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## Acquisitions & Sales: Some Key Issues for Sellers



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**WHEN NEGOTIATING A COMMERCIAL PURCHASE AGREEMENT** there are several key issues a seller may want to consider, including the following:

- **Due Diligence** – Buyers often want a study period to examine the property, but before a buyer conducts any invasive tests, the seller should make sure the buyer has appropriate insurance and indemnifies the seller from any damages.
- **Representations and Warranties** – Whenever a seller must provide representations (“reps”) regarding its property to a buyer, the seller will want to limit the scope and nature of the reps it makes, including limiting them to the seller’s knowledge when appropriate.

In some cases it may be appropriate for the seller to say it has not received any notices of a matter (e.g., legal violations), rather than going further and making broader reps. Another consideration is how the buyer’s due diligence should modify seller’s representations and warranties. This ties into our next point.

- **Change of Circumstances** – One subtle issue that sellers often fail to address is how a change of circumstances could cause the seller to unintentionally breach its reps and warranties. For example, a buyer could discover a lease amendment or governmental notice that the seller failed to disclose or which conflicts with a seller rep (even though there are no other material consequences). Should such a discovery allow a buyer to walk from the deal? Or claim other damages arising from a technical seller default?



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- **Remedies** – If the buyer breaches the purchase agreement, usually the only remedy the seller will have is the right to keep the buyer’s deposit. Therefore, it is important that the deposit be sufficient to compensate the seller for the time the property is off the market. As to buyer’s remedies, a seller should try to avoid the buyer’s right to pursue damages. A compromise on this point is a reimbursement of the buyer’s due diligence expenses (perhaps capped), and only for so called willful seller defaults.

**Final Thoughts** – The seller would like a buyer to close as soon as possible on the commercial real estate purchase and would prefer to offer minimal representations and warranties. The buyer wants sufficient time to review the physical, environmental and legal condition of the property. The extent to which each party achieves its objectives depends on their bargaining strength, nature of the project and market conditions.



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