



Law Office of
KEVIN F. JURSKINSKI
& Associates

IMPORTANT ISSUES TO CONSIDER WHEN SELLING OR BUYING A HOME IN FLORIDA AND WHY LEGAL REPRESENTATION IS ESSENTIAL

By: Kevin F. Jursinski, B.C.S.

This Article addresses some key points that are essential to both Seller and Buyer as it relates to real estate transactions in Florida. As a Florida Bar Certified Real Estate Attorney, I have successfully handled thousands of real estate transactions and have also been involved in hundreds of contract disputes as well as lawsuits involving real estate transactions. Accordingly, I have identified a number of key issues to consider. Notwithstanding these factors, however, I always recommend that both Buyer and Seller each have their own legal representation since the acquisition of real estate is generally one of the largest investments that an individual makes in his/her lifetime. Here are some key issues to consider:

PRICE:

Price has always been an extremely important factor in a real estate transaction. It is absolutely critical, in today's real estate economy because of the significant changes in Florida real estate values. For example, historically, Florida has had a 6.7% annual increase in residential prices year over year with these figures tracking Florida residential prices from 1991 up through the real estate decline in 2007. Since that time, numerous areas have experienced volatile real estate pricing with Lee County, for example, having drops in median price almost approaching 50%.

Because of our current recovering real estate economy, Lee and Collier Counties have experienced significant increases in home prices having posted price increases of more than 39% from 2012 to 2013 in Lee County with Collier County following close by with 28%. Therefore, it is absolutely important to identify the pricing on a home. Here are factors to consider:

A. Property Assessment. An initial starting point would, of course, would be the property appraisers website for the County. For example, in Lee County or Collier County, you can go to www.leepa.org or www.collierappraiser.com and you can then obtain the current tax assessed value and also check the history of the tax assessed value.

B. CMA/BPO from Real Estate Agent. Another key point in establishing value is to obtain the services of a real estate agent. If you are listing the property, of course, your own real estate agent should have prepared a comparative market analysis. In certain parts of the country, this may be known as a Broker's Opinion of Value, or Broker Price Opinion, but the long and short of it is that this is an evaluation of the current market price for the particular property that you are selling or buying. The listing agent should prepare this for the Seller and, if the Buyer is working with a real estate agent, they should also request information.

C. Appraisal. Another area that can be utilized to establish value is an appraisal but keep in mind that appraisals are a look back at valuations rather than a good estimate of the current trend and appraisals are generally used for financing (See discussion below).

D. Personal Property Exclusion. You should exclude items of personal property and the Lender involved should be aware of personal property items but the appraisal and loan should be based upon price of the home only and not on items of personal property. Generally, values for items of personal property are 10% or less of retail costs of these items.

SECURITY DEPOSIT:

Seller should never accept nor should a Buyer allow Seller to hold the contract deposit. Always have the security deposit put in escrow, preferably with a Florida Attorney, into a Florida Attorney's trust account. The Seller needs to be careful of scam cashier's check deposits with demand for return on the cashier's check that is worthless.

Buyer may want to provide that the deposit is made upon acceptance of the Contract by the Seller. The larger the deposit, the greater the risk for the Buyer but a solid deposit also demonstrates strength and sincerity of the Buyer and may also enhance the view of the contract by having a substantial deposit. Generally a deposit between 2% to 5% of the purchase price is adequate and acceptable on most contracts.

Seller needs to be cautious of a Buyer/manipulator who puts a nominal amount down and simply does so to tie up the property to assign or flip the contract.

CLOSING DATE:

This should be a realistic estimation of the closing date on the subject property. The closing date should take into consideration not only the due diligence period of inspection, the timing of when the Seller wants to close and the Buyer wants to purchase, but also issues such as ordering a survey and financing. Generally, Lenders are going to require a certain period of time to bid out and have an appraisal obtained, review the credit of the borrower, review the title commitment and address any closing issues. Therefore, the closing date needs to be realistic and 45-60 days is generally the norm for residential closings that require financing and a provision should be included in the Contract for reasonable extensions if necessary based upon identification of items due the due diligence period or financing underwriting requirements. Even in a cash closing, there still should be adequate time to properly perform all of the requirements of the contract.

