal opinions are based upon legal experience when commenting on an existing mortgage obligations, tax ramifications, promissory note deficiencies, subordinations, discharges, title issues, and negotiated settlements. Remember, only attorneys can give you legal opinions. And as a courtesy, your attorney should leave the home selling to your real estate attorney.

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Are You Selling Your Home or Letting the Buyer Take A Test Drive?

With home sales activity increasing throughout the country, sellers are feeling excited about better prospects. Some national mortgage programs are less restrictive than in recent years and buyers needing home financing feel relieved. Despite the optimism, sellers and buyers must still keep their wits about them to avoid making silly real estate mistakes that can have financial or legal consequences. Making your buyer your tenant, ("buyer/tenant") is but one avoidable mistake that sellers often make.

Understand that selling a home can be a lengthy and often frustrating process. Perhaps a seller is seeking a short sale with their bank, or a buyer's financing arrangements hit a snag. When things don't go as planned, eager sellers and anxious buyers may consider allowing the buyer to move in the home prior to a closing.

Four reasons a seller should never let their buyer become their tenant.

1. **The buyer's new legal status as "tenant".** When a seller allows a buyer to move into the subject home before a closing has occurred, they now have created a landlord-tenant relationship. And like some tenants, they may not pay rent, or they don't leave when they should. So when a buyer, in anticipation of securing a mortgage is later denied, the buyer should leave the home voluntarily, right? If they refuse to leave, then the seller must legally evict them since their buyer now has the same rights as a tenant under the law. Unless there is a mutually beneficial relationship that remains after the buyer's financing falls through, there is no further reason to allow the buyer to stay in the home.

2. **Buyer's remorse is quickly amplified.** The excitement of buying the seller's home is short lived. The buyer/tenant now living in the home may begin to notice the little things that they may have overlooked when they first fell in love with the home, or they realize a deficit in their earlier buying decision. Perhaps the location isn't as good as they thought, they found a cheaper home, or worse, they met your neighbors. As "tenants", they are free to look elsewhere for a more "suitable" home.

3. **The "test drive".** Once the buyer moves into the home, unless specifically stated otherwise, the seller is obligated to make any repairs to the home while both parties are awaiting the closing. Suddenly items that would normally be a new buyer's "wants", become their "needs" at the seller's cost. From having simple blinds replaced, to having a furnace or air conditioner replaced, a sharp buyer won't close on the home until their "needs" are met. Don't be a sucker and let a buyer "test drive" your home.

4. **The "garage" scenario.** Often there may be a small window of time between the buyers move from their former residence and the time for closing on the new home. When the buyer's real estate agent asks if the buyer can set their items in the garage before the closing for a few days, be careful. Resist the temptation. If the sale does not close, will the buyer remove their belongings from the garage? If so, when? Next week? Next month? Next year? If and when the buyer does remove their items, is the seller prepared to answer for the disappearance of a priceless heirloom that was allegedly in the buyer's belongings, now termed "antiques"? Should the seller have to underwrite the risk posed by storing the buyer's items, now "treasures", in their garage? Avoid the needless headaches and pass on this request.

Considerations. Seek the advice of an objective legal professional. Yes, there are good real estate agents out there. They are essentially the sales person that ushers a buyer and seller through the home sale process, and good agents make the job look easy. It isn't. But despite these accolades, agents are still commissioned sales and marketing people. And what may be good for them and their client, may not be good for you. What happens when your deal doesn't close? If the buyer/tenant fails to leave voluntarily, the agent will not be paying for, nor performing the eviction. If the buyer/tenant destroys the inside of your home, you will be paying for repairs in order to get the home back on the market. If a buyer fails to remove their items from the garage, you will be hauling these items away, or walking through a mess every day, not the agent.

No one says that the buyer/tenant relationship is completely untenable. Certainly the examples above are provided for the seller to stay alert and take precautionary measures. Sellers need to obtain maximum protection by consulting with outside real estate counsel so that they may protect their biggest investment, and themselves from becoming an unwitting landlord.

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Not So Fast! How Real Estate Advisers Often Put Their Interests Before Their Clients And How To Preserve The Integrity of The Transaction

As if purchasing or refinancing a home wasn't stressful enough, sometimes, the key professional players in a real estate transaction don't necessarily have their client's best interest in mind. Conflicts of interest and lack of proper professional guidance are prevalent throughout the real estate world.

Six items purchasers need to know about the real estate process that are not frequently discussed:

1. **Home Inspectors**. First, never waive the right to a home inspection. Second, purchasers should select their own home inspector. Real estate agents sell real estate every day, and may have a stable of these home pros, and therein lies the potential conflict of interest that compromises the integrity of the inspection in favor of "getting a deal done". Third, avoid blurring the distinction between an appraisal and an inspection. An appraisal is a professional opinion as to the value of the subject property. That's it. While the appraiser may note deficiencies in the property's condition, it cannot ever be mistaken for a home inspection. An inspection should consist of a thorough examination of a home's mechanical and structural condition. Finally, a home inspector's liability is often limited to the cost of the inspection itself, and no more. So, an inspector who fails to note a leaky roof may only be liable for $300, the average cost of an inspection. Therefore, if a specific item is questionable, call on a licensed contractor to delve further and give you peace of mind.

2. **Real Estate Agents**. It is not surprising that many legal issues involved with real estate transactions involve the real estate agent as they are the center of the transaction. But, understand an agent's limitations. Work with a buyer's agent or seller's real estate agent, but not both. Known as a "dual agent", the real estate agent is responsible for representing both parties. There is absolutely no way that a professional can represent the competing interest of a buyer and seller. Purchasers can remove the potential for conflict of interest by hiring their own buyer's agent. Finally, understand that a seller's agent has their professional duty to the seller, not the buyer. So tread carefully. Purchasers should not disclose information to a seller's agent that they don't want the seller to know.

