LEGAL TID BITS

One of the goals of a real estate salesperson should be to impress the client. If the client is impressed with the information he or she receives from you, it is more likely that they will allow you to procure an important transaction for them. Whether representing a seller or purchaser, you can increase the confidence your customer has in you by knowing the answers to the difficult questions they ask. Subtle nuances in the transaction can make a huge difference. No matter how knowledgeable you are, you are never too wise to learn more. My hope is that each reader will find something beneficial in the information I provide. As a practicing real estate attorney for twenty years, I have closed thousands of transactions. While one would think it becomes routine, the opposite is true. New laws, new issues and new solutions are always in the making. It is my goal to share that with you!

LEGAL TID BITS

By: Jon B. Felice, Esq.

Volume 2, Issue 1

1. Q: If you have a foreign seller with a social security number, must the purchaser send ten percent of the purchase price (for sales over $330,000.00) to the IRS?

A: As you know, under the FIRPTA rules, to make sure foreigners pay required capital gains tax without leaving the country, ten percent of the purchase price must be paid directly to the IRS (unless waivers are obtained from the IRS prior to the closing). The seller then has to make an application to have the funds returned. However, if the seller does have a social security number, the purchaser is NOT required to send ten percent to the IRS and the full amount of the purchase price can be paid directly to the seller. However, to protect the purchaser, it would be prudent to modify the boilerplate contract to make any requirement to file with the IRS the seller's responsibility, not the purchasers.

2. Q:What is meant by financials and prospectus?

A: When evaluating a building as an investment, the attorney looks at the buildings financial statements, prospectus (offering plan), Attorney General's office filings and amendments to the plan, as well as the minutes of the board meetings. The financials are normally done by an accountant and they should be "audited" to be credible. The financials state the income and expense of the building (profit loss statement) and also have a balance sheet, showing the assets and liabilities and net worth of the building. The financials show how the income of the building is spent, to wit: mortgage, repairs, staff, renovations, the amount in the reserve fund, the amount of cash at the beginning and end of the year. It also shows the sources of income for the building. The offering plan (or prospectus) is what is filed with the Attorney General's office when a building converts from rental to Co-op or Condo or if it is a new construction. The Plan basically states all of the terms and conditions of the offering and is a public record. The plan includes a description of the properties, a copy of the by-laws, a copy of the proprietary lease and all SPECIAL RISKS involved.

3. Q:Can a borrower/purchaser in New York City be required to pay mortgage recording tax at the higher rate (2.175%), rather than 2.05% if the loan is less than $500,000.00?

A: Yes. If the same person obtains two loans within a twelve month period, both can be counted in determining whether the total loans aggregate $500,000.00, thereby forcing the purchaser to pay at the higher rate. However, an individual purchaser may file an affidavit seeking exemption from mortgage tax aggregation if for example the earlier loan is being paid off, or if was an unrelated transaction without the intent to circumvent the aggregation law.

4. Q:Once a Recognition Agreement is signed by the Co-op, does the board have to meet again to re-issue it if the amount of the loan changes?

A: Yes. A recognition agreement must clearly indicate the exact amount of the loan and last minute changes in the amount of the loan may not be simply signed off on by the management company. The management company is not vested with authority to issue or execute a document as important as a recognition agreement. As such, if you know a loan has changed, make sure that new recognition agreements are delivered to the board for execution. Do not wait until the closing and then learn (the hard way) that the management company will not close without proper recognition agreements.

5. Q:What is a renter's policy?

A: This is the equivalent of a home owners policy in a Co-op. Essentially, the Co-op shareholder is a renter, since he/she has a proprietary lease and stock, not a deed. The renter's policy protects the shareholder from third party claims for such things as theft, slip and fall, property damage and is in addition to the coverage given by the buildings master policy. By owning a renter's policy there should be no gap in insurance coverage and the shareholder will be 100% protected. In the event of an interim lease, the occupant should always have insurance.

6. Q:What issues can arise when sellers are in the midst of a divorce?

A: The seller's attorney can not take it upon himself/herself to allocate the net proceeds of the sale 50/50 to husband and wife. If there is a divorce decree already existing, then the funds can be distributed in accordance with the court order. If the divorce is just starting, however, an agreement is needed as to how the funds should be distributed. If the sellers can not agree and do not cooperate, the attorney is forced to hold the monies in escrow pending an order on the distribution of the funds. Alternatively, the attorney can write a check for the entire net proceeds to both husband and wife. Chances are they will not cash it and the attorney will remain as the escrowee/stakeholder.

7. Q:What is a Lis Pendens or Notice of Pendency?

A: These legal words mean the same thing. A Lis Pendens or Notice of Pendency is a document that is used to assert a claim against real property. By filing it, a cloud is placed on title and the world is on notice that someone is making a claim against the title of the property. A summons and complaint must follow within thirty days or else the notice lapses. The Lis Pendens is good for three years and must be renewed to remain as a lien The Courts have found that a broker's commission does NOT justify the filing of Lis Pendens. The equivalent of a Lis Pendens in a Co-op is a UCC-3. By filing a UCC-3 you effectively place a lien on the shares (personal property).

8. Q: What is a CEMA or MECA?

A: Both are interchangeable and mean the same thing. Consolidation Extension and Modification Agreement ('CEMA"), or Modification Extension and Consolidation Agreement.("MECA") When a borrower/owner is ready to refinance, since rates dropped, he/she can avoid very high mortgage recording taxes by doing a CEMA or MECA. By consolidating the existing loan (old loan) into a new loan, mortgage tax is only applicable to the "new money" and not to the previous underlying loan. So, if an

owner has a $200,000.00 loan which mortgage tax was already paid on, and he/she is increasing the total loan to 275,000.00, the old $200,000.00 is consolidated into the new loan and the mortgage tax only applies to the $75,000.00 of new money. In a straight refinance without consolidation, the borrower would have to pay tax on the entire $275,000.00, despite that he/she already paid mortgage tax on the original $200,000.00 loan that he/she is replacing. Thousands of dollars are saved by using a CEMA.

