



Some Common and Uncommon Problems in Real Estate Transactions

Seminar Topic: This material provides an in-depth examination of the process and procedure of some common and uncommon problems in real estate transactions.

This material is intended to be a guide in general and is not legal advice. If you have any specific question regarding the state of the law in any particular jurisdiction, we recommend that you seek legal guidance relating to your particular fact situation.

The course materials will provide the attendee with the knowledge and tools necessary to identify the current legal trends with respect to these issues. The course materials are designed to provide the attendee with current law, impending issues and future trends that can be applied in practical situations.





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About the Author and Presenter

Erica is a graduate of Loyola University School of Law and has practiced law for more than 35 years. She concentrates her time, talents and passion on assisting clients to be well-informed about their real estate decisions, whether they are buying a home or an investment, as well as helping them get out of debt and to build a solid financial future. Her field of expertise includes the spectrum of conventional and distressed real property issues for both residential and commercial properties, foreclosure defense, short sale transactions, sales out of decedent's estates and personal and land trusts and counseling her clients in re-establishing their credit and becoming debt free and mortgage free. She also advises investors in need of exit strategies for real estate deals gone sour as well as those who see the current market as a great place to invest, as well as home buyers who are purchasing conventional and distressed real estate. For five years in a row, Erica has been named a Leading Lawyer by the Leading Lawyers Network and has been named a Super Lawyer for 2017 and 2018, she has an AV Rating from Martindale Hubble from both colleagues and the judiciary. The extent of her mentoring younger attorneys in her areas of concentration as well as marketing and law office management has been acknowledged in the Kathryn Barisa Rinella Mentoring Award, given to her by the Justinian Society of Lawyers. Erica is actively involved in her community and profession serving as president of the Association of Foreclosure Defense Attorneys (Founder and President), and Illinois State Bar Association Real Estate Section Council (past chair) and the Board of Directors of IRELA. She regularly speaks at continuing legal education programs on real estate issues. Erica is a Commissioner on the Village of Skokie Economic Development Commission. Her business association memberships include the Justinian Society of Lawyers, Small Business Advocacy Council, and Women's Council of Realtors. She is on the drafting committee for revisions to the Multi-Board Contract. She has maintained her Real Estate License for over 28 years. The mother of two grown children, she has been married for over 34 years to her husband, Jim.

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Timed Agenda:

Time	Description
00:00:00	Program Start
00:00:21	Intro to Some Common and Uncommon Problems in Real Estate Transactions
00:02:06	Multi Board 6.1 or CAR Contract
00:07:23	Make Sure If The Client Is Accepting Tenants
00:09:58	Seller Will Not Turn Off Utilities
00:10:19	Limit Damages To Buyer's Earnest Money
00:11:57	Disclosures
00:15:31	Insurance Claims
00:16:16	Insurance and Permits
00:16:56	Permits
00:19:34	Attorney and Inspection Review
00:21:47	Tax Prorations
00:26:48	Good AR Procedures for Condos
00:34:18	Inspection Issues
00:39:02	Mold and Asbestos
00:42:18	Air Condition Units
00:45:56	Title
00:47:24	Deeds
00:49:45	Trustee's Deed
00:52:51	Pre-closing and Post-closing Possession Agreements

**SOME COMMON – AND UNCOMMON – PROBLEMS IN REAL ESTATE
TRANSACTIONS**

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Review of attorney's role, Good AR, IR, Condo review

Good AR procedures for Single Family Homes

- a. Check to see If you are using the Multi Board 6.1 or the CAR contract
- b. For the Multi Board consider the following issued:
 - i. The term “possession” should include any tenants that have not been agreed to be kept on the premises to be removed
 - 1. You do not want you client being responsible for evicting tenants.
 - 2. Make sure if the client is accepting tenants that the following documents will be tendered:
 - a. Assignment of Lease
 - b. Attornment letters to tenants (formally advising them that rents are to be paid to new owner)
 - c. Substantiation and warranty that all city/village Landlord/tenant requirements have been met throughout tenancy (especially that all Chicago Residential Landlord Tenant Ordinance Requirements have been met. I often ask for a warranty and hold harmless on this

because the penalties can be so extreme)

ii. Make sure that Seller will not turn off utilities but instead will have them transferred to your client. Sometimes Sellers are anxious to stop being billed for something they are not using and don't want to delay turning off. However, the buyer is entitled to make sure all appliances are working during their final walk-through. If that is not done until right before the closing, it could cause all sorts of problems with checking on appliances and HVAC.

ii. We usually try to limit damages to Buyer's earnest money. (If I am on the Seller side, I will only do this with 5%-10% earnest money)

iii. Even though we get the Seller's Disclosures, we ask whether there has been any leakage in the property. The Disclosures generally pertain to the foundation or the roof, but you might want to check on any seepage in other parts of the property or through windows, which the Disclosures might not fully address.

iv. Check on whether there have been any insurance claims. You want to make sure the property is insurable and that you have a basis for terminating if it is not. The Buyer's insurer will run a C.L.U.E report to find out about prior claims, so if you are representing the Seller, make sure they don't lie. Credibility is important in Real Estate transactions.

v. Make sure the Seller knows that they are required to maintain adequate insurance on the property until closing.

vi. Ask if all necessary permits were obtained for any work done on the property.