CLOSING EXPENSES:

Seller may want to provide a net out amount for closing expenses so that the price looks better. In certain circumstances the Seller, especially in a for sale by owner, may want to have all of the closing items addressed and taken care of and identified as being paid by Seller so that Buyer can focus purely on the price and emphasize that no expenses will be

incurred by Seller nor hassle with anything other than inspecting the property. As indicated in the section below on the sale of new homes, there may be builder or developer incentives on closing costs.

TITLE INSURANCE:

Buyer should absolutely obtain title insurance including purchases from relatives and friends for cash. Any financed transaction will require title insurance. Obtain a fee quote from your attorney and compare it to a title company. Generally, attorney fee quotes are very competitive with title company fees. A concern that has arisen in the last several years is the purchase from entities which have obtained properties through foreclosure. The concern is that, often times, the Lender's counsel who does the foreclosure (commonly known as "foreclosure mills") include in their contract price that they get the opportunity to also handle the title closing and issue the title insurance policy for the Buyer when the property closes. The problem arises inasmuch as the law firm that has done the foreclosure insures over its own work and oftentimes if it failed to properly identify the necessary parties in the foreclosure action will, likewise, miss this on the title. While the Buyer may get insurable title it may not necessarily mean the title is marketable.

A further discussion should take place between the Buyer and his/her counsel to explain the difference between insurable title and marketable title. A Buyer needs both insurable and marketable title to protect his/her investment.

HOW TITLE IS TO BE HELD:

This is an important and often overlooked aspect of a real estate closing. For rental properties, consider taking title in a Florida entity (Corporation, LLC or Land Trust) rather than in your individual name. This is one way to avoid personal liability in circumstances where a casualty loss or damage claim occurs which exceeds your insurance policy limits or is outside your insurance coverage. Consider premises liability claim of a tenant if you are landlord in a rental property.

Some Lenders on residential properties will have restrictions taking title in Florida entities. These may result in higher financing rates for title taken in the name of a Florida corporation or a Florida limited liability company. This may not be so if taking title in a Florida Land Trust under Florida Statute 689.071. Florida Land Trusts are modeled after the Illinois Land Trusts and, oftentimes, Lenders will allow property to be held in the name of a trustee under a Florida Land Trust (or Estate Trust) without the restrictions in their financing versus property taken by a of a corporation or LLC. Again, a qualified real estate attorney can discuss these particular terms since it could be significant, especially if you later decide to change the status of title. You may find that such a change in title is not available based upon the mortgage or; alternatively, even if available, may cost you documentary stamp tax and additional attorney's fees and costs when making a change later. Better to evaluate this up front and make an informed decision when first accepting title.

Foreign Nationals have other issues in reference to acquiring real estate in Florida. Non-U.S. Citizens taking title to real estate in Florida, we recommend that they seek the advice of a qualified tax attorney who specializes in international tax law with knowledge of their particular country's tax requirements. For example:

We do not provide tax guidance but we are aware of issues that many of our Canadian clients have addressed with their tax counsel on properties that we have closed for them. Specifically, Canadian citizens who purchase US property, as the case here, will pay estate tax at the time of death on the purchase. Some estimates are that this is at 35% to 40% of value less an exemption (please confirm this with your tax advisor).

As such, many of our Canadian clients have decided to take title as husband and wife with tenancy by the entireties (joint tenants with the right of survivorship with some added benefits under Florida law) and also consider other approaches, inclusive of adding children onto the title to avoid the issue of the estate tax.

Taking title in a Florida Land Trust under FS 689.071 is another option to discuss as is the use of a number of type of both US and Canadian entities.

Taking title held in a life estate with the remainder interest to the children is yet another possibility. Each situation has benefits and drawbacks.

There are a number of varieties to discuss with your tax advisor and you be aware of the estate tax.

With that said, a Canadian buying a home in the US is enjoying probably the best investment from the standpoint of the Canadian dollar to the US dollar that we have seen. Not sure it will bet better but it is a great time to buy and that is a reason why so very many Canadians are closing deals in Florida.

In such cases, a discussion should be undertaken as to how a foreign national takes title to Florida property.