3. **Lending Officers**. Residential lenders are required to disclose all of the third party vendors, that they intend to use in a transaction. Appraisers and title companies are third party vendors and loan applicants are not legally required to use them. Find a licensed appraiser or title company before you apply for your mortgage. Also, get "pre-approved" by a lender before going house hunting. Purchasers should avoid using the real estate agent's lender referral unless they are having difficulty securing a mortgage on their own. Loan officers often rely on referrals from agents and they can, and will discuss your finances and credit with the agent.

4. **Insurance Agents**. Buying a home requires home insurance. After closing on the property, keep the insurance agent informed of significant changes planned for the home. When making any material structural changes that involves wiring or plumbing, or any other change that requires pulling a building permit, don't skimp. Pull the permit. No matter how handy a homeowner may be, if there is a fire, flood or other home disaster, the insurance company could deny your claim because your improvements were done without a permit. This is true even when homeowner repairs were not the direct cause of a structural problem.

5. **Title Agents**. It is standard in the real estate industry to secure title insurance with a home sale or refinance. In a sale, the seller customarily pays for an owner's policy for the buyer equal to the purchase price. If the buyer financed the purchase, then a lender's policy in the amount of the mortgage is paid for by the buyer. Review the title policy. Title insurance has exceptions and exclusions which is based upon what is revealed in the public real estate records. A buyer needs to know these exceptions as it could

impede their ability to sell their property in the future. Moreover, when a buyer purchases a home below market value, they should purchase title insurance equal to the home value, not the purchase price. For example, a buyer who purchases a home for $75,000 and valued at $100,000, would be exposed to $25000 in the event of a title claim. No one is ever precluded from purchasing more title coverage. Finally, if there is a title issue, consult with a real estate attorney as no other real estate professional is qualified to comment on the legal consequences of clouded title.

6. **Real estate attorneys.** While it sounds self-serving, for most people, purchasing real estate is one of the life's most significant legal and financial transactions. Hiring a real estate agent costs about 3 to 6 percent of a home's purchase price. Secure home financing costs anywhere from 1 to 3 percent of the loan amount. Why people sign a purchase agreement, a mortgage loan agreement, or sign-off on warranties, title schedules, insurance declarations, or other various third party legal agreements, without the expertise of a real estate attorney, is puzzling. Real estate transactions are all about legal contracts in the end. A loan officer is not an attorney. A real estate agent is not attorney. A neighbor or cousin, may or may not be an attorney. Don't skimp. When any real estate professionals pushes or "encourages" a home buyer to forgo legal advice, then it is a pretty good sign that a real estate attorney is needed.

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The Waterfall That's In Your Basement: Home Seller Liability and Buyer Remedies for Basement Water Damage

With the change in seasons, snow melt and the onset of spring rain, some home buyers, who had recently purchased their property during the winter months, have come to discover to their surprise that their basement leaks or worse, floods. Nothing is more disappointing, frustrating and disruptive as having a basement leak or flood, especially when the buyer relied upon a seller's statements concerning a home's condition and a

home inspection. They relied upon their seller's representations that the seller had no knowledge of basement water problems. In almost all cases, had the buyers known of existing water problems, they would not have written an offer on their home.

With very few exceptions, Michigan real estate law requires that a home seller must in good faith, provide a complete disclosure of their home's condition to prospective purchasers prior to selling the property. Sellers are not liable for errors in the disclosure statement which are not within their personal knowledge. But when they know of a current water problem or had a former water issue, they had better disclose this fact to their buyer. Yet, there still are sellers who think they can get away with misleading their buyer and it's this misguided attitude that continues to contribute to my job security.

Seller Misrepresentation. In Michigan, a seller may be legally and financially culpable to a buyer for making statements contained in the disclosure form that they knew or should have known are inaccurate. Sellers are committing "misrepresentation," when the seller had personal knowledge of the problem, but failed to exercise "good faith", by not disclosing that knowledge. In cases of water damage that allege a seller's misrepresentation, Michigan courts look at whether or not a "reasonable fact finder" could determine if the seller knew about a leak, yet allowed the transaction to move forward without disclosing the water problem to the buyer.

Seller Fraud on the Buyer. When a seller fails to disclose known water leaks and then tries to conceal the damage, they are committing fraud. It is deceitful and if the seller is found culpable, they will be responsible for triple the damages. An example of knowingly concealing water damage is when a seller installs new paneling or drywall over a water damaged area so as to prevent the buyer or their inspector from discovering the water problem.

Buyer's Remedies Against the Seller

Rescission. In both instances where a seller has been found to misrepresent or intentionally mislead the seller by hiding or concealing water damage, Michigan courts allow a buyer to rescind or cancel the entire purchase transaction. This can come months after the buyer has moved into their home. The purchaser of the home is permitted to transfer the property to the seller, and the seller must return the purchase price, plus interest.

Triple Damages. Buyers don't have to actually rescind the transaction. They can sue for their money damages if they elect to remain in their home. Damages can include the cost to remove the material that concealed an offending leak, as well as the costs for repairs and restoration needed to stop the leak in the future. In cases of fraud, sellers are responsible for triple the damages. For example, a $10,000 problem can cost a deceitful home seller $30,000.

Conclusion

Real estate transactions are serious business and the related home disclosure requirements should not be taken lightly. If a seller is uncertain as to whether they should disclose a known defect in the home that cannot be observed in plain sight, always remember that it's best to disclose. A competent real estate professional can address the defect in the sales price. The alternative choice to hide a known defect from a home buyer will be far more costly later. When in doubt, or if you are having problems with the condition of your home after the home sale, consult with a real estate attorney.

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Part 2 Real Estate Precautions: For Homeowners & Investors Alike

Buying Property Over the Telephone: Precautionary Tips for Aspiring Real Estate Investors

On November 24, 2014, the FBI Detroit Field Office issued an official press release that it had arrested 16 people in a telemarketing and real estate ponzi scheme netting the offenders over $20 million from 290 victims nationwide, who thought they were investing in bank owned homes. According to the authorities, telemarketers lied about the values of the homes, telling investors that they were purchasing homes worth many times more than the current sales prices.