1. If they were not, your client could be liable for code violations if there is an inspection during their ownership.

2. Alternatively, for your clients to get building permits might require opening up walls to check plumbing and electrical work.
 3. Often, if a property is sold “as is” there have not been permits obtained. Make sure you explain the risks to your client.
- vii. Make sure Attorney and Inspection Review is extended until all issues are resolved.
- viii. Make sure Disclosures are corrected as necessary up to the date of closing.
- ix. Clarify the best way for counsel to communicate with one another.
- x. Clarify that the terms of the attorney review supersede terms in the contract once accepted.
- xi. Tax prorations: You should be (checking online and) asking whether there are any exemptions (other than homestead) or freezes and ask for prorations to be made without those in place for the following year. There are exemptions for Seniors, Disabled, and Veterans. You should really make sure you check the tax bill yourself or check the Assessor’s website to determine what exemptions or freezes have been allowed. If you do not, your client will be paying on a tax bill without the discounts for exemptions and freezes for which they are not allowed to take themselves.
- xii. If you are dealing with the CAR contract, be aware:
 1. There is no right to terminate the contract in AR as there is in paragraph 11 of the 6.1. Only if there is no agreement as to the AR issues can the contract be terminated in the CAR contract, not just because the attorney “doesn’t approve” as in the 6.1.
 2. The escrow fee gets split even if it is a financed transaction.

Good AR procedures for Condos.



- c. Make sure you ask for the following documents, and make your approval of the documents a contingency of the contract:
 - i. Declarations
 - ii. Bylaws
 - iii. Rules
 - iv. Minutes (at least the past year and make sure you get the most current)
 - v. Budget for current and past year and check on whether there are any projections.
 - vi. 22.1
- d. Review at least the minutes, the budgets and the 22.1 to determine:
 - i. Whether there are any special assessments expected.
 - ii. Whether the association seems financially sound
 - iii. Whether there are problems with the association that are not obvious from looking at the property (e.g. foreclosures, tenants, problem owners, security issues) Help your client determine whether there are problems they are not willing to accept.
 - iv. Make sure your client reviews the Rules. Is this a community in which they will want to live? Are there leasing restrictions or allowances that will make living there or investing in the property problematic.
 - v. You may want to look at the makeup of the ownership of the property. De-conversions can be devastating to an owner, especially if they have invested more money into the property to make it to their own liking or are very close between loan-to-value as a de-conversion may depress rather than improve the amounts paid to the homeowners. I would not consider it malpractice to not analyze for this issue, but it certainly is a value-added that can show your client you worth.

- vi. It is not a bad idea to confirm in AR that there are no special assessments contemplated and what the amount of the monthly assessments are. Read the contract for the language that addresses who is responsible for special assessments.
- e. Special considerations for purchasers in smaller condo buildings (2 -6 units)
 - i. Being a litigator has given me special insights to how awful people can be when they have the money to fund litigation, have bad motives and weak co-owners.
 - 1. I have been involved in litigation between owners of a two-unit condo building that cost each side tens of thousands of dollars – purportedly over whether one owner could put a coat rack and boot rack in the common area hallway outside of their unit.
 - 2. I have drafted a Power of Attorney for my client who was in her seventies to give to her son so he could represent her in Board Meetings, because she was regularly ganged up upon by, not only members of the Board, but their roommates who thought they had a say in the operation of the building.
 - ii. Because of these issues, I regularly check the Clerk of the Circuit Court of Cook County website to see if co-owner are particularly litigious so I can give my clients warnings. No guarantees, but worth looking into. It may also advise you of pending foreclosures which may impact the revenues of the Association. It's easy enough to find co-owners by changing the last four digits of the unit your client is purchasing to check the other owners names on the Recorder's website to check against the Circuit Court website.

If you don't think it is worth your time to do this research, explain to your clients how to do it. Lawyers get blamed for things outside of their

control all of the time. Don't let his be one of the issues for which you are blamed.

Inspection Issues

Review the terms of the contract for what you are entitled to request ¶12 of the 6.1 Contract; ¶16 of the CAR Contract.

- a. You are entitled to request issues of health and safety even if under \$250 (e.g. working carbon monoxide and smoke detectors.)
- b. There are some issues you should advise your client against accepting, e.g.
 - i. Extensive mold, black mold. It can be remediated but be concerned about why it is occurring, whether seller is crediting or remediating. What is the basis for knowing that remediation is complete and issue will not reoccur.
 - ii. Asbestos – It is not a problem unless it is airborne. If, for example, there is tile with asbestos, will homeowner be covering it with carpeting? If so, they shouldn't have a problem, but will there be a problem selling later? What if it needs to be removed because of fire or flooding? What will the cost be, since removal requires Hazmat equipment? What if it is piping that is wrapped with asbestos covering? May not be airborne now, but what about costs in the future?
- c. Some attorneys ask for everything in the inspection report, others attach the report (so that Seller has to disclose items if the contract falls through). I p refer to educate my clients and the brokers I am working with about what the contract allows and does not allow.
- d. Special issues regarding Air Condition units when the temperature is under 60 degrees.
- e. An inspector cannot test an a/c unit if the temperature is under 60 degrees on the day of inspection, or if the

temperature has been fluctuating and the a/c unit is still covered and winterized.