9. Q: What is a 255 Affidavit?

A: In the context of a CEMA or MECA, this affidavit is filed to basically explain, in a formal way, why the borrower is paying a lower recording tax than for the entire amount of the loan. The borrower signs it before a notary and it gets filed and recorded with the CEMA. It recites the “old money” loan and describes the “new money” that is subject to the recording tax.

10. Q: Can the seller or purchaser speak directly to the attorney on the other side?

A: No. Ethically, the lawyer may only speak with his client and not with anyone else’s client. A lawyer needs permission from the other attorney to speak to that attorneys’. The attorney is ethically required to advise the caller that he may not speak to them without their attorneys written consent. However, a party can speak directly to a party, i.e. buyer and seller. A Lawyer may not circumvent the ethics rules by having someone else call on his behalf!

Please feel free to refer your clients to my firm. I will give them free legal advice and take great care of them. Also, our website is www.jbfelice.com, which has a brochure on our firm. Our phone number is 212-867-2700 and our fax is 212-867-2783/7755/7942. We charge $750.00 for closings up to the price of 750,000.00, $950.00 up to a price of 1,250,000.00, and $1,250.00 thereafter. Also, if a broker requests, we will make the fee $750.00 regardless of price as an accommodation. Please do not give legal advice to clients. I welcome your calls and calls from your clients. Jon B. Felice, Esq. Ext. 203

LEGAL TID BITS

By: Jon B. Felice, Esq.

Volume 1, Issue 4

1. Q: May a purchaser move into the premises prior to the closing?

A: Yes. Normally, this would be worked out in the Contract of Sale and would be subject to Co-op approval if the premises is located in a Co-op. Some Co-ops are against occupancy prior to the closing because it raises insurance issues and could lead to litigation if the deal does not close. The “interim lease” usually indemnifies and holds the seller, lessor and Co-op harmless from any and all claims, including attorneys fees, in the event of a dispute. Also, the “risk of loss” shifts over to the tenant in the event of a fire, etc. Normally, the seller remains legally responsible for any risk to the premises during the period from contract signing to closing. In view of this, proof of insurance is often required before occupancy will be permitted.

2. Q: If you are selling a townhouse or 1-4 family dwelling is there any special disclosure required if seller’s broker and buyer’s broker are from the same real estate company?

A: Yes. Condos and Co-ops are exempt. However, if seller’s broker and buyer’s broker are in the same company, Real Property Law, Section 443 requires that both seller and buyer sign a form acknowledging the “dual agency”. A broker has a duty of “undivided loyalty” to his client. This form makes sure that the seller and buyer are made aware of the potential risks of having two agents within the same company. The Department of State has the power to impose penalties, suspend licenses or to void commissions for misconduct. Most importantly, always disclose and always have some paper trail to establish that seller and buyer knew that the agents worked for the same company.

3. Q:What happens if a hazardous violation exists in the premises sought to be transferred?

A: The seller must cure th violation prior to transferring. The premises may NOT be sold with hazardous violations existing, such as “Unsafe building structure” or “exposed electrical wiring.” The seller has the earlier of 60 days or the date on which the buyers commitment letter expires to CURE the violation. If the violation is not cured, the buyer may cancel the contract and get a full refund of the down payment. If the seller refuses in bad faith to cure a violation in a timely manner, the buyer has the remedy of an action at law for damages.

4. Q: What do you do if the buyer is not given a board interview or if the board rejects the candidate in a Co-op after the board interview?

A: If a board interview is not given, that means based on the financial information submitted, the board does not believe the proposed purchaser can afford the premises. If you believe that the board may have misunderstood a complicated financial circumstance, you may be able to convince the management company and the board to re-consider. That would mean providing additional documentation to make it clear that the buyer really can afford the apartment. If, however, the board denies after the interview, it is less likely to change the outcome. The board is protected under the 'business judgment rule' and in all likelihood they have asked the proposed purchaser about his/her finances and they were not satisfied with the answer. The Co-op does NOT have to disclose their rationale for denying in either case.

5. Q: Can a Co-op condition the approval on the purchaser depositing money into escrow with the management?

A: Yes. If a proposed purchaser is on the border line financially, an option to suggest is escrowing maintenance for a period of time. Some Co-op boards will say if you deposit one year of maintenance as security, then they will approve the sale. After a year, the board can continue the escrow for an additional period, or terminate it and refund the money to the shareholder if they believe the shareholder has proven their ability to pay and to pay on time. This is a "conditional" approval and is used to permit a sale to proceed.

6. Q: Is an escrow required in a "possession agreement?"

A: Yes. A possession agreement allows the seller to remain in possession beyond the closing date. This is used when the seller needs time to renovate their new residence before moving in. Normally, an escrow of $2500.00 to $3000.00 is held. The seller is normally given up to five (5) days to get out without charge, except that adjustment are made as of the date possession is actually given to the buyer as opposed to adjusting the midnight before the actual closing date. If the seller holds over beyond the free five days, then draconian penalties are imposed (as a deterrence), normally in the amount of 200.00 per day. The purchaser is also allowed to seek reimbursement from the escrow amount for actual damages in the event the seller holds over beyond the five days.