It seems that every year law enforcement exposes an unscrupulous real estate or mortgage scam, but what is even more incredulous is that there are people willing to purchase real estate over the telephone. The old adage is true: "A fool and his money are soon parted."

Five considerations to seriously examine before purchasing investment property:

1. **Visually inspect the subject property.** In real estate, variables such as property location and structural integrity, affect value. A physical inspection of the property is imperative. If it's too inconvenient to personally visit an asset, hire an independent, licensed professional appraiser to assign a property value.

2. **Order a property title search.** Every property comes with its own unique title history. Mortgages, delinquent taxes, assessments, and judgments are but a few types of liens that

will directly impact a purchaser's ownership rights. Order a title search from a reputable title company or get a "title opinion" from a real estate attorney.

3. Investigate participants. State and federal law require licensing for most real estate services and activities that involve real estate investments, sales, or loans. When in doubt, contact state licensing authorities to see if an activity is regulated or contact a real estate attorney for an opinion.

4. Funding. When purchasing property, use a title or escrow company to disburse purchase funds to a seller, even in a cash transaction. Title companies will also provide title insurance to verify property ownership, address property liens, confirm property taxes and itemize money disbursements in a transaction.

5. Documentation. Real estate transactions involve many documents that include, but are not limited to sales agreements, deeds, mortgages, discharges, liens, settlement statements, authorizations and resolutions. Review these documents with a real estate agent, or a real estate attorney. Most importantly, never endorse any documents that are blank or contain incomplete or blank fields. Never relinquish original documents without retaining copies.

Successful real estate investing requires patience and reliable information. Rushing into a transaction without thoroughly performing one's own due diligence or hiring experienced professionals to do the same is an open invitation to deep financial disappointment.

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Real Estate Investment Income: Ways Property Investors Can Secure a Positive Outcome

After a 4 year court battle to obtain title to a foreclosed Florida condo, a Florida State Appellate Court for the Fourth District ruled that Bank of America must restart the entire foreclosure process from the beginning because of a clerical error, namely an incorrect property legal description. (Case No. 4D13-4066) On the same date, Florida's Daily Review quoted one bank attorney involved in a similar case as saying, "It was a case that should have never happened." Famous last words.

Investing in real estate mortgage notes and flipping properties can be financially rewarding. According to numerous "real estate investing" or "note buying" websites (A Google search of real estate "note buying" prompted over 19 million results), it's even "fun" and "easy." Perhaps it can be, but not without "work." As seasoned real estate and note investors know, buying real estate notes and distressed property can be a great source of income, but as in the Bank of America matter above, it can also a be source of problems.

Five things real estate and note investors can do to reduce headaches before rushing in to acquire income producing commercial or residential properties:

1. Audit the loan file. It's good business to have an attorney or compliance professional review loan documents before purchasing a note. Any legal defenses that a borrower has against a lender, they can have against the loan assignee or note buyer. Have a professional review loan documents such as federal loan disclosures, deeds, legal descriptions, issue an opinion on potential title defects and verify back property taxes and IRS liens. Note buyers want to buy a note, not a lawsuit.

2. Understand the implications of invoking certain loan provisions. For instance, in commercial loans, it's common to have provisions for an Assignment of Rents. This means that the note holder can require tenants, currently at a property, to make payments directly to the investor in the event of a landlord - borrower's default. This sounds straightforward until one considers that in most jurisdictions, note holders who exercise the right to collect rent, become responsible for property repairs even when the investor does not yet own the property. Tenants could withhold rent from the investor until prior neglected repairs, such as a roof repair, are addressed. It can be quite costly especially when tenants in distressed properties often request rent abatement.

3. **Don't ignore title insurance.** Note buyers usually have three options to make their investment profitable. If they can't modify an existing note, taking a deed in lieu from a

property owner, or initiating a foreclosure action are they only ways to take legal title to sell a property. In both instances, having title insurance is very important. Taking a deed in lieu from a borrower without having title insurance can be folly since any and all liens on the property will be transferred to the grantee. Starting a foreclosure action without knowing what's on title could expose the property to IRS liens that affect the investor's clear title. At the very least, perform a title search.

4. Being compliant. Make sure the entity acquiring a note or property is in compliance with state and federal law before taking any action against a tenant or borrower. For instance, evicting a tenant without a recorded title interest can be legally challenged. It's the same for investors who issue notices of loan default. Recording one's legal interest in a property is paramount. It's also important that incorporated investors register their business with the state in which their investment property sits, otherwise their authority to enforce provisions concerning their own investment can be challenged. Finally, make sure all collection and default notices comply with federal and state laws.

5. Expect 'push backs' and time delays. Making properties profitable or collecting timely payments does not happen right away. True, there are times when a borrower agrees to a loan modification, brings themselves current or even refinances off the note, but these instances are uncommon. Instead, anticipate little, if any, tenant or borrower response to correspondence and prepare for eviction, foreclosure or even bankruptcy actions.

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Leasing with the Option to Buy: Landlords Proceed with Caution

A lease with option to purchase is a real estate agreement that allows a tenant to lock in the purchase price of a home while the tenant is still leasing. Lease with options ("lease options") appeal to both landlords and tenants. Landlords use lease options as a means to keep good tenants interested (and paying) on the Landlord's property. Landlords can

usually negotiate a higher sales price and these agreements are used more often in a depressed real estate market or where a property is in fair to poor condition. Tenants have the opportunity to “tie up” a property that they want to own, without having to put down a large down payment. Before entering into a lease with option to purchase, Landlords should review the following emotional, legal and financial considerations.

1. **Emotion**. Just because a tenant pays for a purchase option, once the 'tenant' is in the home, they may grow 'out of love' with the home. At times, tenants try to renegotiate the purchase price in the agreement or they decide not to move forward at all, but just continue to rent. This consideration should already be built into your option price and your monthly rent.