- f. We usually ask that the Seller warrant that the a/c was in working order when used during the last warm season. However, the problem is that if it is not working when the temperature warms up, you have to get the Seller to agree to pay for repairs. Good luck! The repairs are often in the neighborhood of \$500 - \$1500. The Sellers are done with this property; the sellers' attorney is often silent – because they are not getting paid for any more work. Consider these solutions instead:
 - i. Make sure the inspection did not note problems with the a/c for which you are entitled to a repair before closing.
 - ii. If there is no way of knowing that the unit will be working, ask for a home warranty, or recommend that your clients obtain a home warranty for themselves. For \$450 -600, there are plans that will cover appliance replacement and maintenance and repair. Again, value-added for a client who does not want to face an uncertain cost when the temperature warms up.
 - iii. Consider a hold-back that can be escrowed until the a/c can be run and shown to be operational.
- g. Make sure your client agrees to the AR & IR letter you send to opposing counsel.
- h. When you are responding to an Inspection request from opposing counsel, review paragraph 12 (6.1) or 16 (CAR) to see what limitations you can put on requests. Remember that Buyer can cancel the contract if you are not willing to give in on repairs, but it is better to get rid of a contract early on – or settle for the least you can.
- i. When an issue needs resolution consider asking for a price reduction rather than a closing cost credit – especially where it might affect financing.

Title

There is no substitute for reviewing title issues prior to sitting at the closing table.

1. Make sure that clients are told to order payoffs in a timely manner
2. Make sure you review to determine if there are judgments that need to be cleared/Judgment Affidavits that need to be filled in before the closing.
3. Check your Paid Assessment Letter to assure that funds have been properly credited to each side.

Preparing Deeds

1. Warranty Deed/Special Warranty Deed
 - a. A Warranty Deed is the most common Deed you will use. It is used for Individual to Individual and Corporation to Individual
 - b. A Special Warranty Deed is generally used by a seller who has not resided in the property and cannot Warrant all of the normally warranted issues that are given with a deed. The warranties are limited to the acts of the Grantor only and are subject to easements, covenants and restrictions of record. It is used, for example, by REO Sellers, relocation sellers services, parties transferring out on a Transfer on Death Instrument (TODI).
2. Trustee's Deed
 - a. Deed out of Illinois Land Trust – You will need:
 - i) All Land Trust fees paid in advance or at closing
 - ii) Letter of Direction from all living beneficiaries
 - iii) Copy of Death Certificate for any deceased beneficiaries
 - iv) Knowledge of how title is being taken by purchaser(s)
 - b. Deed out of a personal Trust – You will need:
 - i) "Trustee's Deed" rather than a Warranty Deed
 - ii) A copy of the Trust Agreement to determine who is entitled to sign the Deed
 - iii) Death certificate(s) of any deceased Trustees
3. Estate transfers
 - a. Non-probated estates
 - i. See if your title company will accept a Bond in Lieu of Probate.

- a) Usually, it requires 2% of the purchase price, copy of the will, if any, Affidavit of Heirship and a Death Certificate.
 - b) The further away from the death the sale is, the more likely you can use a Bond in lieu of Probate because of the diminished likelihood of their being any claims against the estate.
- b. Probated estates – Court will issue an order authorizing the sale of property. Executor will issue an Executor's Deed.

Pre-closing and Post-closing possession Agreements –

Pre-closing possession - Some attorneys absolutely refuse to allow pre-closing possession because of the problems that can arise. Knowing what those problems are and planning for preventing them, may help keep a deal together that might otherwise flounder.

1. Make sure you have a pre-possession agreement in place. A Sample is included with these materials.
2. Get a sufficient security deposit to allow you to evict if necessary. Assume the worst and longest timeframe for the eviction.
3. Make rent equal to the PITI that your client will be paying (or should be paying if their mortgage is paid off – base it on the buyer's mortgage amount) while they are in the property.
4. Make sure the condo association will allow pre-possession – some will not if the pre-possession agreement is for less than a particular period of time (e.g. 6 months, a year) because the Rules are written in a way to prevent AirBnB rentals).

Post-closing possession agreements.

1. The challenge of buying and selling properties at the same time often makes it difficult for a seller to vacate in time for their purchase to conclude. The same rules apply to a post-closing possession agreement as to a pre-closing possession agreement: (1) get an agreement in writing; (2) get a sufficient security deposit to deal with a possible eviction; (3) unless it is spelled out in the contract, get the equivalent of the Buyer's PITI.

Closing

- A. Issues that can arise at closing include final walk-through, punchlist items on new or rehab construction, Sellers taking items they were not supposed to take, Sellers leaving items they were supposed to take that the Buyers now need to deal with removing, Seller not having completely vacated the property, flooding that occurs just before closing. Most closing issues can be resolved with a closing cost credit or holdback. Best to address these before you get to the closing table if possible.