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# Common Legal Problems on Investor Real Estate Transactions

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DUE DILIGENCE PROCESS, TITLE PROBLEMS, DEAL  
STRUCTURE ISSUES, CONDITION PROBLEMS

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1. Due Diligence Process
2. Title Problems
3. Deal Structure Issues
4. Condition Problems

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## 1. Due Diligence Process

- a. Review the MLS listing information/conversation with the seller.
- b. Visit the property.
- c. Review the sellers' property condition, radon, lead-based paint disclosures.
- d. Write and negotiate an offer.
- e. Perform inspections and title work, analyze and determine whether to move forward.

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## Disclosures (Seller's Disclosure of Real Property Condition Report)

The law requires that the seller disclose material defects.

### **“6 Del C. § 2572 Disclosure of material defects.**

(a) Except as excluded by § 2577 of this title hereof, a seller transferring residential real property *shall* disclose, in writing, to the buyer, agent and subagent, as applicable, all material defects of that property that are known at the time the property is offered for sale or that are known prior to the time of final settlement.

(b) This disclosure shall be made in writing before the seller signs the listing agreement and shall be updated as necessary for any material changes occurring in the property before final settlement.”

The Seller's Disclosure of Real Property Condition Report was created to remove doubt that a seller has adequately disclosed material defects to minimize future litigation.

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## Disclosures (Radon)

### “**6 Del C. § 2572A Radon testing and disclosure.**

(a) Except as excluded by § 2577 of this title, every purchaser of any interest in residential real property on which a residential dwelling exists *shall* be notified that said property may present the potential for exposure to radon.

(b) Except as excluded by § 2577 of this title, the seller of any interest in residential real property on which a residential dwelling exists *is required* to provide the buyer with any information on radon from tests or inspections in the seller's possession, and notify the buyer of any known radon hazards.”

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Disclosures (Lead)

## “42 U.S. Code § 4852d

### (a) LEAD DISCLOSURE IN PURCHASE AND SALE OR LEASE OF TARGET HOUSING

(1) **LEAD-BASED PAINT HAZARDS.** Not later than 2 years after October 28, 1992, the Secretary and the Administrator of the Environmental Protection Agency shall promulgate regulations under this section for the disclosure of lead-based paint hazards in target housing which is offered for sale or lease. The regulations shall require that, before the purchaser or lessee is obligated under any contract to purchase or lease the housing, the seller or lessor shall—

(A) provide the purchaser or lessee with a lead hazard information pamphlet, as prescribed by the Administrator of the Environmental Protection Agency under section 406 of the Toxic Substances Control Act [[15 U.S.C. 2686](#)];

(B) disclose to the purchaser or lessee the presence of any known lead-based paint, or any known lead-based paint hazards, in such housing and provide to the purchaser or lessee any lead hazard evaluation report available to the seller or lessor; and

(C) permit the purchaser a 10-day period (unless the parties mutually agree upon a different period of time) to conduct a risk assessment or inspection for the presence of lead-based paint hazards.”

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## Disclosures (Lead)

### **(a) LEAD DISCLOSURE IN PURCHASE AND SALE OR LEASE OF TARGET HOUSING**

**“(2) CONTRACT FOR PURCHASE AND SALE.** Regulations promulgated under this section shall provide that *every contract for the purchase and sale of any interest in target housing shall contain a Lead Warning Statement and a statement signed by the purchaser that the purchaser has—*

**(A)** read the Lead Warning Statement and understands its contents;

**(B)** received a lead hazard information pamphlet; and

**(C)** had a 10-day opportunity (unless the parties mutually agreed upon a different period of time) before becoming obligated under the contract to purchase the housing to conduct a risk assessment or inspection for the presence of lead-based paint hazards.”

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## 2. Title Problems

### a. Open estates

- i. Check whether estate is closed: <http://www3.nccde.org/will/search/>.

### b. Open judgments and mortgages

- i. Settlement attorney will tell you about judgments.
- ii. You need to check with settlement attorney about mortgages.

### c. Easements and covenants

- i. You need to check with your settlement attorney about these.

### d. Past due tax, sewer and water charges

- i. Settlement attorney will identify these, but proactively reach out to attorney's paralegal on this issue.



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## 3. Deal Structure Issues

- a. Individual vs. LLC listed as buyer on AOS
  - i. Usury
  - ii. Additional steps in process
  - iii. Additional cost
  
- b. JV deals
  - i. Principal-agent relationship, formal joint ownership (i.e. for a new LLC), or roll the dice and wish for luck.
  - ii. Document the agreement and be sure your are positioned to enforce your rights.
  