2. Legal. Lease options prolong the time in which a landlord can exercise available legal remedies in the event of the tenant's default. Generally, when a tenant purchases the option, they have an equitable interest in the home. An equitable interest means that the tenant has financial interest or claims to legal title in a property. Courts tend to treat tenants with an equitable interest more favorably and a tenant's defenses under federal laws such as the Dodd-Frank Act afford legal protections for purchasers on lease option.

3. Financial. Consider financing the “end game" for the tenant who wants to purchase the property after the purchase option expires. Usually mortgage lenders do not credit the full amount of the rental payment toward the purchase price without first calculating the fair market rental value. Additionally, under the Dodd-Frank Act, if this is challenged, lenders will not be able to credit any monies collected for rent or the option price towards a down payment. Remember, when a tenant purchases an option, there is not a guaranty that they will close on the agreed sales price in the future. Tenants who don't close on their option, often attempt to offset their spent option money by withholding rental payments.

Considerations. As stated above, these are a few factors landlords need to consider when offering a tenant an option to purchase a home. If you are not clear on how to properly proceed with a lease with option, consult with an experienced real estate attorney.

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Buyer Risks Associated With Online Property Auctions

Buying a property, whether it be a home or building, through an online auction site has become increasingly popular since the "Great Recession of 2008." Online property auctions give sellers (usually lenders) the opportunity to sell their foreclosed and repossessed inventory (REO's) quickly and gives buyers the chance to pick up properties for substantially less than market value. Online property auctions can be exciting and generate great deals. But there are also risks associated with purchasing auctioned property, found less in the physical condition a property, than in the provisions embedded in the auction company's purchase agreement.

Five things to consider before entering into a purchase company with a real estate auction:

1. **Seller Representation**. Online auction companies act as the seller's agent. The "transaction facilitator" or "desk agent" does not represent the purchaser, so relying on any statements or assurances from an 'account representative" is a poor idea. There is nothing wrong with hiring your own real estate agent to assist with the transaction. The private auctions can, and do protect commissions.

2. Contracts. Auction purchase agreements are notoriously unilateral or one-sided, with most rights and discretion to act or not, vested with the seller. For example, buyers have very little rights except for cancelling the purchase agreement performing a timely property inspection. Even then, some contracts will release a purchaser of their contractual obligations, but will refund only a portion of the purchaser's entire deposit after poor inspection results. If one is unsure of ambiguous contract language or unfavorable provisions, have the contract reviewed by your own real estate attorney.

3. Timelines. Buyers must be careful to review and understand timelines within the purchase agreement. There are time limits for conducting property inspections, notification, reviews, closings, and obtaining approval for financing. A Buyer's failure to meet a specified timeline could be cause them to lose their deposit or allow the Seller to cancel the contract. Remember to get any time extensions in writing.

4. Flexibility. Most auction sales contracts contain 'boilerplate" language, and buyers are often told that the 'take it or leave it" language limiting buyer's rights, cannot be changed. This isn't

always true. Many provisions in a purchase agreement can be negotiated, although when it comes to replacing seller's third party vendors such as a title company or inspectors, it's unlikely. Remember, all changes to a contract in real estate must be in writing. One should secure the services of a professional negotiator such as a real estate attorney, if a buyer does not regularly engage in and negotiate real estate transactions.

5. Market environment. Consider that in the very slow real estate market after 2008, lenders needed a method to quickly unload inventory. Auctions were such a source. But in today's relatively robust real estate sales market, one has to ask why a property isn't sold on the regular "retail" market. I suspect that there is a defect in the property's chain of title or there is a legal defect in the process in how the lender / seller obtained title. Auctions are a way to sell property without making any warranties or assurances to prospective buyers that would otherwise have to be disclosed on the retail real estate market.

Conclusion. Buying property through online auctions can save prospective property owners thousands of dollars. However, the process is fraught with risks. To avoid disappointment, buyers should have a real estate professional review the transaction process and terms before committing to a price at auction.

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Why Quit Claim Deeds are Like Bad Tattoos

Each month I receive more than a handful of calls concerning quit claim deed forms. Usually the callers are not looking to me to obtain the legal forms - they can easily download the form online. No, instead, they are usually calling me for legal advice on how to "reverse" or "undo" the real estate transaction they've created - and what has been created is usually a real legal mess.

Quit claim deeds "gone bad" are like an unsightly or embarrassing tattoo. Reversing the transaction can be painful and expensive and involves a healthy dose of regret.

1. **The Lowly, Quit Claim Deeds**. Deeds are the documents that legally transfer property interests. There are a few types of deeds that convey title, depending upon your jurisdiction. Among them are: (1) Warranty, (2) Covenant, (3) Trustees, (4) Ladybird, (5) Sheriff, and (6) Quit Claim. This list is not exhaustive, but suffice to say, each type of deed has its own purpose, conveying different 'guarantees' of ownership to a grantee. But only the 'lowly" quit claim deed comes without grantor representations or warranties. In essence, a grantor of a quit claim deed basically says to the grantee, "I may own this property, but I can't guarantee you that someone else doesn't have a better claim to it. Oh, and by the way, if someone else does have a more superior interest or claim to the property that I am deeding to you here, don't expect me to do anything to help in defending your rights to the property." As a legal document it sounds pretty useless doesn't it? Yet, with the proper legal guidance and due diligence, a quit claim deed can be an effective transfer instrument.

2. **What Went Wrong?** With access to online legal forms readily accessible to the general public, it is easy to forget that with these legal documents comes "great responsibility." "Practicing" law without the requisite knowledge has consequences, usually financial. Nowhere is this more evident than when "John Public" creates a quit claim deed. Here are two of the most common problematic scenarios:

   A father deeds his investment property valued at $200,000, to his daughter and her husband using a quit claim deed. Several years later, his daughter and her husband divorce. The father wants to sell the property. Daughter quit claims her interest in the property back to him. The now ex-husband decides that he wants 50% of the proceeds when the property sells. Father wants ex-husband off the deed. But, since he was a grantee, that boat has sailed. The transaction is over. Now Father and ex-husband own the property as tenants in common, and short of a legal partition action, there is very little Father can do.

