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HAVE AN ATTORNEY REVIEW REAL ESTATE CONTRACTS

A client of mine engaged in a high-risk occupation sent over a contract for a property that he was purchasing. He wanted me to place the property into an asset-protected form of ownership instead of in his name individually since he has exposure to personal liability which might occur. Since his wife is in a high-risk profession as well, placing the property into her name or in their joint name doesn't offer the level of asset protection that they seek.

Trouble was he already signed the real estate purchase and sales contract before he forwarded it to me. I asked the developer selling the property whether we can assign the contract to a wholly-owned entity such as an LLC or a partnership. I indicated that my client was not intending to remove himself from personal liability from closing under the contract, and I indicated that we would prepare whatever paperwork would be necessary to provide comfort to the developer that my client would be personally obligated to close.

But that wasn't the toughest obstacle. The lending institution that was providing the purchase money mortgage financing wouldn't allow my client to close in the name of his asset-protected entity either. I called the lender's representative in an attempt to persuade her that the client intended and would sign whatever paperwork was required to personally obligate my client to the loan, but that he wanted to protect the property from the claims of third parties.

My client relayed to me that the lending representative told him that he "could always transfer the property after closing to his LLC or other asset protected structure." So he wondered why I couldn't do the legal work transferring the property after closing. I explained to him that there were two problems with transferring after closing. First, there might be additional costs such as documentary stamp taxes and other recording fees. These costs can be quite significant.

Secondly, and even more troublesome, I explained to him that most loans contain "due on transfer" provisions. The intent of these provisions is to ensure that someone can't sell the property to someone else without paying off any mortgage. Although in this case we were not intending to transfer a third party, but instead to a wholly-owned entity for estate planning and asset protection measures, in my experience the lending institutions don't differentiate between these factors.

So I telephoned the lending institutions' representative, and inquired about her statements to my client regarding a post-closing transfer. She started out by telling me what she told him, "you can always transfer after closing," she said.

I then asked whether the lending institution would provide my client a written assurance that the lending institution would waive the "due on transfer" clause contained within the mortgage so long as my client transferred to a wholly-owned entity and remained personally liable on

the mortgage. She gave me the answer I thought that she would give me, which was "no". She explained that her institution normally sold the loans on the secondary market and would not be the servicing institution for the loan over its life. So if my client were to follow her advice that she had given him, then he would have run the risk of having the lending institution trigger the "due on transfer" clause – causing all unpaid principal and interest to be due any time the bank wanted. In a rising interest rate environment, you don't want a lending institution to have any reason to "call" your loan.

However, today sellers are having a difficult time moving real estate and lending institutions are having a difficult time closing loans to qualified buyers like my client. My client should have been in the driver's seat and gotten whatever he wanted. But what went wrong?

What went wrong is that my client signed the contract BEFORE he gave it to me to review. If I had reviewed it before the client signed the document, I would have suggested to him that he not agree to purchase the property unless the provisions necessary for my client to close or transfer his interest in the property to an asset-protected vehicle were allowed. I'm almost certain had he known to demand this before agreeing to purchase the property, the Seller and the lending institution would have agreed to his requirements, or my client would have purchased some other property and/or borrowed from another institution.

My client isn't without alternatives. I suggested that he contact another lending institution who might be more amenable to a post-closing transfer. Whether he has time under the contract to consider these alternatives remains to be seen. He may have other options as well, but all of this effort could have been avoided.

Buying and selling real estate is too important to not have your attorney review the contract before you sign it. Sometimes a buyer or seller will feel rushed for various reasons. Maybe the real estate agent wants to firm up the deal to ensure a commission. The mortgage lending broker is also trying to close a deal for his commission. Often these professionals dissuade parties from having the lawyers look at the documents as they call us "deal killers".

Over the past twenty years I can count on one hand the number of deals that my clients have not closed due to advice that I have given them. Most deals do close when the parties really want the property. These details can usually be worked out. I'm here to tell you that you should always take your time and make sure all ends are considered before signing on the dotted line – because once you've signed you are obligated and the other side has no reason to budge to make your life any easier.

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