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## DEADLINES IN PURCHASE AND SALE AGREEMENTS

Generally, “time is of the essence” in meeting deadlines in an earnest money agreement. This means that both parties can insist upon strict compliance with deadlines set forth in the agreement, and neither party is obligated to give the other party a grace period within which to perform. Exceptions to this general rule arise when the party asserting the deadline is guilty of bad faith, lack of diligence, estoppel, or waiver.

A party is guilty of bad faith when the party interferes with the performance of the other party or refuses to cooperate with the other party in fulfilling a requirement of the contract. For example, a seller who refuses to allow an appraiser or inspector access to the property is guilty of bad faith.

A party is guilty of lack of diligence if the party fails to take reasonable steps necessary to fulfill a term or condition of the agreement. For example, a purchaser who fails to timely submit information reasonably requested by the lender as a condition of loan approval is guilty of lack of diligence.

Estoppel occurs when a party makes a representation of existing fact upon which the other party relies to their detriment, which representation the first party later denies. For example, a seller who represents that work orders required by lender have not yet been completed cannot later get out of the transaction on the basis that the work orders in fact were completed. Of course, a lender would not order a re-inspection of the repairs until the seller indicates the repairs have been completed. It would be unfair to allow the seller to get out of the transaction on the basis that the sale failed to close by the agreed date, when the reason for the delay was the seller’s own representation that the work orders had not yet been completed.

A waiver of a deadline occurs when the party now asserting the deadline has engaged in conduct inconsistent with the termination of the agreement. For example, if the purchaser continues to pursue financing after the closing date has passed, then the purchaser has waived the closing date. Likewise, if the seller continues to treat the agreement as still in effect, then the seller may not take the position that the agreement has expired when a better offer is presented. Any conduct which treats the agreement as still in effect, and which is inconsistent with termination of the agreement can constitute a waiver of a deadline. Of course, neither party may unilaterally waive a deadline; the waiver is only binding on the party who has engaged in the inconsistent conduct.

Extensions to deadlines in earnest money agreements are common. However, as with any other modification of an existing contract, an extension must be supported by new and independent consideration to be enforceable. The party who requests the extension or for whose benefit the extension operates must give up something of value or incur a legal detriment, or the other party must receive some additional benefit in order for the extension to be binding. If the party requesting the extension has the legal right to terminate the transaction, but foregoes that right in exchange for the extension, then the extension is binding and enforceable without any additional consideration. However, if the extension benefits only one of the parties, then the extension is not binding on the other party, even if the extension is in writing and signed. For example, a purchaser who requests an extension of the deadline for waiving a financing contingency must give some consideration to the seller in exchange for a binding extension. A seller who grants an such extension without any consideration is not bound by the extension. On the

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other hand, an extension of a closing date necessitated by lender delay, where the financing contingency has not been waived by the purchaser, is enforceable, because the agreement would have been legally defunct without the extension and the purchaser would not have been in default.

The implied duty of good faith and cooperation does not go so far as to require a party to grant an extension of an express deadline to accommodate the other party. Therefore, the party requesting the extension should be prepared to make some concession in order to obtain the extension.

Deadlines in earnest money agreements are a frequent source of disputes between purchasers and sellers. Such disputes can be avoided by allowing sufficient time periods in the first place, by recognizing as early as possible when extensions might be needed, and by securing written extensions, when needed, supported by sufficient consideration.

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