   Same scenario above, but right after the father deeded the property over to his daughter, the IRS put a $50,000 tax lien on the property. When the daughter later deeded the property back to her father, the ex-husband's creditor attached a judgment lien in the amount of $100,000 to the property. The $200,000 investment property now has $150,000 of liens on it. The liens go with the property. Therefore, when the house sells, the ex-husband can't complain about how the Father's earlier $50,000 tax lien on the

property is eating into the proceeds, and the Father can't complain about taking back the property with an additional $100,000 judgement lien.

They both accepted quit claim deeds. Could the above scenarios happen with other types of deeds, such as a warranty deed or covenant deed? Certainly, they could. But I can assure you that these scenarios don't occur quite as often when using these type of transfer instruments. Unlike the quit claim deed, the other deeds come with inherent warranties and remedies available to the grantee. From my vantage point, if you are using a quit claim deed as a "quick" form of action, beware! Quit claim deed forms, which the public frequently calls "quick" claim deeds, should come with a cooling off period...come to think of it, that wouldn't be good for business.

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Just What Are Your Intentions? Problems Associated with Letters of Intent

Imagine for a moment, a small business owner, "Sally", is considering a new location for her business when she happens upon a small retail building that would serve as a perfect location for her future success. One problem. The building is not for sale. But Sally is eager to buy the property, and wants to show the property owner that she is serious about purchasing the building. The building's owner wasn't anticipating selling the property when Sally approaches her, but would consider selling it for the right terms. Together, both parties can write up a letter of intent, which is a document that details their wishes to enter into serious negotiations at a later date. Essentially, letters of intent are agreements to create an agreement in the future and are commonly used in the purchase of real estate, a business, and contracting for goods or services. Letters of intent outline important elements of what parties intend to have placed in a future agreement. They help to gauge how serious a party like Sally is about something. They include provisions addressing things like purchase price, timelines, confidentiality, exclusivity, financial

considerations, property or product condition.

Rushing to draft a letter of intent can have legal consequences. Letters of intent can create real legal problems and expensive litigation when one party, such as Sally above, wants only to enumerate the beginnings of a future contract, but the building owner, now considers the language to be more than just an intent to negotiate, and to Sally's surprise, a binding agreement itself. In certain situations, courts have found that letters of intent that memorialize terms for an agreement at a later date can be enforced as a binding contract.

Four things to do to avoid when having a letter of intent litigated and enforced as a contract:

1. **Avoid Specificity**. The more specific the terms, the more the letter of intent begins to look like the contract itself. For instance, in a letter of intent to lease, stating the lease term and payment would be sufficient, but detailing the various responsibilities of the landlord or tenant, or listing default remedies tends to appear more like a lease itself.

2. **Qualify the Language**. Make sure that there is language in the letter of intent that clearly states: "***This is not a legally binding contract."*** Some legal experts go so far as to insert the language multiple times throughout the letter of intent. Without such language, courts will look at the surrounding circumstances and the party's behaviors to determine what the original intent was at the onset of negotiations.

3. **Have an attorney review or even draft the letter of intent.** Some courts have found that where the elements of a contract are present in a letter of intent: an offer, an acceptance, mutual obligations and remedies, the more likely than that it can be construed as a contract. The language is what counts, and an attorney can ensure that certain elements of a legally binding contract are excluded from the letter of intent.

4. **Don't sign the letter of intent.** The recipient of a letter of intent shouldn't sign it. If the proposal is enough to peak one's interest, then the parties should instead engage in drafting terms for a contract with a qualified attorney.

Conclusion. The above items are the best way for a letter of intent to remain non-binding and enforceable. Before creating "self-inflicted legal wounds" and endorsing a letter of intent, it is always best to consult with an attorney.

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A Big and Fluffy Cloud on Title: What Real Estate Investors Need to Know About Proactive Due Diligence

I recently had a client who, along with his partner, had owned a Detroit investment property for many years. He had come into my office very excited about a recent purchase offer they had received. They had owned their investment property for decades, weathering numerous Michigan economic cycles, but with all of the sales activity happening in and around metropolitan Detroit, they could finally realize a significant return on their investment. "This is the year!" he exclaimed. "We're going to finally sell this baby!" Happy for them, I began the typical due diligence work which included, among other things, pulling title work. Three days later, title came back showing several items affecting the partner's title interest. Nothing was too severe, except for one lien showing an old security interest still on title. This old lien had to be addressed or the partners could not complete their sale. "Oh, we paid that off years ago," the client explained. But when asked to produce a copy of signed lien release, the partners, after days of searching, could not produce one.

Excitement Turns to Panic. And so it began...by "years ago," my client meant he and his partner had paid their loan off in the late 1980s. A further investigation revealed that this old lien was formerly owned by 3 partners, and as my clients' luck would have it, all were now deceased. We would soon learn that their accountant was deceased. So too was their lawyer. Only one of the partners had a surviving spouse. My client's excitement quickly turned into frustration, slowly deteriorating into panic, and without proper legal intervention, was on a clear trajectory to major disappointment. Suffice to say, it was only several months later, after much anguish and additional legal expense that the deal thankfully closed.

Conclusion. My real estate law practice is almost exclusively based on clients who are reactionary. Most real estate investors are not proactive in their approach to their business. But it doesn't have to be that way in real estate. Ensuring a property's marketable title is but one

example. A property has marketable title when it can be sold without any encumbrances, liens or 'clouds' affecting clear title. A cloud on title prevents a buyer from taking clear title to a property, and with few exceptions, why would they? Unless your buyer is taking a quit claim deed (a deed without any representations as to ownership) your deal is dead until you clear the cloud on title. A cloud on title may arise when there is no recorded lien release for an old interest in a property such as a mortgage lien, tax lien, judgment lien or any other claim of interest by a third party. It can also occur when a deed or transfer document has not been recorded or was improperly signed. Before you list your property for sale, perform your due diligence, which includes, but not limited to, ordering title work, beforehand. If you are not clear about any issues that affect your ability to transfer your property, its best to consult with a real estate attorney.

