



For Your Consideration

Buyers and sellers of commercial real estate assume that their contracts mean what they say. However, because of recent judicial activism and uncertain future decisions, that may not be the case; and without some new language in your purchase agreement - sellers may be able to break the real estate contract and walk away without consequence (keep reading - we provide suggested language below).

At issue is whether a buyer's refundable "free look" earnest money deposit is sufficient (as "legal consideration") to bind Sellers. In order to protect yourself, we advise including a buyer's "independent consideration" for entering into the contract to ensure the enforceability of the agreement and not inadvertently providing a seller with its own right to terminate the agreement.

This issue came to a head in the California Court of Appeals case *Steiner v. Thexton* (163 Cal. App. 4th 359), where the court ruled that a "free-look" purchase agreement was no more than an "option agreement" that the seller could rescind due to a lack of consideration. Notwithstanding that the lower *Steiner* ruling was overruled by the California Supreme Court last year, the Supreme Court's own ruling held that the agreement in question was in fact an "option" but nevertheless enforceable because the buyer had taken specific entitlement steps to create sufficient legal consideration to make the contract binding.

The ruling has nevertheless led many buyers to require the insertion of an independent contract consideration clause into their purchase agreements to ensure that adequate legal consideration is given in all circumstances so that it will not be left with an unenforceable option agreement.

The following is an example of a sample independent contract consideration clause:

Independent Consideration. Simultaneously with the delivery of the Earnest Money by the Buyer, Buyer shall pay to Seller an amount equal to One Hundred and No/100 Dollars (\$100.00) as independent consideration for Seller's performance under this Agreement ("Independent Consideration"), which amount the Parties bargained for and agreed to as consideration for Seller's execution, delivery and performance of this Agreement and shall be retained by Seller in all instances, and shall not be applied against the Purchase Price.

We help real estate investors and developers understand unfolding areas of law and assist in all phases of commercial real estate transactions, including the drafting and negotiation of enforceable purchase agreements, financings, development, leasing and operations.

For more information please call (480) 889-8948, send an email to info@steinlawplc.com or visit www.SteinLawPLC.com.

Upcoming Speaking Engagements

[Scott J. Stein](#) will serve as a faculty member for the [National Business Institute \(NBI\)](#) and present a seminar on *Handling Real Estate Transactions With Confidence* on **Thursday, December 1, 2011** (time and location to be confirmed).



Mr. Stein's presentation is entitled "Step-by-Step Through the Purchase Contract" and will offer proactive strategies to confidently navigate through commercial property transactions and prevent future disputes.

More information is available at www.nbi-sems.com.

Stein Law Recent Developments Archives

The following is a link to our Stein Law, PLC Recent Developments Archives:

[Recent Developments Archives](#)

Practice Areas

Stein Law, PLC is a boutique business and real estate transactional practice offering legal services in the areas of:

- ◆ real estate purchase and sales, leasing and development;

- ◆ business transactions, joint venture and operating agreements, and corporate contracts;
- ◆ entity formation;
- ◆ loan financings, workouts and modifications; and
- ◆ hospitality development, management and licensing matters.

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