7. Q: What happens when a lien search or title search shows a prior open mortgage of record that is not the seller's?

A: Often, the seller is panic-stricken when they are advised that a mortgage is on the premises that preceded their mortgage. The seller normally orders their payoff, stock and lease (in a CO-op) and they believe that they have nothing else to do to prepare for the closing. However, a mysterious mortgage sometimes shows up in the search. Normally, that prior mortgage is a result of an error in recording a "satisfaction of mortgage." In other words, the seller, when they bought their premises and obtained a mortgage, had a title company that picked up the payoff of the preceding mortgage and picked up a satisfaction of that loan, but for whatever reason, it is not recorded of record. The seller's ALTA policy, the policy that insured their original purchase, is 100% on the hook to clear this cloud on title. Normally, they will simply issue a clearance letter to the purchaser's title company and title will be deemed clear. Sometimes, however, an actual prior mortgage that has not been satisfied exists. Any sale is "subject to" that mortgage. That would only occur if the purchaser did not obtain a title search and bought it not knowing that a lien actually existed on the premises. "Buyer beware!"

8. Q: Do you buy title insurance when purchasing a Co-op?

A: Most do not. However, we have noticed that more and more are obtaining this insurance. Essentially, it protects the purchaser from litigation in the event that a break in the chain in the transfer of shares is later discovered. Such insurance requires the insurance carrier to defend any challenges to the purchasers right title and interest in the shares of stock of the Co-op. This insurance cost less than the regular title insurance and should be considered.

9. Q: What is an ALTA policy?

A: "American Land Title Association". Title insurance policy that protects the interests in a collateral property of a mortgage lender who originates a new real estate loan. Essentially, the Alta policy will clear any open prior mortgages of record that might appear. The issuing insurance carrier must defend any claims and must protect the owner and the bank from any claims that are made against the property. Hence, if a 'preceding mortgage" was found, that the title company somehow missed in their search, the title company is on the hook and must defend and issue a title clearance letter. One exception to this is when the purchasers attorney knew of the prior loan and purposely withheld that

information from the title insurer and bank. Such fraud or collusion allows the insurance company to disclaim under its ALTA policy.

10. Q: What is a tax lien and can someone buy one and foreclose on the property?

A: Simply, money owed to the government for property taxes is a “super lien”on the property. The government often sells its liens to third party buyers at a discount. The third-party buyer can insist on payment in full or else they can foreclose on the property. They are in a position before the bank. In order to transfer property with such a lien, the lien must be paid.

LEGAL TID BITS

B y : J o n B . F e l i c e , E s q .

V o l u m e 1 , I s s u e : 3

1. Q: What is mortgage tax?

A: Simply, when you record a mortgage (which is defined as a lien on real property), you are required to pay 2.05% of the amount of the mortgage as a tax. If the loan amount is over $500,000.00, the rate changes to 2.175%. Just six months ago, these rates were 1.175% and 2.125%, respectively. If you recorded a mortgage of $500,000 in the City of New York, your tax would be $10,875. This is a closing cost that is stated in the Truth and Lending Disclosure Statement given by the bank to the borrower. This is a substantial closing cost and should be considered when determining total funds needed to close. Do not confuse mortgage tax with State (TP584) or City (RPT) transfer taxes. Those taxes are normally paid by the seller at closing.

2. Q: Who can live in a Co-op apartment?

A: In most co-operative apartment corporations, you should list the actual occupants in the contract of sale. For example, if you know a parent is buying the apartment for a daughters use, the parents and the daughter should be listed on the contract of sale as occupants. This avoids confusion. Technically, most proprietary leases allow immediate family members to be in possession without the board's consent. That includes mother, father, brother, sister, son, daughter, etc. In fact, Real Property Law section 226-b allows such persons to be occupants without them being illegal subtenants. Hence, as long as the Co-op board knows who the family members are, there should not be a problem. The term family member has been construed by the New York Court of Appeals (Barachi decision) to mean significant or gay lover as well. If the customer allows anyone else to be in possession without the written consent of the Co-op, in all likelihood, an illegal sublet case will be brought against them. Notably, a board may not unreasonably withhold consent to a sublet request.

3 Q: Who pays for the package/application fees in a Co-op and Condo?

A: In order to get a board of a Co-op to review a proposed applicant, a fee must be paid. This fee is for the review of the applicants financials, loan commitment, references and recommendations. Normally, the purchaser pays the Co-op. The fee is usually in the $400 to $600 range. In a condominium, a package goes to the board. However, this is a package for informational purposes only, to wit: who is coming into the building and what are they paying for the unit? The board in a condo issues it's waiver of right of first refusal and issues it's common charges letter at this juncture. That grants the seller the right to sell to purchaser and indicates that the seller is current in their common charges. Normally the seller pays these fees. It should be noted however, that the person who pays the fee is technically a matter of contract negotiation. In conclusion, Co-op is normally paid by seller.

4. Q: What is an "Authorization to file a lien" and fee for "lien search?"

One of the first communications received by a buyer in a Co-op is a letter from the bank attorney seeking "authorization to file a lien" and for a check to obtain a lien search. The cost to the purchaser is normally $350.00 dollars. Undoubtedly, the customer will call the salesperson out of confusion and ask what this is. Simply, the bank will not lend money until it conducts a lien search and then files its own lien against the shares of stock for the apartment. The bank’s lien has to be of record as the first mortgage before the loan will be funded. The lien search is done to make sure that there are no other lenders in first position. The bank does not want to accidentally give a second mortgage! It should be noted that the Co-op corporation actually has the first lien and that any bank loan is subordinate to the Co-op corporations lien for unpaid maintenance charges. That is written in the fine print right on the back of the stock certificate.

