

## Signing Strategies

### *How To Handle Precarious Agreements So Deals Get Done*

By Steven P. Heller, Esq.

In today's uncertain economy, transactions often unravel in unpredictable and unusual ways such as unplanned cancellations when financing falls through or renegotiations right before agreements are signed. But the current market's anxiety is causing even signed deals to come apart before they start, with unsettled parties scrambling to revive these unresolved transactions and mulling over their basic contract rights.

More than ever, deal makers must consider the legal context to understand the precise point at which they do – and don't – have enforceable written agreements. A brief review of basic contract law reveals several strategies and challenges property owners and managers should consider if a lease deal wobbles despite the existence of a signed or partially signed agreement.

#### **Lease Signing Issues**

A binding agreement exists only when the contract is completed, which means it is fully executed and delivered to the other side. Therefore, always sign and return agreements quickly. And always make sure to address lender concerns, signatories who are out of town, or committee approvals as soon as possible to speed the completion of a binding agreement.

In today's climate, buyers and tenants can change their minds quickly based on news reports or more-recent economic data. For example, a faltering national retailer may negotiate for a shopping center lease, sign the lease, and then send it back to the property owner. Thinking the deal is done, the landlord spends a few days reviewing the document with its lender before sending the fully signed lease back to the retailer.

Meanwhile, the retailer reconsiders and sends a letter withdrawing its signed agreement, canceling the deal. Because the landlord has not yet technically accepted the contract (by returning it signed), the deal is dead. However, if an acceptance and a cancellation cross in the mail, then the "mailbox rule" dictates that the document sent first is the one that is effective. So, unless the landlord sent its document first, the deal would be canceled.

#### **Letters of Intent**

Property managers, owners, and landlords sometimes use signed letters of intent to negotiate deals. LOIs can provide the basis for an enforceable contract if they clearly identify the price and all other basic terms of a completed deal. Usually LOIs are intended to be non-binding and contain a disclaimer stating this fact. However, if the LOI has an inadequate disclaimer or no disclaimer at all, a court might determine that the LOI, alone, binds the parties. The likelihood of this result is enhanced if an LOI is coupled with actions consistent with an enforceable agreement that imply a deal does exist despite the lack of a formal contract.

#### **Negotiate Restructured Deals With Care**

If a signed deal threatens to unravel, scour the provisions of any suspect documents for overlooked termination rights. A party anxious to escape a signed deal may quietly wait for a slip up.

For example, suppose a purchase agreement contains an obscure provision that allows the buyer to terminate if the seller fails to record a minor document within 30 days. While the buyer presses the seller

to restructure the deal, the 30 days speed by without the seller's recording the document. The buyer then exploits the mistake, terminates the agreement, and exits the deal on a technicality.

So, if restructuring a fully signed deal, do not to squander valuable contractual rights amid the distractions of the negotiations process, otherwise the deal may be subject to cancellation. By securing a binding agreement, a party obtains valuable legal rights and remedies against the other party if a breach of contract occurs. During negotiations to restructure the terms of a deal, it's natural that the parties' respective leverage would radically change if an enforceable agreement goes into effect or terminates. Accordingly, parties should perform all legal obligations under any executed agreement while restructure discussions continue.

Uncertainty about the legal enforceability and the practical utility of a written agreement can create unpredictability that most property owners and managers don't want, especially in today's economy. However, an awareness of the legal context and use of careful strategies can revive precarious deals while safely preserving the parties' legal rights.

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