

# Twelve obstacles to closing your transaction

Getting to closing is the goal of any real estate transaction, but it isn't always easy to reach. A few simple obstacles can delay or kill your closing. They can come during negotiation or happen because of timing, due diligence (or lack thereof) or finances. Here's what you should watch out for:

## Negotiation obstacles

- Avoiding the hard issues. Have you ever heard parties in a negotiation say, "Leave it to the lawyers to work out the details," or, "We'll figure it out at closing"? It's code for: "We're too chicken to talk about the hard stuff." If you have inadequate documentation that fails to clarify all important business terms, issues will pop up throughout the transaction and at closing, such as how will net profit be calculated when determining an earn-out payment? Make sure all parties have a consistent understanding of terms through proper documentation.
- Deal-killers. Lawyers sometimes push deals to the breaking point - and even over the cliff - by arguing about language of minimal importance. Every negotiator should understand that if she wins every point in negotiations, she should watch her back at closing. Every transaction needs a deal-making lawyer, not a deal-killing lawyer.
- An abused party. A party who has felt abused in negotiations

will often become immovable at closing. The abused party will arrive at closing with the attitude that he will give the other side



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"not one penny more." This attitude makes resolving routine last-minute issues nearly impossible.

## Timing obstacles

- No clear timelines. When is your closing date? Is it date-certain or is it based on 30 or 60 days from something else? If it's something else, is that time frame determinable? Prior to signing the agreement, outline key dates to make sure they flow to an ultimate closing date.
- Last-minute schedules. Don't wait until closing to complete asset lists, liabilities assumed or exhibit documents such as non-competes and assignment documents. If you haven't attached exhibit documents well before closing, be prepared to compromise on the terms you want or need.

## Due diligence/ title obstacles

- The survey. If a survey is going to be required, or if your lender is going to demand extended-coverage title insur-

ance, be sure you order the survey immediately. Surveys - and the problems they bring up - take time and often raise issues.

- Legal descriptions. It is pretty frustrating to get to closing and learn that the recorder will not record your deed due to a faulty legal description. Work with your title company to make sure that yours is accurate and that it is consistent with the survey.
  - Title exceptions. Everyone has experienced last-minute title exceptions, unrecorded or recorded leases, mechanics or judgment liens. You should request an updated preliminary title report shortly before closing to confirm there is nothing new.
  - Environmental discoveries. In nearly every significant real estate transaction, a Phase I environmental site assessment is ordered, and everyone progresses based on finding nothing. Identify red flags, and if there are any, give sufficient time to receive the Phase I and address any issues.
- ## Financial obstacles
- Prepayment penalties. If the seller doesn't calculate his prepayment penalties into the financial aspects of the sale, he can arrive at closing without enough funds to close. Prepayment penalties can often be reduced through negotiations, but not if you wait until the closing date.
  - Lender delays. Often, lenders won't deliver loan docu-

ments until the day before closing in an effort to minimize negotiation of their standard language. An issue growing in frequency is having a primary lender that is participating portions of the loan. If one of the participants drops out at the last minute, the lender will not close until she finds a replacement, leaving the parties at the lender's mercy.

- Defeasance. Defeasance is a process by which a seller can complete a transaction despite having a prepayment prohibition in its existing loan. This situation arises when a lender has participated portions of the original loan to participants who have a right to a specified stream of payments.

In the defeasance transaction, the mortgage payments are substituted with government securities, thus enabling the seller to pay off the mortgage and sell the property. As with many of the obstacles, although a defeasance transaction is often available, it takes time.

Every experienced purchaser, seller or practitioner can run into obstacles that delay closing. By following this checklist, your transaction should go smoothly, and you should make it to closing in a timely and painless manner.

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