5. Q: Does "as is" mean that the appliances, plumbing, heat and electrical may not work at the time of the closing?

A: Not usually. Normally, in paragraph 7.1 of the Co-op contract and in paragraph 4 of the Condo contract it states "all appliances shall be in working order at the time of closing." Also, in the Rider to the contract it usually states that "TO THE EXTENT WITHIN SELLERS CONTROL, all heating, plumbing and electrical shall be in working order at the time of closing." Some attorneys strike this language from the contract and the it is up to the buyers attorney to catch it and reinsert it. If the buyer does a 48 hour inspection and finds that something no longer works, the closing usually proceeds and an escrow or adjustment is given by the seller to compensate for the repair. If the problem relates to something in the walls, such as pluming risers, electrical source, insufficient heat, that is NOT within the seller's control, but rather the responsibility of the board. However, the seller is required to put the board on notice and make sure that the board resolves it. Whether the board is required to fix the problem prior to a closing is purely a matter of contract negotiation. Sellers will not usually agree to this since they have no power over when the board will fix it. The purchaser does have a direct claim against the board after the closing occurs. "AS IS" usually relates to the condition of everything other than appliances, heat, plumbing and electrical. No warranties are given.

6. Q: What do you do if the closing date has passed and the seller is still not ready to close?

A: Most importantly, never tell the purchaser that this is unacceptable...that only fuels their fire and serves no purpose other than to upset them. Most contracts are written with on or about language. For example, on or about April 15, 2004. That means either side can get reasonable adjournments up to 30 days WITHOUT ANY PENALTY, and totally within their contractual rights. The goal should be to prevent the buyer from becoming adversarial. On or about closings are intended to be with cooperation between both parties, and non litigious. Purchasers are always advised at the time of contract that either side may adjourn up to thirty days and that they should make sure their lock in with the bank accounts for that potential delay. Do not try to blame the delay on anyone, it is often just a fact of life, to wit: a death, an error, a lost document etc. Just accept that it is within each parties contractual right to delay up to thirty days. That might benefit buyer and that might benefit seller. Of course, if the seller goes beyond 30 days, then that becomes a default under the contract and actual damages can be recovered in litigation if desired. Normally, litigation should be avoided. In summary, tell the client to speak to the attorney about their contractual rights. Never attempt to give legal advise to the customer if you are not an attorney.

7 Q: What is meant by the commitment date?

A: The date by which the buyer is required to notify the seller whether he/she has obtained a commitment letter from a bank in a mortgage contingent contract. If the sale is conditioned upon financing, the buyer may get out of the contract and obtain a full refund of the down payment if their loan application is denied. If the commitment date comes and goes without an action, then the purchaser has waived their right to get out of the contract and must close whether or not they get loan approval. It becomes an all cash deal, essentially. Normally, if a loan commitment is not received by the commitment date, the attorney can get a reasonable extension. Normally, the commitment date is 30 to 45 days from the contract signing. However, if a seller is not comfortable with a mortgage finance contingency, one compromise is to simply allow a 15-20 day commitment period. This gives the buyer a much shorter time to get approval and allows the seller to cancel much quicker. The seller would be preventing the property from being tied up if they are skeptical about the purchaser's finances.

8. Q: When is a board application due to a Co-op and how quickly must the board act?

A: Normally, a board application must be submitted within ten business days, or if a commitment letter is required as a part of the board package, within three days of the issuance of the commitment letter. I have yet to see a litigation over this, but some attorneys have argued that the undue delay in submitting the package damaged the seller who had to carry the property longer than anticipated. Unless the purchaser is dealing in obvious "bad faith," it is unlikely to lead to a court case. It should be noted that every standard Co-op contract has, in the fine print, a clause that the closing may be adjourned an additional thirty days (30) if board approval has not yet been granted. While most boards act diligently, some do not. Especially during July and August. If the delay goes beyond thirty days from the contracts EXTENDED "on or about date," then the purchaser may be able to get out of the deal. It should also be noted that a thirty to sixty day delay is built into most Co-op contracts in the event of unforeseen title issues. In short, if a title issue did arise, the seller could get up to sixty days beyond the closing date. I always change this to a maximum of thirty days or no longer than the expiration date of the buyers commitment letter.

9. Q: Are there different ways to take ownership?

A: Yes. The three most common ways to take title are "Tenants in Common, Joint tenants, or Tenants by the Entirety." Tenants in Common means that each owns a certain specified interest in the property. It could be 50/50%, or 60/40%, etc. You can have three or four owners each with an equal ownership

amount. If a death occurs, the estate takes over the decedent's interest, and the estate essentially becomes partners with the other tenants in common. A tenant in common can bequeath the property by will. In Joint tenancy, if a death occurs, the surviving owner becomes the 100% owner of the property. That is automatic and the shares or deed do not have to be changed. Tenants by the Entirety is identical to Joint Tenancy, except it applies to married people. It has the same right of survivorship.

10. Q: Does a Proprietary lease expire?

A: Yes. However, it is renewed by the board as a matter of regular business. Every contract for a Co-op has a blank space for the date at which the proprietary lease expires. If the term of the proprietary lease is due to expire PRIOR to the expiration of a purchaser's 30 year mortgage, the bank will require some sort of representation from the board that it will renew the lease. Normally, the leases are for 99 years. If the rare instant occurred in which a Cooperative Corporation went bankrupt, and chose not to renew the proprietary lease, the shareholders would most likely succeed to be permanent rent-stabilized tenants in the building. I am aware of only one building in Manhattan in which this happened. In that case, so long as the shareholders were current in paying their maintenance, they had the absolute right to a rent-stabilized lease. This is so rare that I would avoid the topic and simply tell the purchaser that the Board renews them as a matter of regular business. "WE ARE DEAL MAKERS, NOT DEAL BREAKERS!"