- c. Assignments

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## 3. Deal Structure Issues

### c. Assignments

#### i. **Potentially engaging in real estate services without a license** (i.e. acting as a realtor)

#### § 2901. License requirements; exemptions

(e) This chapter shall not apply to:

- (1) Any person or a subsidiary or division thereof with common ownership or control who, as owner or lessor or buyer or lessee, performs any of the acts enumerated in this section with reference to property owned, purchased or leased by such person or a subsidiary or division thereof with common ownership or control or to the regular employee of such person, with respect to the property so owned, purchased or leased, where such acts are performed in the regular course of or as an incident to the management of such property and the investment therein; or
- (2) Persons acting as attorney in fact under a duly executed power of attorney from a person engaged in a real estate transaction authorizing the final consummation by performance of any agreement of sale, leasing or exchange of real estate.
- (3) This chapter shall not be construed to include in any way the services rendered by an attorney-at-law . . . .
- (4) An “auctioneer” as defined in § 2301(a)(3) of Title 30.
- (5) A provider of property management services as defined in § 2902 of this title excepting that a provider of property management services shall not directly or indirectly sell or offer to sell, buy or offer to buy, negotiate the purchase, sale, or exchange of real estate, lease or rent or offer for lease or rent any real estate, or negotiate leases or rental agreements thereof or of the improvements thereon for others.

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## 3. Deal Structure Issues

### c. Assignments

- ii. **C's Lender may only use the A-B purchase price when determining loan amount.**

#### Assumptions for Examples:

Purchase Price: \$80,000

Assignment Fee: \$20,000

Total: \$100,000

	<u>Example 1</u>	<u>Example 2</u>
Maximum loan (80% LTV):	\$ 80,000	\$ 64,000
Closing Costs	\$ 3,000	\$ 3,000
<u>Total Purchase Price:</u>	<u>\$100,000</u>	<u>\$100,000</u>
<b>Amount needed for closing:</b>	<b>\$ 23,000</b>	<b>\$ 39,000</b>

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## 3. Deal Structure Issues

### c. Assignments

**iii. C's Lender may not allow an assignment of the AOS or an assignment fee paid at settlement.**

A. Consumer financing greater likelihood of issues.

B. Commercial financing less.

**iv. Attorney (settlement agent) conflict of interest if attorney represents assignor and assignee (buyer).**

A. Is waivable with knowing and signed waiver, upfront.

B. Otherwise, timing issues could present themselves.

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4. Condition Problems
  - a. As-is
  - b. Sellers' disclosures
  - c. Inspections

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## 4. Condition Problems

- a. As-is - The law requires that the seller disclose material defects, except when:

“6 Del.C. § 2577 Exemptions

This subchapter shall not apply to the following transfers of residential real property:

- (1) Transfers governed by the **Delaware Out-of-State Land Sales and Promotions Act** [repealed] where the property disclosure report required by that law is provided to a prospective purchaser.
- (2) Transfers pursuant to **court order** such as transfers ordered by the Court of Chancery in the administration of an estate, trust or guardianship or pursuant to a writ of execution, by a trustee in bankruptcy or a receiver, by eminent domain, and transfers resulting from a decree for specific performance.
- (3) Transfers to a mortgagee by a mortgagor in default by a **deed in lieu of foreclosure**.
- (4) Transfers by any **sheriff's sale** for default on an obligation secured by a mortgage, judgment, tax or other lien.
- (5) Transfers by a fiduciary in the course of the administration of the decedent's **estate, guardianship or trust**.
- (6) Transfers from 1 co-owner to 1 or more other **co-owners**.
- (7) Transfers made to a **spouse** or to a person or persons in the **lineal line of consanguinity** of 1 or more of the transferors.
- (8) Transfers **between spouses** resulting from a property settlement incident to a **divorce**.
- (9) Transfers to or from **any government entity**.

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1. Important Agreement of Sale Terms.
  - a) Key issues in addition to minimum requirements:
    - i. Risk of loss (buyer)
    - ii. Inspections (buyer)
    - iii. Financing (buyer)
    - iv. Allocations and pro-rations
    - v. Default remedies
    - vi. Attorneys' fees
    - vii. Assignment
    - viii. Lead Warning Statement (seller)





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## Recommendations:

- a) Service Providers
  - i. Realtor
  - ii. Appraiser
  - iii. Inspectors
  - iv. Attorney
- b) Agreements of Sale
  - i. Include key provisions that work with your business model.
- c) Due Diligence
  - i. Seller's Property Condition Report
  - ii. Perform Inspections
  - iii. Inspection Contingencies
  - iv. Request a copy of the title search

