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Should the Seller Have the Right to Cure Defects?

Sometimes, a purchase agreement will provide that after the buyer discovers a defect during its due diligence (for example, a physical defect or a troublesome lease), the seller must first be given the opportunity to cure the defect before the buyer may cancel the agreement.

Should the seller be given the right to cure? The best reason for giving the seller the right to cure is that the deal stays alive, and the seller has the opportunity to remedy the buyer's objections. This only seems fair. There are a number of reasons, however, why it may not be wise to give the seller the right to cure.

First, there is seldom an objective standard for determining whether a suggested cure should be acceptable to both parties. Suppose a document review contingency allows an objection based on the documents revealing a "material defect" in the property, and that one of the documents reviewed discloses contamination slightly below regulatory enforcement standards. The seller may reasonably believe that no cure is necessary. The buyer might just as reasonably believe that enforcement standards could be raised and demand further cleanup. The resulting dispute may be one that can be resolved only in court. As a result, the seller's right to cure may lead to litigation rather than mutual agreement.

Second, the right to cure can prolong the buyer's ability to nickel-and-dime the seller. If the market is a seller's market, the seller will not want to put itself in a position where the buyer can come back more than once to seek a discount in the purchase price. By eliminating the cure right, the buyer is forced, earlier in the game, to decide whether to proceed with or walk from the deal.

Finally, the buyer may uncover issues that cause it not to want to buy the property even if the defect is cured. For example, if the buyer discovers a significant number of material defects in the property, it may decide that it no longer wants to buy the property even if the seller cures all of the listed defects. If the seller has the right to cure, it may not be so easy for the buyer to walk.

If the buyer and seller elect to give the seller the right to cure, they should address the following issues in the purchase agreement:

- The buyer's notice of objection should specify as precisely as possible what actions by the seller constitute an acceptable cure.
- The seller will want the right to elect whether or not to cure the alleged defect.

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If, for example, the buyer's recommended cure is to have the seller remove every ounce of environmental contamination from the property, the seller may wish to reserve the right to refuse to undertake a cure. This right should be clearly enumerated to avoid a claim that the seller's refusal is a violation of its duty to use good faith efforts to satisfy the contingency.

- On the other hand, the buyer should insist that the seller be obligated to cure certain defects. For example, if objections to title exist that would typically be satisfied at closing (for example, the payoff of the seller's mortgage, payoff of back taxes, etc.), the seller should be obligated to cure such defects at closing. Furthermore, the buyer may want to insist that the seller must make a good faith or commercially reasonable effort to cure. In such cases, the seller frequently insists that it either not be required to spend any money to cure the defect or it may, at least, limit the amount it is required to spend.
- If the seller attempts an unsuccessful cure, or elects not to cure, the buyer should be given the opportunity afterward to either terminate the agreement or waive the defect and proceed to closing.

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