In summary, many fine details surround the transaction. Each quarter, I will provide more insight into other areas and introduce interesting topics. My sincere hope is that as salespersons, you will learn as much as possible to answer your client's questions and to impress them. Remember, however, that you can not give legal advise to a client, and should always refer them to an attorney who can fully explain all of the fine nuances involved in a transaction. If you have any questions, please feel free to call me, or your clients may call as well. Jon B. Felice, Esq. 212-867-2700 Ext. 203, or write to Jon B. Felice & Associates, P.C 11 East 44th Street, 8th Floor, New York, New York 10017. E-mail: jbfelice@jbfelice.com. In case your clients (buyers or sellers) ask for a REFERRAL, my firm charges $750.00 for a closing under 500,000.00 (which is the same rate we charge to our top bank clients!) Or, $950.00 for closings over 500,000.00. In hardship cases (or for brokers) we would close for $750.00 as an accommodation.

LEGAL TID BITS

B y : J o n B . F e l i c e , E s q .

V o l u m e 1 , I s s u e : 2

The goal of a broker should be to impress the client. If the client is impressed with the knowledge and information he or she receives from you, it is more likely that the client will stay with you and allow you to procure an important transaction for them. Whether representing a seller or purchaser, you can increase the confidence they have in you by knowing the answers to the difficult questions they ask. Subtle nuances in the transaction do make a difference. No matter how knowledgeable you are, you are never too wise to learn more. Each quarter, I will issue a newsletter which introduces new points of law and/or issues relating to the real estate transaction. My hope is that each broker will find something interesting, which can be useful to you in some way.

1. Q: What is a Possession Agreement?:

A: An agreement in which the purchaser agrees in the Contract of Sale to allow the seller to remain in possession AFTER THE CLOSING for a pre-agreed period of time. The normal possession agreement is for five days at no cost to the seller, so long as the seller puts money into escrow at the closing (usually $2500.00 to $3,000) and agrees to pay penalties (usually $150.00 per day) as a deterrence to holding over beyond the five day period. Possession agreements allow sellers to coordinate a smoother transition into a new premises and to get work done in that premises prior to moving into it. Occasionally, possession agreements can exist for up to two weeks, or more, however the longer the period, the more likely the seller will have to pay money. Purchasers will sometimes ask to be reimbursed for their carrying costs (Mortgage and maintenance) for the five day period, but this is purely a matter of negotiation.

2. Q: Does the purchase price have to be $1,000,000.00 for a "Mansion Tax" to be imposed on the Purchaser?

A: Not Always. If the purchase price is lower than $1,000,000.00 and the purchaser is paying additional consideration to the seller, such as absorbing the State and City transfer taxes, (which are usually paid by the seller) or if the purchaser is paying for personal property, or upgrades, the government could impose the transfer tax if the total consideration reaches a million. Thus, be careful if the purchaser price is around $975,000.00 and the transaction is a new construction or sponsor sale. You would not want to be subject to the tax (1% of the total consideration paid) because your are a few thousand over a million. The transaction can be structured legally to avoid the tax in some instances.

3. Q: Should the Purchaser get an Engineer Report?

A: My advice is that unless it is a house, townhouse or building, it is not necessary, and is a waste of $500.00. If the premises has a roof, boiler, basement, drains, plumbing, electrical, heat, etc., which are within the control of the seller, then an engineer report is needed. It will pinpoint any and all problems with the premises and be used to negotiate the purchase price down. If on the other hand, the plumbing, heating, electricity, etc. are controlled by the Co-op board or Condominium Association, then the seller really has no duty to make repairs on them, and will not give any offset in the price. The purchaser can, however, put a clause in the contract of sale, requiring the seller to take reasonable steps to notify the management of the building and cause the repairs to be made as a condition to closing, even though the seller has no right to repair them on their own.

4. Q: Should the Purchaser get a lead paint risk assessment?

A: My advice is to try and avoid giving any opinion on this. The laws are fairly new and the statute is broadly written. It is not yet clear who might be held liable in the event of lead paint poisoning case. Generally, lead paint is harmful to children seven and younger, and can cause severe damage to their brains. Therefore, if you know your client is pregnant or has young children, it should be obvious that they should have a lead paint test and NOT waive their rights. That should be clear to then from the lead paint pamphlet you give them. Normally, a purchaser would have ten days from a fully executed contract to have an inspection for lead. If lead paint is found, the seller generally has a right to avoid the expensive repairs and terminate the agreement, if the purchaser does not agree to undertake the expense.

5. Q: What is a Payoff Bank?

A: The seller usually has a mortgage on the premises. Therefore, in order to sell the premises, that mortgage must be fully paid off at the time of the closing. The bank that holds that mortgage is the "payoff bank." That bank has their own attorney, who appears at the closing, and who picks up funds and drops off documents, such as the stock , proprietary lease and UCC-3 (satisfaction). The stock and lease are the collateral which the bank holds until the loan is satisfied. It should be noted, that a Co-op management company will not even schedule a closing until it knows the payoff bank (and their attorney) have the old stock and lease, and a payoff letter indicating the total due to the payoff bank.

The stock, lease and payoff letter must be ordered a month in advance of the closing as a minimum. Many banks delay closings by losing stocks and leases.

6. Q: When is a "Lost Stock and Lease Affidavit" used?

A: As mentioned above, the "payoff bank" on a Cooperative loan holds the stock and lease as collateral for the loan given. At the time of closing, that stock and lease must be produced so that it can be officially canceled by the Co-op and a new stock and lease issued. If the bank cannot locate the documents, which does occur, then they can issue a "lost stock and lease affidavit" which the Co-op management company can accept in lieu of the actual original documents. However, most banks will not sign such an affidavit until they are reasonably certain that the stock and lease are ACTUALLY LOST. If they are just delayed in obtaining them, they will not execute the affidavit and everyone has to wait to close. If they are in fact lost, the affidavit I used and a closing can be scheduled. Notably, the wording of the affidavit MUST BE PRE-APPROVED by the Co-ops attorney/closing agent. If the seller did not have a loan, and they lost the stock and lease, then they also would have to execute a lost stock and lease affidavit, which must be pre-approved by the Co-op attorney prior to scheduling a closing. I have repeated this question from the last quarterly because it is a common problem that seems to need more attention.

