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The "Whys" and "What Ifs" of Writing an Addendum

By David Hamerslough

September 13, 2013

Seller agrees to credit buyer ... for NRRC. Close of escrow to be extended to Buyer and seller agree that the price for the property shall now be The time for contingencies to be removed shall be extended to

Getting to the point in plain, unambiguous language is one of the goals of drafting any document, including an addendum. The foregoing examples illustrate this point. While there is nothing wrong with these addenda, do they tell the complete story? Is there additional information that could be included that could expand or clarify the story?

None of these addenda tell us who made the request, why it was made, whether any money or other consideration was exchanged, whether either party had performed or failed to perform its contractual obligations, or what the other party expected to receive in exchange for agreeing to the credit, time extension, or price reduction.

Questions that might be relevant to an addendum requiring one of the parties to undertake a specific task or activity could include when performance is to take place, how performance is to take place, what standard is performance to be judged by, and what will happen if one party fails to perform.

The foregoing questions are not meant to be exhaustive but, rather, illustrative of those and others that may be asked, given which type of situations arise during purchase transactions.

If questions such as these are being asked at the time an addendum is being written, then why are they

typically not part of the addendum? Have they been left out because they are not considered important or part of the agreement? Are they being excluded for the sake of getting to the point? Or do we believe that the consequences - of, for example, nonperformance - will work themselves out?

The answers to these questions are usually important to our clients and generally clarify what has taken place and whether our clients' expectations have been met. When disputes arise between the parties, whether these questions have been asked or considered and the answers to them can have more significance.

My suggestion for avoiding having to revisit questions such as these in hindsight when one or more of them becomes the source of a dispute between buyer and seller is to consider them at the time you are writing your next addendum. A good way to do so is to ask yourself these questions before writing the addendum – in other words, go through a checklist of questions such as those identified in this article. The concluding question should always be, "What is going to happen?" or "What are my clients' expectations?" if the performance called for in the addendum does not take place. Are those expectations the same as those of the other party's? If not, how do we resolve those, or do we even have an agreement?

Some of the consequences that can arise from the four addenda provided as examples in this article include the following: is the lender aware of the credits, will the lender ask for any reports or other documentation regarding the credits, and do the amounts of the credits exceed the lender guidelines? Does the seller expect that by giving the credits, it has no further liability or responsibility for the conditions that prompted the credits, and is there a release of liability confirming this expectation? If so, what is the scope of the release, and will that release cover not only known but also unknown issues? Will the transaction be canceled in the event of nonperformance? Who will get the deposit? Is a notice to perform or other demand or tender necessary, what is the impact on the time-is-of-the-essence provision, do the Alternative Dispute Resolution provisions of the contract still apply, etc.?

Often, the questions get asked and discussed, but the answers don't find their way into the addendum. Including this information in the addendum can eliminate potential disputes over these issues, as well as whether these issues are even part of the agreement between the parties.



Laurie and I had two very challenging real estate rights issues that we were advised were going to be difficult to prevail on. The RHRC team engaged with us and helped us understand our rights and

prevailing position. RHRC were thoughtful advocates for us from the beginning to conclusion of our cases. We feel fortunate to know we will always be able to call on the firm in the future and that they are our legal counsel.

Albert "Rocky" and Laurie Pimental, President of Global Markets and Customers, Seagate Technology

Office Locations

Rossi, Hamerslough, Reischl and Chuck
1960 The Alameda
Suite 200
San Jose, CA 95126

Phone: 408-261-4252

[Map & Directions](#)

Rossi, Hamerslough, Reischl and Chuck
8 Harris Court
Suite A1
Monterey, CA 93940

Phone: 831-655-3180

[Map & Directions](#)

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