INSURANCE – REVIEW OF POLICY:

As purchasing a home is the largest expense a homeowner will ever incur, it is advisable to obtain homeowners insurance to protect your interest in the property. When a purchaser obtains a mortgage, the mortgage company will require that the mortgagor obtain an insurance policy which names the mortgage company as an additional insured under the policy in order to protect its interest in the property. If a mortgagor later cancels the insurance policy or fails to renew the policy, the mortgage company will "force place" insurance coverage on the property and pass the exorbitant cost of such a policy on to the mortgagor. This is not a scenario which a homeowner wants to encounter as he will be paying significantly more money for lesser quality insurance than had he simply obtained an insurance policy on his own.

When searching for residential property insurance for a single-family home, the most common policy form to be had is the HO-3 Special Form policy. This is known as an

"all-risk" or "open peril" policy which means it provides coverage for direct damage to the property caused by any event except those events which are excepted or excluded from coverage. This differs from "named peril" coverage (such as the coverage provided by the HO-8 form) which provides coverage for direct damage to property caused by only those events identified in the policy.

HO-3 policies provide different coverages with different limits of liability. This information can be obtained from the policy's declarations page.

Section I Coverages – Property

- Coverage A: this is the main coverage under the insurance policy and provides coverage to the dwelling.
- Coverage B: provides coverage for additional structures on the property which are not attached to the main dwelling.
- Coverage C: provides coverage for personal property such as furnishings and clothes, i.e. those items in the home which are not considered part of the dwelling.
- Coverage D: provides coverage for loss of use, i.e. the additional living expenses incurred if you are unable to reside in your home after a covered cause of loss.

Section II Coverages – Liability

- Coverage E: provides coverage for personal liability, i.e. if you are sued because someone is injured while present on your property.
- Coverage F: provides coverage for medical payments, i.e. limited coverage for medical expenses incurred by a person injured on your property.

As everyone is aware, property insurance is a hot topic in Florida due to the never-ending rise in insurance premiums. In the last five years, Florida property insurers have raised premiums and altered their policies to provide less coverage than what was being offered only a few years ago. Unfortunately, this has caused people to shop for insurance coverage merely on the basis of price without regard to the quality of the product being purchased. Just like anything else, not all insurance policies are created equal and homeowners must be mindful that they are comparing similar products when searching for a new insurance provider. Many people do not realize that they have purchased an inferior insurance policy until they have a loss and are informed that their insurance policy does not provide coverage for their particular loss event. The \$300 saved in premium expense does not outweigh \$50,000 in damages from a non-covered loss.

Another factor which a purchaser may want to consider is whether to purchase replacement cost coverage for his personal property in the event such property is damaged by a covered loss. The standard HO-3 policy will pay for damage to personal property at actual cash value, meaning the current value of the property subject to depreciation for it being in a used condition. If you paid \$2,500 for a 55" flat screen

television five years ago and it is damaged in a fire, the insurance company will only pay you for its current depreciated value, say \$500. If you were to purchase replacement cost coverage, the insurer will pay for the actual cost to replace that 55" television (or television of similar quality) if you actually replace the television.

Another question which arises when obtaining insurance coverage relates to Ordinance and Law coverage. As building codes change, existing homes are exempt from compliance with the new code provision. However, when that home becomes damaged and must be repaired, the repairs must be made in compliance with building codes as they exist at the time of the repair. Property insurance policies are designed to pay for repairs to a building that will put it back in the same condition that it was prior to a loss. The policy is not designed to pay for items that were not present prior to the loss. If there is an increase in the cost to repair the home which is due solely to the imposition of a law or ordinance, then the homeowner may recover from his insurer up to 25% of the insurance policy's limit of liability under Coverage A. At the time a policy of insurance is purchased, the homeowner may elect to pay an extra premium and be able to receive up to 50% of the insurance policy's limit of liability under Coverage A for those expenses actually incurred because of a change in building codes.

Statistically speaking, the most common causes of loss are fire and water damage, i.e. a leaking pipe. Five years ago, most insurers provided coverage for water damage caused by a leaking pipe regardless of the amount of time the pipe was leaking as long as it was hidden and the homeowner was unaware of the leak. Now, many insurers exclude coverage for water damage caused by a leaking pipe if the leak was continuous for "weeks" or a "period of time." This example is only given to demonstrate that not all policies are the same and that less expensive policies cost less because they provide less coverage.

