

Contract Addendums & New Provisions To Address The Realities Of COVID-19

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At this time of the pandemic, some of the most impacted areas within real estate and construction are residential purchases and sales and home improvement contracts. Addendums and new contractual provisions are going beyond standard agreements and in some cases, giving a buyer or seller extraordinary rights.

Residential Purchase & Sale Contracts

Increasingly, purchase and sale contracts are using addendums to recognize the unprecedented impacts of the pandemic on real estate transactions, including:

- travel restrictions
- self-imposed and governmentally required quarantines
- closures of governmental and private offices required to fund, close and record transactions

Attorneys are drafting provisions directly in contracts or within attorney review letters. The addendums addressing these new problems give a buyer and/or a seller extraordinary rights such as an option to postpone or delay a closing due to Coronavirus illness, or an option to terminate the contract if, for example, there is a pandemic-related loss of income or employment.

The following is an example of new contractual language addressing the impact of COVID-19 and anticipated issues resulting from the pandemic.

The Buyer and Seller acknowledge and agree that this transaction is occurring during a National Emergency and Pandemic caused by the COVID-19 (commonly known as the “Coronavirus”). The parties further acknowledge and agree that there are Governmental Orders that have been and continue to be issued, together with resulting changes to Municipal Government and general business practices that are currently, and will prospectively, materially affect time frames for performance under this Contract. As such, the closing date hereunder shall be subject to force majeure, and all time periods set forth herein for compliance with any of the above shall be extended due to governmental closures, pandemic, epidemic, catastrophe, accident, weather, storms, acts of war and insurrection, unavailability of materials, strikes, embargoes, moratoriums or other conditions beyond the parties’ control. For purposes of this transaction, some anticipated matters beyond the parties’ control, may include but be not limited to, scheduling inspections, accessing the property, obtaining any required municipal permits (such as certificate of continued occupancy, smoke detector, fire extinguisher and carbon monoxide), obtaining a Bulk Sale Notice in a timely manner, and/or conducting closings. Consequently, the Buyer and Seller do hereby agree to act reasonably and in good faith towards effectuating the purchase and sale of the subject property knowing that strict adherence to timeframes may be impacted by factors beyond the parties’ control, and neither party shall be deemed in default without having been given a reasonable opportunity to correct or cure any alleged defaults, taking into consideration the facts and circumstances as they then may exist at the time of the alleged default.

New Jersey Home Improvement Contracts

The Home Improvement Practices Act requires that all contractors engage in home improvement be licensed, and all home improvement contracts in excess of \$500 (and change orders) be in writing and signed by all parties. In addition, all home improvement contracts must include a detailed description of the work to be performed, materials used, a start and end date, and the total cost.

However, with the pandemic, the required home improvement contract terms, such as the start and end date, could be potentially materially affected, due to any of the following issues:

- Materials are unavailable due to supply shortages
- Construction permits are not timely issued by a municipality
- You or your employees become ill or are exposed to the virus

To avoid potential claims by homeowners for breach of contract, the home improvement contract must include protections to address foreseen and unforeseen circumstances due to the pandemic. Specifically, “force majeure” is a contract provision which, under certain described circumstances, will either delay or excuse timely performance required by the contract. The use of a force majeure provision is common but often overlooked, and the language is frequently buried in the “miscellaneous” section of a contract. The pandemic, however, has brought the force majeure provision to the forefront.

Delays in performance caused by the pandemic are being challenged by referencing force majeure provisions. It is critical to review your agreements and identify this provision. Finding the time to undertake a review of contracts may be difficult while trying to manage day-to-day operations, and it may be more efficient to request a review from counsel.

The key is that this language must be carefully drafted to protect against breach of contract claims for delays or failures in performance caused by the pandemic.

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