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You Have Every Reason to Be Skeptical: What You Should Know About Real Estate and House Flipping

Investing in Detroit single family homes is really hot, and each week I receive calls from prospective investors from all over the world, lured by the sirens of big profits, wanting to know if this market is as good as the media portrays it to be. My answer these days is a highly qualified "yes, but…."

Four considerations that smart real estate investors need to be skeptical of:

1. **Property managers and contractors**. In Michigan, property managers need to have a real estate broker's license. The have a fiduciary duty to their clients to manage and maintain properties. Before sending a property manager any money to perform construction or manage remodeling projects, screen property managers carefully. Too often, unauthorized property managers abscond with significant client monies without performing the work. (I was recently hired to sue a property manager who stole over

$25000 from an out of state investor.) Using unlicensed contractors can be just as disappointing.

Solution: Work with reputable property management companies and licensed contractors who have a history in business and referrals from happy clients. Trust but verify licenses and insurance.

2. **Documentation.** I am busier than ever cleaning up after 'self-inflicted" legal problems caused by non-lawyers. They create various real estate and finance agreements that include, but are not limited to mortgages, loan assignments, leases, purchase agreements, contractor agreements, and lease options. Trust me, I am not complaining, but the last time I checked, the real estate business is hard enough without having to deal with the frustration, delays and setbacks caused by poorly drafted documents and weak due diligence. Recently, a purchase agreement earned my client a high 5 figure settlement, all because the person who drafted the agreement, a non-lawyer, failed to include one sentence in their agreement. Yes, one sentence.

Solution: Do yourself a favor, have an experienced real estate attorney create or review your documents and assist you with legal due diligence.

3. **Inspections and Certificates of Occupancy.** Relying on third party inspections without personally checking on a property can generate a host of problems. Many investors use their own money or money procured from small investor groups. Purchasing a property without knowing the estimated repairs needed to obtain a Certificate of Occupancy ("C of O") is like flushing money down a drain. Last year, in order to get her C of O, a client lost substantial equity when the city required her to replace an entire pea gravel circle driveway with a concrete one. Many clients and other smart Detroit investors come far and wide to inspect properties before they purchase. Recently, an investor believed they had purchased a vacant property. When they went to secure the property they soon learned the home was 'tenanted." The cost of a contested eviction delayed their 'flipping" plans for over 5 months. Those who invest in properties sight unseen have only themselves to blame.

Solution: Personally inspect your investment property or hire a reputable agent. Would you invest in a stock without reading the prospectus?

4. **Title and property taxes.** Understand the property tax forfeiture and foreclosure process and verify a property's lien and tax status before you close. Nothing is worse than restoring a property only to find that it was sold to another party at tax sale or that title is such as mess that the investment does not have marketable title.

Solution: Hire a real estate attorney and pull a title abstract before you buy. Why buy into a lawsuit?

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Protecting Property Title Interests: In Real Estate, You Have To Show Up 100% of the Time

Over the last two months, several clients (prior to hiring me) lost a combined total of $1,729,631 because, they failed to file their real estate documents publicly with the county recorder. Their property rights, as evidenced by various deeds, trusts, assignments, land contracts, mortgages, and liens, simply went unnoticed. Most of the properties were lost to the taxing authorities or through foreclosure, because the clients were never notified of a property auction. Other properties were sold or mortgaged to third parties who had no idea that my clients also had prior property claims. Whatever the cause, $1.7 million is an alarming figure when the solution against such loss is so easy.

1, Multiple transfers. Nationwide, state property laws encourage, but do not require, anyone with property interests to record them in their county recording office. Recording real estate transfer documents protect against situations where the same property interest is transferred multiple times, (ie. seller grants a mortgage for the same property to two different lenders). State laws determine which party's interest prevails, based upon when a deed,

mortgage or other documented interest is filed with the recording office. The laws predominantly favor those who properly record their property interests over those who don't.

2, Notice to the world. Recording real estate documents into a property's 'chain of title' provides "notice to the world" (known as "constructive notice") of one's property interest. By not appearing in the title chain, interested parties will not receive legal notices concerning the property, such as tax notices or lien filings. More importantly, in almost all instances, good faith purchasers, lenders and other lien holders who are unaware of prior outstanding, but unrecorded property interests, have superior claims when challenged by property owners who failed to record their property interest.

3, Who or what should be filed? The list is not exhaustive, but generally all real estate deeds need to be filed. Where land contracts are concerned, it is important that the buyer have a Memorandum of Land Contract recorded. Too often is the case where a seller has sold a property out from underneath a land contract buyer, all because no evidence of the sale was ever recorded with the county. Most title or closing agents will file real estate transfer documents as part of their business for a small fee. Lastly, mechanic liens, judgment liens or claim of liens against a property need to be recorded in a timely manner to be effective.

If you are unsure about filing requirements, contact a real estate attorney.

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Part 3 Land Contract Do's and Don'ts

A Festering Property Problem: A Seller's Underlying Mortgage Obligation On A Land Contract

Land contracts are a great way for a property owner to sell their property to a buyer, who, because of credit history, income or other factors cannot secure a traditional mortgage approval. But it's not always the buyer who may have issues. The property itself may not meet a lender's standards, or the seller does not want to wait for the time a buyer generally needs to get a loan application approved. Some sellers provide seller financing as an investment.

In a land contract between a seller and buyer of real property, the seller provides financing to a buyer to purchase the property for an agreed-upon purchase price. Generally, the buyer pays the seller directly and when all of the required monthly payments are made, the buyer then will receive title to the property.

One problem area for land contract buyers is when their seller already has an existing mortgage ("underlying mortgage") on the subject property that they want to sell. Here are several things buyers should consider before buying a property on land contract:

1. Marketability. A buyer should never purchase a property on land contract for a price that is less than what a seller currently owes on their underlying mortgage. For example, if the seller owes their bank $100,000, on the property, it makes little sense for the buyer to buy the same property for $80,000 on land contract. That is unless the seller is capable

of paying down the difference of $20,000 prior to the land contract maturing.