Homeowners would be well advised to seek the advice of an attorney who is familiar with insurance policies in helping them evaluate which policy will be better for their particular situation. While no insurance policy is perfect, some are better than others. Consumers should also be aware of how insurance carriers treat their insureds at the time of the loss and the steps they take, or do not take, to resolve a claim quickly and fairly.

QUALIFIED INSPECTION BY A LICENSED HOME INSPECTOR:

Seller should offer and Buyer should require adequate inspection by a qualified home inspector, preferably one who is not only licensed as a home inspector but is also a general contractor. Be cautious of the inspector's agreement and the disclaimers (not liable for pool inspection, not liable for roof inspection, damages limited to the amount paid by the Buyer to the home inspector, etc).

Florida Statute 468.83 provides for a format and procedure of a licensed home inspector. You should also identify the manner and method in which fees are paid and the type of report you will be receiving.

Seller needs to avoid inspection offsets and holdbacks since this may reduce the purchase price and also create issues post-closing in regard to holdbacks, offsets and the like. I often recommend for both Seller and Buyer that the Seller allows for a full and complete inspection and the Buyer's right to cancel the contract for whatever reason after a full and complete inspection. However, we also provide that there will be no contingent offsets for repairs and other issues. If we allow for a 10-15 day period for inspection, at that point in time the Buyer has to decide whether he/she wants to proceed or it wants to cancel out. If he/she wants to cancel out because of repairs, at that time, the Seller and Buyer can negotiate and the contract can either be cancelled and the new purchase price negotiated with the additional repairs or the Seller will not be obligated, rather than having repair issues linger through the contract and post-closing.

Both the FAR/BAR Rev. 6/10 and NABOR (Naples Area Board of Realtors Contract provides for inspection caps on amounts of repairs together with formats and procedures. If the FARBAR "As Is" Contract is not being used (or an Addendum with an "As Is" provisions as is recommended as above set forth) then the Seller and Buyer both need to be very aware of what their rights and remedies are and the time periods for reporting repairs and making claims under a Contract that is not purely an "As Is".

HOME WARRANTY:

Often overlooked is the fact that a Seller and Buyer can negotiate a warranty on sale of home as a possibility and a marketing tool for the Seller and some protection for the Buyer. Seller should investigate the cost of a warranty and, if same is available, potentially offer it and include it in the price of the home. If so, the type of warranty should be specifically designated and the Seller should have a copy of the Warranty and the coverage allowance as provided in the contract. The Seller should also, of course, know and include that in the purchase price as to the cost of the Warranty. The Buyer should consider that a home with a warranty would give them additional protection for post-closing issues. A Buyer of a resale home from a Seller (other than a new home developer or builder who has built the home) should consider that this warranty would be similar to what a Buyer of a used car would get when it obtains a manufacturers "certification" or "certified" used car designation. The warranty provision is an often overlooked section of the contract.

NEW HOME EXTRAS:

Buyers of new homes should also recognize that there are certain warranties available for them on new homes as well as certain warranties available to them as Buyers of Condominium units from the developer. Again, for a full detailed analysis of the warranties available on new homes, the Buyer should consult with a qualified real estate attorney.

FINANCING CONTINGENCIES:

Thoroughly review the contingency provisions and especially the time periods required for the Buyer to proceed to obtain financing. The overarching theme in the financing

contingency is that the Buyer must use a “good faith effort” to obtain financing. This may include more than one loan application and, generally, would require the Buyer to apply for and attempt to get financing and, even if turned down by the first lender, would require the Buyer to proceed to demonstrate that the Buyer was unable to get financing by demonstrating a good faith effort by seeking financing from another Lender. This is subjective analysis but is important especially if there is a deposit at risk and will avoid any claims that the Buyer failed to use good faith effort and would forfeit his/her deposit.