7. Q: Who pays for extension fees on loans when closings are delayed?

A: Unless the seller has defaulted under the contract of sale, the purchaser must bear the expense. When seeking a loan, the purchaser must attempt to negotiate so that the "lock in" of he rate continues through the closing date in the contract PLUS thirty days. Most contracts set closing "on or about" a certain date. That means the seller can adjourn for up to thirty days. That is within their contractual right and thus, the purchaser cannot seek reimbursement if they incur bank charges for the delay in the closing. It is up to the PURCHASER to make sure their loan is good through the contract date plus reasonable extensions. Notably, in a Co-op, the board could cause an additional delay of thirty days beyond the closing date, and that is also in the standard Co-op contract. That is not the fault of the seller and the seller is NOT liable for the purchaser’s expense in extending their loan "lock in."

8. Q: What is the "Business Judgment Rule?"

A: In a co-operative corporation, the board of directors has the power to make business decisions on behalf of the shareholders. That is their function and the courts recognize that they cannot second guess every decision made by a board of directors. As such, the "business judgment rule" comes into play as a defense for the co-op when denying an applicant who seeks their approval to purchase shares of stock in the corporation. Essentially, the board can deny an applicant approval giving no reason at all. The courts will generally not intervene and attempt to second guess the board's decision. Many boards hide behind this rule, and it acts as a deterrent to denied applicants who want to sue someone when they do not get board approval. EXCEPTIONS DO EXIST, however, such as acts by the board which are fraudulent, collusive, or which violate Federal laws, such as the Fair Housing Act. If a board member sought to buy the apartment for himself or with other board members as an investment, or if they discriminated, based upon any fourteenth amendment right, the Court can review their decision making process and hold them liable for damages if appropriate.

9. Q: What is FIRPTA?

A: A Federal Law which pertains to foreign investors who own and then sell real estate, including Co-ops . When the seller is a foreign person, ten (10%) percent of the sale price (if the transaction is more than $330,000.00), must be paid by the purchaser directly to the Internal Revenue Service. The seller then files a form to obtain the return of the monies, which can take up to 90 days. Most contracts of sale require the purchaser to submit the ten percent with the proper forms at the time of closing, but this can be shifted to the seller's attorney. You must advise your foreign investors that they will get ten percent less than the full price at the closing, although they can file forms and get it returned.

10. Q: What is "Due Diligence?"

A: Generally, the attorney for the purchaser will examine the financials of the building for two or three years, the offering plan, the buildings budget, "special risks," amendments to the plan, and will contact the management company, and read the minutes of the board meetings, if applicable, to learn as much about the risks of the purchase as possible. Of main interest is the likelihood of maintenance or common charges increases, the overall financial stability of the building, pending litigation, taxes, or other possible pitfalls. Of course, in any year, at almost any time, a board of a building can meet and decide to increase maintenance fees or common charges prospectively. That is part of their function as a board, to wit: to determine the income and expense of the building on an annual basis. Due diligence is somewhat subjective, however. Lawyers are not accountants and should not offer accounting advise to purchasers. However, if an assessment is pending or about to take effect, the attorney and broker must be aware of

it and forewarn the purchaser. Assessments that are about to occur can be a subject of negotiation, and they are often split between buyer and seller.

11. Q: What is meant by "Boilerplate Contract" and "Rider?"

A: The "boilerplate" is the standard form Co-op Contract as approved by the New York State Bar Association. The "fine print" in that form is the product of nearly a hundred years of real estate contract law. Virtually all contingencies are provided for and the general terms, and laws, govern the transaction. The "Rider" on the other hand, is the buyer or sellers own changes and modifications to the standard boilerplate contract, and it supersedes the terms of the boilerplate contract. When a lawyer tells you he received a contract with a long rider, that is when red flags go up. Some sellers attempt to "reinvent the wheel" by adding so many exceptions and contingencies to the transaction, that it leads to dispute. Most Riders have five to ten paragraphs and they exist to further clarify certain potential dispute areas. Often, they unknowing simply repeat the language in the boilerplate. In the event of a long rider, the attorney must scrutinize it very carefully to make sure it has not changed basic contract law, and this will add time to getting the contract negotiation phase complete. If the lawyer tells you the Rider is short, or nonexistent, then you know you have a seller who is very direct and just wants to move forward without any "curve balls." In summary, many fine details surround the transaction. Each month I will provide more insight into other areas and introduce interesting topics. My sincere hope is that as brokers, you will learn as much as possible to answer your client’s questions and to impress them. Remember, however, that you cannot give legal advise to a client, and should always refer them to competent attorney who can fully explain all of the fine nuances involved in a transaction. If you have any questions, please feel free to call me, or your clients may call as well. Jon B. Felice, Esq. 212-867-2700 Ext. 203, or write to Jon B. Felice & Associates, P.C 11 East 44th Street, 8th Floor, New York, New York 10017. E-mail: jbfelice@jbfelice.com. In case your clients (buyers or sellers) ask for a referral, my firm generally charges $750.00 for a closing, which is the same rate we charge to our top bank clients!

LEGAL TID BITS

B y : J o n B . F e l i c e , E s q .

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The goal of a broker should be to impress the client. If the client is impressed with the knowledge and information he or she receives from you, it is more likely that the client will stay with you and allow you to procure an important transaction for them. Whether representing a seller or purchaser, you can increase the confidence they have in you by knowing the answers to the difficult questions they ask. Subtle nuances in the transaction, which others may not be aware of make all of the difference. As such, what separates the successful from the mediocre is the formers thirst for information that can be used as a tool. No matter how gifted you may be, you are never too wise to learn more. Each month, I will issue a newsletter which introduces new points of law and/or issues relating to the real estate transaction. My hope is that each broker will find something important that I share with you, which can be useful in procuring a lucrative transaction.

