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Client Alert: FAR/BAR Contract Considerations in the Time of COVID-19

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The REALTOR®-Attorney Joint Committee is working expeditiously to create educational opportunities aimed at helping REALTOR® Association of Sarasota and Manatee (RASM) members navigate the COVID-19 pandemic. Now more than ever, it is important for REALTORS® and lawyers to work together to protect the interests of buyers and sellers, provide exemplary service, and live up to the professional standards our industry demands of us. Buyers and sellers are understandably nervous about what the future holds, but with careful consideration and thoughtful planning, we can guide them through the process and keep more deals on track for a successful closing.

In this article, we shed some light on the general issues and approaches we have experienced up to this point as a result of COVID-19, and outline considerations you may need to take into account for current and future deals.

Deals Already Under Contract

Coronavirus (COVID-19) Extension Addendum to Contract

Florida REALTORS® responded quickly to the changing market and issued the Coronavirus (COVID-19) Extension Addendum to Contract. Unlike the FAR/BAR contracts, this addendum was not developed by the Florida REALTOR®-Attorney Joint Committee; rather, it was a response to the immediate needs of REALTORS® to provide extensions to keep their deals together. The form serves to put many, but not all, contractual timelines in one place, making it easier for REALTORS® to respond to their customer's request to extend an inspection deadline or closing date. However, the form also amends the financing contingency by allowing a buyer to cancel the contract and receive a refund of their deposit if their loan approval terms or conditions expire or if the lender refuses to fund the loan due to "COVID Restrictions." COVID Restrictions are defined as, "travel restrictions, self-imposed and/or governmental required isolations, potential closures of offices and institutions required to fund, close and record real estate transactions, and actions or inactions of a homeowners' or condominium association." The expanded definition of COVID Restrictions may afford a buyer additional protections not otherwise contemplated in the contract. Listing agents should make sure a seller understands the terms added to the contract by virtue of executing this addendum and seek advice from legal counsel if a more specific contract amendment is needed for their circumstances.

Force Majeure

The Force Majeure clause is certainly getting its 15 seconds of fame these days! Many buyers and sellers are looking to the FAR/BAR contract's Force Majeure clause to determine its applicability to the COVID-19 pandemic and whether the pandemic is a Force Majeure event. It's a multi-faceted provision, so let's break this down. First, events qualifying as a Force Majeure under the "AS IS" contract are defined as an act of God, unusual transportation delays, or wars or acts of terrorism. Epidemics and pandemics are not specifically included in this definition and, as a result, we are seeing many different interpretations being applied in an attempt to make a square peg fit into a round hole. The real answer is we don't know if COVID-19 rises to the definition of a Force Majeure event and it will ultimately be decided by the courts once cases are brought forth.

Even if COVID-19 was an event contemplated by the Force Majeure clause, it alone is not enough to trigger an extension under the contract. The event must cause the delivery of essential closing services to be disrupted, delayed, or prevented such that a party is unable to overcome it by use of reasonable diligent effort. With many closing services being deemed "essential" by Florida executive orders and accommodations being made daily to assist with electronic and other alternative closings, an extension under the Force Majeure clause may never be triggered.

As you can see, this is a nuanced issue that may continue to develop as responses to COVID-19 evolve from the government and businesses engaged in closing services. If the Force Majeure clause is being asserted by a party to delay or cancel a closing, advise your customer to seek counsel to provide guidance and assistance.

Other Legal Defenses for Cancellation

One legal doctrine we've seen discussed in response to a party's inability to perform under the contract is "impossibility of performance." This is a legal defense used by a party being sued for failing to perform under a contract.

Impossibility of performance is most often used when it is objectively impossible for a party to perform under a contract. An example may be that, due to an issued emergency or executive order, closing services are unavailable and it is therefore impossible for certain required closing documents to be properly executed and delivered. In this example, it may be considered objectively impossible for title to be transferred and give rise to an "impossibility of performance" argument. This defense is only available if the knowledge of the facts making performance impossible was unavailable from the time the contract was executed. Specific facts, including a party's ability to avoid the impossibility, determine the outcome in each case. Keep in mind, courts grant this type of defense sparingly due to strong public policy in favor of enforcing contracts.

Cancellation and the Deposit

It is likely you have been asked by a buyer if they can cancel a contract due solely to COVID-19 concerns. If a buyer is beyond their inspection period in the "AS IS" contract, the simple answer is probably no. However, based on the caveats and considerations discussed above, a buyer may try to make a claim on the initial deposit at the same time the seller is trying to make a claim on the deposit due to the buyer's default. Skipping the legalities of who is entitled to the deposit, a disputed deposit under the contract triggers the Dispute Resolution process outlined in Paragraph 16 of the "AS IS" contract. Ultimately, the escrow agent will not release the disputed funds to either party and the parties have 10 days to resolve the dispute. If the dispute is not resolved, the matter must be submitted to a certified mediator. If after mediation the dispute is still not resolved, the escrow agent may have to file an action referred to as an "interpleader," where the funds are deposited with the court and a judge makes the final decision. Lawyers' fees and court fees to see the process through interpleader can sometimes be higher than the deposit itself. If at all possible, try to

resolve the deposit dispute before raising it to the level of mediation and interpleader. Put the agreed upon terms in writing and have both parties sign the agreement. Of course, if the terms cannot be agreed upon, you can rely on the terms in the contract to resolve the issue and determine who will receive the deposit.

New Deals in the Time of Coronavirus

Any new contract entered into should be drafted to account for the COVID-19 pandemic. The COVID-19 Addendum alone only takes into account challenges in securing financing due to specific matters related to COVID-19. For a greater level of protection, the parties should consider amending the definition of Force Majeure to include the COVID-19 pandemic and define exactly what delays may result from the Force Majeure, for example, delays due a party's quarantine, hospitalization, or restriction on travel. By clearly outlining the potential delay, it allows the parties to pinpoint the start date from which to calculate the contract extension. There may be other items specific to your transaction you want outlined in the contract—be sure to negotiate those terms between the parties in advance and include them in writing as part of the contract.

REALTOR®-Attorney Joint Committee is Here to Help

The effects of COVID-19 on real estate transactions are evolving daily as the industry faces new challenges and finds new solutions. We encourage you to reach out to trusted advisors with questions and seek legal counsel as you negotiate deals. RASM's REALTOR®-Attorney Joint Committee is committed to providing educational opportunities to RASM members in a timely manner and we ask that you keep an eye on the calendar to take advantage of upcoming events.

For the most up-to-date legal and legislative information related to the coronavirus pandemic, please visit our Shumaker COVID-19 Client Resource & Return-to-Work Guide at shumaker.com. We have also established a 24/7 Legal & Legislative Helpline at 1.800.427.1493 monitored by Shumaker lawyers around the clock. To receive the latest news and updates regarding COVID-19 straight to your inbox, [sign up here](#).