Otherwise, the buyer will not be able to get clear or marketable title. A lender's existing lien at the time of land contract always takes priority over the land contract buyer's interest. Buyers should review the terms of the seller's mortgage to verify payments and how the underlying mortgage is paid down ("amortized").

2. **Monitor payments.** Where a seller's underlying mortgage exists, the buyer should ensure that the seller is paying down their own mortgage on the property, timely and consistently. In fact, it's recommended that the buyer make their installment payments directly to the seller's mortgage bank so that payments will be credited towards the balance of the underlying mortgage and not "somewhere else."

3. Due upon sale. Most mortgage documents contain "due on sale' clauses. These provisions allow a lender to call a mortgage balance due in the event the property it secures is sold. Land contracts are considered sales transactions. Buyers should verify that their seller has permission from the mortgage lender to land contract the property. Lenders have no obligation to the land contract buyer if and when the lender calls the mortgage due. Without a lender's written permission, buyer's risk losing the monies that they paid to the seller as well as lose the property.

4. **Memorandum of land contract.** Buyers should confirm that the seller files a Memorandum of Land Contract with the county recording office. This puts the 'world on notice" that the land contract buyer has a claim to the subject property and prevents the seller from selling the property again to another buyer. Land contracts are an excellent alternative to the traditional bank mortgage and allow both sellers and buyers flexibility to finance property. Land Contracts are contracts with legal provisions that protect both seller and buyer and are meant to preserve the integrity of the sales transaction. Because property sales by their very nature involve substantial investment, it's prudent to have a real estate attorney assist, review and prepare a land contract.

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When Selling a Home on Land Contract Is a Bad Decision

A land contract essentially works like a mortgage, but instead of a bank financing the purchase of a property, the home seller provides the financing and retains possession of the deed until the purchaser satisfies the terms of the land contract.

Land contracts can be useful for selling a home, such as when a purchaser may not qualify for a conventional bank loan, the seller can offer financing. Moreover, a seller may own the property without any underlying debt, ("free and clear") and a seller can earn interest. Compared with current returns from a bank savings account, that makes for significant earnings. Finally, it can be difficult to sell a property in poor condition. Seller financing can make an otherwise less than desirable home, more appealing.

Despite the advantages for selling a home on land contract there are times when a seller should be wary of offering a home on land contract. Here are but a few considerations to make:

1. **An Improved Housing Market.** The residential home market is improving and housing inventory is low. Current rates for conventional and government insured mortgages such as FHA are low. In such a favorable market, if a buyer offers to purchase on land contract it should raise concerns as to why a prospective purchaser cannot obtain bank financing. If the reasons include credit or income issues, then a seller should ask themselves why they would want to assume a financing risk when a bank will not. So it's important to qualify a purchaser before offering seller financing. Unless there is something noticeably wrong with a property, this is the time for most sellers to be paid in full at a closing.

2. **A Seller's short term financial needs**. Most sellers list their home intending to receive the entire purchase price at once. In a land contract, there is a negotiated down payment, and the remaining balance of the purchase price is paid back monthly with interest. For those sellers who need money in the short term (2 to 4 years) entering into a land contract with a 12 or 24 month term could prove problematic. If the buyer has credit or income issues or unforeseen events later change the buyer's financial

circumstances, they may not be able to obtain the bank financing needed at the time the land contract expires.

3. **Buyer Default.** Land contract sellers retain the deed to their property until paid off. If a buyer defaults on payments or for any other reason, the seller will need to sue for a land contract forfeiture or foreclosure. Until legal action ends, the buyer has the right to remain in the property without making any payments. Barring a buyer filing bankruptcy, a land contract can take anywhere from 4 to 6 months to get the purchaser out of the house. What the buyer is doing to the inside the home during this time is anyone's guess, but rest assured, repairs will be the seller's problem.

4. **Underlying mortgages**. Sellers who sell on a land contract while having an underlying mortgage on the home may be violating their mortgage agreement which most likely has a provision known as a "due on sale" clause. This means that the lender has the right to call the note due at the time of a sale. In the housing market of the Great Credit Crunch (2008) many lenders looked the other way when homeowners sold their home on a land contract. But no longer. With an improved market, lenders are looking for loan payoffs and will not hesitate to invoke the "due on sale" provisions. On another note, a seller who is financially stretched and needs the buyer's land contract payment to make an underlying house payment should instead strive to sell their home outright. Otherwise, a buyer's payment default could put the seller's underlying house payment behind. Once a buyer learns that the seller's own house note is behind (usually by opening the seller's mail) the buyer could stop making their payment or propose to renegotiate the terms of the land contract.

5. **Sellers are paid last.** When a real estate agent lists a property, they must present all offers to the seller. Terms in a purchase offer not only include price, but also address how the purchaser proposes to pay the price, be it with cash or a mortgage. A seller may like the proposed price, but not the method of financing. Some sellers can feel pressured to take an offer because the asking price is met. When an agent or purchaser asks the seller to finance on a land contract, it is the seller who bears the risk if a purchaser defaults. Real estate agents collects their commission at the time of sale and in land contract sales, from the down payment.. Depending on the size of the down payment, the seller may collect very little at the time of closing. For instance: A 10% down payment on a 200,000 sales price is $20,000. A typical real estate commission (about 6%) is $12000. Add in other closing costs and the seller typically walks away

with about $5000 -$6000. That's not a lot considering the seller will remain involved with their property for the term of the land contract. The real estate agent will have already been paid their commission, but at a later date the seller may be asked to perform home repairs or provide concessions to the buyer for items "unknown" to them prior to the home closing.

Conclusion. Land contracts serve a purpose in a slow housing market, where the property is in need of substantial work, or where a seller desires a stream of income and is financially capable of addressing legal issues. But with the improved housing market, and competitive lending rates, Sellers should first consider selling to buyers who can obtain some bank financing.