1. Q: WHEN IS A CONTRACT LEGALLY BINDING?

Many purchasers ask this question. Purchasers get very excited when they meet with the attorney, negotiate the terms of the Contract of Sale, sign, initial, and write one of the largest checks in their life. Some think once they sign and send the contract, and tender their check, it is a done deal.

A: My simple response is "the mail box rule." When a seller signs a contract and places it into the custody of the US mail , or overnight service, the offer to purchase is legally accepted. That is true even if the down payment deposit is not yet cashed. Essentially, the seller manifests his or her intent to complete the contract by giving up dominion and control of the contract, making it impossible to further negotiate or change the terms of the agreement. However, if the seller makes any material change to the contract, without having negotiated such changes with the buyer’s attorney, what the seller places in the mail is NOT an acceptance of an offer, but a "counteroffer, " subject to rejection by the purchaser.

2. Q: DO PURCHASERS UNDERSTAND WHAT DOWN PAYMENT MEANS?

A: Many do not. The term "down payment" is often an area of confusion. Purchasers often think it means the amount of cash they are putting down in the total transaction. For example, they are putting down 20% or 30% equity and financing 80% or 70%. They often have this discussion with the real estate broker and the mortgage broker. However, in the legal sense, down payment means the amount they are paying at the time of Contract, not for the entire transaction. Normally, you put 10% down when you send an executed contract back to the seller. It is important to make this clear to the purchaser and seller. I would never allow a client to send more than 10% with the contract, since that money is "at risk" in the event of default.

3. Q: WHAT ARE LIQUIDATED DAMAGES?

A: In a real estate transaction, "liquidated damages" usually equals the exact amount of the down payment paid at the time the Contract is delivered to the seller (the 10%). It is the amount held in escrow by the attorney and the term pertains to what the seller is allowed to keep as damages in the event of default by the purchaser. Essentially, it is a pre-determination, or pre-agreement, that if the purchaser defaults the down payment amount is a fair and reasonable compensation to the seller, since ordinary damages would be too difficult to determine in advance. Before releasing the down payment to the seller, however, the attorney must send notice to both sides, and if objection is received, the attorney must place the money into Court, and the parties are free to litigate or make a settlement.

4. Q: HOW FLEXIBLE IS THE CLOSING DATE?

A: The precise wording of the contract determines the answer. There are four ways to draft the language pertaining to the closing date: 1. "On January 1, 2005," 2. "On or about January 1, 2005," 3. "On or before January 1, 2005," 4. "On January 1, 2005, Time is of the Essence". The first draft, although suggesting a specific date, is implied allowing up to thirty days extension by either side for good cause. That is what the Courts have ruled. The second draft clearly allows extensions by either side for reasonable cause (usually up to thirty days), the third draft means extensions are not permissible or intended and failure to close by the specified date is a technical contract default. The fourth draft is the most drastic making it absolutely clear that if either side default in closing on the date, a default exists, allowing a claim for damages. Time is of the Essence is rarely used in view of the many variables that can necessitate an adjourned closing date.

Caveat: The closing usually occurs when everyone is ready within reason and is rarely a basis for litigation, so long as it is quicker to close then to get court relief. "On or about" is the most common term. The broker must tell the purchaser to lock in a rate for a loan which takes into account the possibility that the seller may need a thirty day extension beyond the listed closing date. If the seller extends within in his or her contractual rights, the buyer has no legal right to compensation from the seller for things such as penalties for extending a lock in time period.

5. Q: ARE ORAL REPRESENTATIONS BY THE SELLER BINDING?

A: No. The contract always states that the entire agreement is within the "four corners" of the written agreement and that no oral representations have been made which are not included. Hence, the parole evidence rule bars the introduction of statements that were allegedly made, but which are not manifested in a writing. The Statute of Frauds requires a writing for a real estate contract. That writing should be all inclusive. It is very important that an "offer and acceptance sheet" from the broker includes all material terms, including personal property inclusions and exclusions. In a rare case, fraud can be argued to get around the parole evidence rule, but it is extremely difficult to prove in Court. One would have to establish that the contract was fraudulently induced in all respects. Oral representations are always deemed to have been merged into the final written contract of sale.

6. Q: WHAT ARE TRANSFER TAXES?

A: Many types of taxes apply in a transaction, which you must forewarn the buyers and sellers about. The most notable ones are the "flip tax," "State transfer tax," "City transfer tax," "Mansion tax," "Capital Gains Tax." Although completely negotiable in a contract, the seller usually pays all of the above, except the "Mansion tax."

1. Flip Tax: imposed in some Co-ops, on seller, as a way to generate income to replenish the reserve money of the Co-op Corporation. This is also relevant to buyers because when the sell, they may have to pay it!

2. State Transfer Tax AKA Deed Stamps a/k/a TP584 tax. This is four dollars on every thousand dollars. If the sale price is 500,000.00, the tax is 500 times $4.00 or $2,000.00

3. City Transfer Tax AKA RPT Tax AKA Real Property Transfer Tax. This is normally 1% of the sale price. On 500,000.00 the tax is $500.00

4. Mansion Tax AKA Cuomo Tax: This is a tax payable at closing from the purchaser to the State for any transaction in which the purchaser buys property for 1,000,000.00 or more. The tax amount is 1%, which means a minimum of $10,000.00

5. Capital Gains Tax- This is a tax the seller pays in his or her gain, subject to many exclusions and threshold levels. For example, if you sell and within two years buy another primary residence, you do

not owe a tax and can "roll the tax" into the new primary residence. When you stop occupying a primary residence, the first $500,000.00 gain is excluded from tax. Accountants should provide this information to the client NOT the broker.