DODD FRANK APPLICATION – PURCHASE MONEY FINANCING:

Many Sellers and Buyers are unaware of the new rules governing the sale of residential property with the Seller acting as the lender and providing purchase money financing or “carry back financing”. See the article that I published on May 31, 2013 in the Business Observer and on June 4, 2013, in the Fort Myers News Press (www.kfjlaw.com/files/2013/06/The_unintended_consequences_of_Dodd-Frank_Business_Review_5.31.13.pdf and kevinjursinski-122012.cert-lawlinks.com/files/2013/06/Dodd-Frank-Act-Government-Overreach-into-private-real-estate.NP_6.4.13.pdf) . Please note that since the publication of the Article, there have been some additional modifications to the Dodd Frank Act which include an implementation of a qualification by a Seller for a one-time ability to avoid certain provisions of the Dodd Frank Act including the balloon mortgage provision based upon the Seller meeting certain requirements.

Again, for a more detailed discussion, the Seller and Buyer involved with purchase money/carry back financing absolutely needs to discuss this matter with a qualified real estate attorney. A recent study has shown that the Dodd Frank Act has had a significant amount of regulations promulgated and one service has identified the fact that there has been more than 5,000,000 (Yes 5 million) words of rules and regulations interpreting the Dodd Frank Act which rules and regulations would mean that the Dodd Frank Act interpretation of rules and regulations is more than three times the length of the Internal Revenue Code. Therefore, of course, one should always try to get the very best opinion in regard to this matter as well as to consider the fact that this new law has not yet been interpreted by any significant cases.

DEFAULT PROVISIONS IN THE CONTRACT:

Carefully read the default provisions and the printed terms as to the rights of Seller and Buyer upon a breach by the other party. Identify what legal remedies are available to each party. Be cautious about contracts that allow the escrow agent to determine how the dispute is to be settled and the format. Florida has one of the best court supervised mediation and arbitration programs in the country. If an alternate dispute resolution provision is contained in the contract make sure that the format and procedure allows for use of the Florida mediation and arbitration rules and statutes rather than an alternative private format which is generally more costly and time consuming. See your attorney to discuss more on this important factor.

CONTRACT DISPUTES – NON DISCLOSURE ISSUES OF SELLER AND SELLER’S REAL ESTATE AGENT:

Please be aware of the fact that even in the contract that has an “AS IS” provision, there are disclosures imposed upon the Seller. There are a line of cases emanating from a Supreme Court Case of *Johnson v. Davis*, 480 So. 2d 625 (Fla 1985). This has also been extended to Florida Real Estate Brokers representing Sellers and essentially is the concept that a Seller of a single family residence has a duty to disclose all known material defects existing at the property which are not readily observable and which would be material to the Buyer in making his decision to purchase the property.

Contract disputes are disputes over the failure of the Buyer or Seller to close the transaction, disputes over deposits, disputes over the condition of the property and post-closing disputes which involve negligent misrepresentations arising under the theory espoused by the *Johnson v. Davis* case.

ASSIGNABILITY:

Both Seller and Buyer should be cognizant of an assignability provision when there is a financing contingency and especially when the Seller is providing purchase money financing. Seller needs to make sure that the Buyer who they are selling to is the Buyer that will be the borrower/mortgagor pursuant to the financing contingency or purchase money “carry back” financing.

Seller must verify that the contract is not being assigned to an entity that cannot qualify for the financing or an entity that would not be a good credit risk. See discussion above re: Dodd Frank.

HOA AND CONDO FEES, SPECIAL ASSESSMENTS AND GOVERNMENT LIENS:

These contract provisions must be read and the terms identified with particularity. There has been a great deal of litigation and there are closing issues that arise over disputes as to obligations of payments of association fees, special assessments and government liens and the obligation to pay by Seller or Buyer and the proration of these charges. Again, a thorough review of these provisions should be made by legal counsel to avoid issues.

HOMESTEAD AND OTHER EXEMPTIONS:

Florida offers a number of exemptions to property owners which are designed to reduce real property taxes for those owners who qualify. They include:

- **HOMESTEAD EXEMPTION:** This is a Florida constitutional benefit of up to a \$50,000 exemption removed from the assessed value of your property. It is granted to those applicants who possess title to real property and are bona fide Florida residents living in the dwelling and making it their permanent home on January 1. Documentation that proves you were a resident at the homestead property is required.
- **SENIOR EXEMPTION:** All residents of Lee County, 65 years of age or older as of Jan 1, whose annual adjusted gross household income does not exceed mandated

income limitation may qualify. Income limits are adjusted annually (Senior Instructions and download forms). (2012 adjusted gross income limit: \$27,590).