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Forfeiture vs. Foreclosure of Land Contracts in Michigan

When a buyer defaults on a land contract, the seller can generally pursue one of two legal remedies: forfeiture or foreclosure. Both remedies have advantages and disadvantages. In general, forfeiture is faster, cheaper and easier than foreclosure but does not allow you to accelerate the debt or obtain a deficiency judgment. Forfeitures are summary proceedings filed in District Court governed by MCL 600.5701, *et. seq*. and MCR 4.202. Foreclosure takes longer and is more costly, but may be appropriate when the buyer is chronically delinquent or when the seller wants to pursue a deficiency judgment. Foreclosures are governed by MCL 600.3101 et. seq. and MCR 3.410 and are filed in Circuit Court.

Five things for vendors to consider when deciding whether to pursue forfeiture or foreclosure as a remedy for default under a land contract.

1. **Does the value of the property exceed the remaining debt?** If the value of the property exceeds the remaining debt, forfeiture may be a better remedy, since a deficiency is not needed and the forfeiture process is quicker. In forfeiture, if the purchaser does not pay the past due payments under the land contract after receiving a

15 day forfeiture notice, the seller may file suit for a judgment for the monthly payments which remain unpaid. If the buyer fails to redeem, the seller can keep the property in satisfaction of the debt and realize the value of the equity.

2. **Is the value of the property less than the remaining debt?** If the value of the property is less than the remaining debt, foreclosure may be the better remedy, since in foreclosure the seller may accelerate the debt and obtain a deficiency. After a 45 day notice period on a default, the vendor may accelerate the debt and pursue judgment on the entire balance due. After a foreclosure sale of the property, if the sale price is not sufficient to pay the remaining debt, the seller may obtain a deficiency judgment for the difference between the sale price and the debt. This remedy is only available if the land contract permits acceleration, and does not contain a non-recourse provision.

3. **Is the vendee chronically in default?** If the vendee is chronically in default and bringing the balance current, and the seller wants to recover the property, foreclosure may be better if the land contract contains an acceleration clause. In forfeiture, the seller cannot accelerate the debt. Therefore, the vendee can cure by paying the past due monthly payments. If the seller wants to terminate the land contract and evict a vendee in chronic default, in a foreclosure the seller can accelerate the debt making it harder for the tenant to cure.

4. **Is the property contaminated?** If the vendor does not want the property back because, for example, it is contaminated; the vendor does not have to pursue forfeiture or foreclosure, but rather can pursue an action on the debt only.

5. **Is the litigation complicated by title issues or counterclaims?** Claims for money damages in excess of district court jurisdiction of $25,000 will get removed to Circuit Court. In addition, the District Court does not have jurisdiction to hear quiet title actions. Therefore, if there are disputes as to title, these will need to be heard in Circuit

Court. For these reasons, a foreclosure in Circuit Court may make sense since the seller will not be able to take advantage of the speed of the summary proceeding in any event.

Conclusion. In short, if you are a vendor on a land contract and your vendee is in default, think carefully based on the language of the land contract, the value of the property and your particular situation as to whether forfeiture or foreclosure is the right remedy for you. The above are just some of the things to consider when pursuing remedies against a land contract vendee in default.

Part 4 Getting it Right

5 Things That Frustrate Legal Clients

Hiring an attorney can be a daunting task. Once that hiring decision is made it can be equally frustrating to encounter the following things:

1. **Unclear Billing:** Begin by learning the various ways attorneys bill their time. Most attorneys bill by the hours, yet some will suggest a flat fee for certain routine matters, such as reviewing a contract or closing a loan. Make sure that you consult with your attorney about his/her billing practices and understand what your case entails. Make certain to get a written agreement.

   2. Availability. Has your attorney explained his/her policy for returning phone calls, texts and/or emails? Don't hesitate to ask before hiring.

   3. Rapport. Do you feel comfortable with and confident in your attorney? Has he/she made an effort to clearly explain your legal options? Good chemistry will ensure a better relationship and more positive results for your legal matters.

   4. Understanding. Does your attorney show an interest in your goals? Does he/she explain the process in a language that you can understand clearly? Does he/she also do this with a sense of respect and compassion?

   5. Experience. Does your attorney explain clearly his/her area of expertise? It's important to find an attorney who specializes in the area where your problems and concerns exist. There are many areas of law (the American Bar Association lists about 85 specialties) and most attorneys will happily explain the experience in the field for which he/she specializes.

Conclusion. Take your time to find the right attorney for your needs. Interview the top 3 attorneys you are considering. Many attorneys will offer an initial consultation without charge.

Be ready to describe your concerns and needs. Take notes and come prepared with questions. It is important to establish a relationship with your attorney. Life has many twists and turns and your attorney should be with you for a long time.

About David Soble

For over 25 years David Soble has provided no nonsense legal advice to banks, lenders and consumers alike, in the areas of commercial and residential real estate, business and residential lending and contract matters. David Soble is a graduate of Michigan State University ('87) and The Ohio State University College of Law ('90). His focus has been on real estate law and lending law.

"Walking the Walk"

David's background is unique in that he has extensive practical experience and knowledge working with commercial, residential, and lending transactions. He has managed sizable loan portfolios ($350 + Million) consisting of commercial and residential real estate for national banks. He was managing attorney to several notable lending institutions and their default loan servicing portfolio. He is a licensed real estate broker and has authored numerous books and articles on issues related to real estate, contracts, foreclosure matters, loan negotiations, and creditor /debtor rights. Besides being an attorney, David is also a landlord, a mortgagor and a land contract seller Over the years he has built his own real estate portfolio throughout Michigan and Ohio.

David is a resident of West Bloomfield, Michigan and is married with two children. Among his favorite activities after work is road biking on a tandem recumbent bike.

You can reach David at Dsoble@provenresource.com, or at facebook.com/provenreosurce or on Linkin.

Be sure to share this information with your friends or family members..