7. Q: WHAT IS A UCC-1 AND A UCC-3?

A: Most brokers do not know what this is, yet is quite simple. Under the Uniform Commercial Code, a form was created to file with the county clerk (UCC-1)to evidence a lien on personal property. Co-operative apartments are legally "personal property" and the shares, which are held as collateral by banks lending money to purchasers, are personal property. You cannot file a "mortgage" on a Co-op apartment. Instead, the bank files a UCC-1 to show its lien on the shares of stock appurtenant to the apartment and has the borrower sign a "security agreement" (which is the equivalent of a mortgage on real property). A bank will not close a loan until it has proof that its UCC-1 is of record as a lien on the shares. The UCC-1 is filed BEFORE the closing. The UCC-3 is even simpler. It is merely the form needed to cancel the UCC-1 or to reflect an assignment of the mortgage loan to another bank. As such, the seller of a Co-op must obtain a UCC-3 if he or she has a "mortgage" on the Co-op apartment in order to cancel the lien and deliver "clear title." The broker should tell the seller to order the stock, lease and pay-off letter from the bank as early as possible. Often this is over-looked and closings are delayed because the seller forgot to get them. The payoff bank sends an attorney to the closing to pick up the payoff, relinquish the stock and lease, and deliver a UCC-3. A closing date can NOT be set without confirmation that seller has the stock and lease.

8. Q: WHAT IS A LOST STOCK AND LEASE AFFIDAVIT?

A: If after due diligence the bank holding a lien on a Co-op cannot locate the stock and lease (the collateral for the loan to the seller), then the bank can sign a "lost stock and lease affidavit." This will circumvent the need to have the stock and lease to close. However, the form of the affidavit must be approved by the Co-op attorney in advance in order to set a closing date. Normally, it takes anywhere between one week and four weeks to get the stock and lease, depending on the bank.

8. Q: DOES AN "ALL CASH OFFER" MEAN YOU CANNOT FINANCE?

A: No. the standard Co-op contract has three options: 1- "all cash, not subject to purchaser getting a loan," 2-"Purchase is subject to purchaser obtaining a loan commitment," 3-"Purchaser may obtain a

loan but the sale is not subject to obtaining a loan." This is paragraphs 1.20.1, 1.20.2 and 1.20.3, respectively of the "boiler plate" Co-op contract. In the contract, you have to pick one. If the purchaser is making an all cash offer, but does in fact intend to obtain a loan, he must pick choice 3. The reason is that the Co-op Board will need to execute a "recognition agreement" to evidence the loan (see below #9) and often if they have a contract that states all cash, no mortgage contingency, the request for a recognition agreement would be inconsistent with the contract. Some Co-ops have raised this objection and it can delay a closing and require an amendment to the contract. The offer and acceptance sheet should make it very clear whether the "all cash" purchaser is going to get a loan anyhow.

9. Q: WHAT IS A RECOGNITION AGREEMENT?

A: Also known as the "Aztech" form, this is simply a document required by a lender to be signed by the Co-op board acknowledging the lien of the bank on the shares of stock of the corporation that relate to the subject apartment. The agreement also creates an obligation by the Co-op Corporation to notify the bank in the event the shareholder defaults in paying monthly maintenance ("rent") to the Co-operative Corporation so that the bank can cure the default of the borrower and protect its lien on the shares of stock. MOST PEOPLE DO NOT KNOW THAT THE CO-OP HAS A FIRST LIEN ABOVE THE LENDING BANKS LIEN, FOR UNPAID MAINTENANCE FEES. As such, the Co-op can foreclose and wipe out the bank's lien which is subordinate. The recognition agreement protects the bank from this happening, giving them the right to pay the open maintenance on behalf of their borrower, and preserve their rights or foreclose if they wish, since a default in paying maintenance to the Co-op is considered a default under the mortgage ("security agreement.") the bank can proceed to foreclose if the default is not cured.

10. Q: WHAT EXACTLY IS A MORTGAGE CONTINGENCY AND COMMITMENT DATE?

A: A mortgage contingency is often confusing to the purchaser. They often assume that because it is in the contract, they are 100% protected from losing their down payment if they cannot obtain a loan. A mortgage contingency means that the purchaser can cancel the contract and get a full refund of the 10% down payment if they duly notify the seller in writing that they have been denied a loan by a date certain. Usually the contract has a "commitment date" of thirty to forty-five days from receipt of a fully executed contract to notify the seller if a commitment has been obtained. IF THE COMMITMENT DATE EXPIRES AND SELLER IS NOT NOTIFIED, THE CONTINGENCY IS WAIVED AND THE PURCHASER MUST CLOSE WHETHER OR NOT THEY GET A LOAN. In view of this, the broker must know the date on which the purchaser is required to have a "firm" commitment from a bank. If the date comes and an unconditional commitment does not exist, an EXTENSION IN WRITING must be obtained to protect the

purchaser's down payment. Normally, sellers freely grant such extensions because they have invested time in the transaction and do not want to start over with another purchaser.

In summary, many fine details surround the transaction. Each month I will provide more insight into other areas and introduce interesting topics. My sincere hope is that as brokers, you will learn everything possible to answer your client's questions and to impress them. Remember, however, that you cannot give legal advise to a client, and should always refer them to competent attorney who can fully explain all of the fine nuances involved in a transaction. If you have any questions, please feel free to call me, or your clients may call as well. Jon B. Felice, Esq. 212-867-2700 Ext. 203, or write to Jon B. Felice & Associates, P.C 11 East 44th Street, 8th Floor, New York, New York 10017