- **\$500 WIDOW/WIDOWER'S EXEMPTION:** To file for Widow or Widower's Exemption you must be a widow or widower prior to JANUARY 1st of the tax year and provide proof of your spouse's death. Divorced persons do not qualify for this exemption.
- **\$500 DISABILITY EXEMPTION:** Veteran / Non Veteran – Florida residents who provide proof of total and permanent disability or proof of legal blindness may qualify. Certification from two professionally unrelated Florida physicians or a statement from the Division of Blind Services is required. Income verification is not required. (Physician's Certification of Disability forms are available in our office or can be downloaded the form: DR-416 Form).
- **SURVIVING SPOUSE OF FIRST RESPONDER WHO DIED IN THE LINE OF DUTY EXEMPTION:** Any real estate that is owned and used as a homestead by the surviving spouse of a first responder who died in the line of duty while employed by the state or any political subdivision of the state, including authorities and special districts, and for whom a letter from the state or appropriate political subdivision of the state, or other authority or special district, has been issued which legally recognizes and certifies that the first responder died in the line of duty while employed as a first responder is exempt from taxation if the first responder and his or her surviving spouse were permanent residents of this state on January 1 of the year in which the first responder died.
- **VETERAN \$5,000 DISABILITY EXEMPTION** – An honorably discharged ex-service member designated as 10 % through 99% disabled due to war-time or by service connected misfortune may qualify. The surviving spouse of the veteran may also qualify to receive this exemption. (Provide documentation from VA indicating percentage of service connected disability).
- **VETERAN – TOTAL AND PERMANENT DISABILITY EXEMPTION** – An honorably discharged veteran with total and permanent service-connected disability may qualify for total exemption of ad-valorem taxes. (Provide documentation from VA stating service-connected total and permanent disability).
- **VETERAN EXEMPTIONS - ADDITIONAL** exemptions available to qualifying veterans over age 65 and to qualifying deployed military personnel – contact our office for more information.
- **TOTAL EXEMPTION OF HOMESTEAD PROPERTY FROM AD VALOREM TAXATION** - Section 196.101, F.S. provides that real estate owned by quadriplegic is exempt from taxation – there is no income limitation for quadriplegics. Paraplegic, hemiplegic, or other totally and permanently disabled persons, who must use a wheel chair for mobility, or are legally blind and produce certification of that fact shall be exempt from ad valorem taxation - Income limitation applies – proof of gross income is required and or other official certification of disability is required. (REPRINTED FROM

THE LEE COUNTY PROPERTY APPRAISER'S WEBSITE ON EXEMPTIONS WHERE FORMS FOR APPLICATION ARE AVAILABLE).

A QUALIFIED REAL ESTATE ATTORNEY CAN IDENTIFY EACH OF THESE AREAS AND DISCUSS QUESTIONS YOU MAY HAVE AS TO APPLICATION AND TIMING

SUMMARY:

A real estate transaction is oftentimes the biggest investment a person makes in their lifetime. Prior to entering into a contract for sale or purchase of real estate, the seller or buyer should consider all of the factors involved and retain a qualified real estate attorney to guide them through the process and protect their legal rights up to through and after the closing. The key points as to why a seller and buyer should choose to hire a real estate attorney rather than a title company are:

- A. An attorney provides representation of the seller or buyer through the entire closing process where a title company does not represent anyone.
- B. An attorney can provide legal advice on each and every aspect of the real estate contract and the closing where a title company, by law, cannot provide any legal advice.
- C. An attorney is responsible to its client for representation as to the contract and closing as opposed to the title company which is responsible only to close the contract and issue title.
- D. The costs of an attorney representing the client and issuing title is generally about the same as a title company, so why not select a qualified real estate attorney to represent your interests.

Kevin F. Jursinski, B.C.S.

Florida Bar Board Certified Real Estate Law, Business Litigation, and Construction Law Attorney

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