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ILLINOIS PURCHASE AND SALE ISSUES FOR BUYERS

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INTRODUCTION

When purchasing commercial real estate, buyers should be cognizant of the local law and custom in the location in which the property is located. In Illinois, as in many other jurisdictions, a failure to appropriately grasp the legal landscape can lead to delays in the transaction, or unnecessary liability or expenses for the buyer. Accordingly, seeking the advice of local counsel is often a prudent choice and may provide cost savings and prevent headaches in the long run. The following is intended to highlight some of the potential issues for a party purchasing commercial real estate in Illinois.

1. Recitals. In Illinois, recitals may not be binding on the parties unless expressly incorporated into an agreement.

2. Due Diligence Termination Right. Illinois buyers generally have the option to terminate a contract for the purchase of real property prior to the expiration of the due diligence period; however, parties should ensure that some nominal consideration is used to ensure the enforceability of the contract.

3. Title Insurance and Escrow. Illinois title insurance rates are generally negotiable. Buyers should be aware of the standard endorsements that should be requested for an owner's policy of title insurance in Illinois, but note that an examination of the property may yield the need for additional protection.

4. Closing Documents and Other Closing Considerations. Buyers should be aware of the various types of instruments of transfer of real property in Illinois, and the protections afforded by each. Additionally, parties to real estate transactions in Illinois should be aware of other documents that may be required for closing, including documents for state income tax withholding and transfer taxes and other property-specific considerations to take into account at closing, such as the transfer of residential deposits in commercial transactions involving residential leases.

5. Certain Remedies and Defenses. A tension exists between the type of remedies that a buyer may prefer, such as specific performance and a right to seek damages, and the type of remedies that a seller may be willing to provide, namely the return of an earnest money deposit or specific performance and damages only in limited circumstances. Furthermore, buyers should be aware of certain situations in which sellers may be able to limit liability, either through careful drafting or the operation of state law.

6. Special Qualifiers. Certain terms of art that parties commonly employ in purchase contracts may need to be carefully defined by the parties in order to enforce their intended meaning.

7. Supplementing and Modifying the Written Agreement. In Illinois, contracts for the sale of real estate generally must be in writing, although certain exceptions do apply.

8. Timing. A best practice is to include a "time is of the essence" clause in a contract to purchase real estate; however, the interpretation of the provision will typically be subject to the intent of the parties in accordance with general contract law in Illinois.

9. Entity, Transfer and Sales Taxes. Buyers should review the three main tax regimes affecting the purchase and sale of real estate in Illinois to assess potential

tax liability with respect to the structure of the buyer entity and the transaction.

10. Property and Transaction Specific Matters. Various other matters may be relevant to a buyer depending on the type of Illinois real property being acquired.

1. RECITALS

The majority of real estate purchase agreements begin with a brief recital of general facts which are pertinent to the transaction, typically the parties and the property to be purchased and sold. In Illinois, recitals to a contract will generally not be binding on the parties unless referred to in the operative portion of the agreement. "Whereas" clauses or recitals will be binding if language in the operative clauses of the agreement indicates that such recitals are intended to form a part of the agreement, such as a statement that "the recitals set forth above are hereby incorporated in and made a part of this Agreement by this reference…" See McMahon v. Hines, 697 N.E.2d 1199, 1204 (Ill. App. Ct. 2d 1998) (stating that "Illinois courts have held that such "whereas" clauses serve as recitals and are merely explanations of the circumstances surrounding the execution of the contract. These recitals are not binding obligations unless referred to in the operative portion of the contract."). See also, Brady v. Prairie Material Sales, Inc., 546 N.E.2d 802, 806 (Ill. App. Ct. 2d 1989) (holding that recital paragraphs were part of the agreement because an operative clause stated that the preceding terms of the agreement were not a mere recital). Note that this differs from some states, such as California, where recitals have been found to be binding on the parties under California Evidence Code Section 622, which provides that "[t]he facts recited in a written instrument are conclusively presumed to be true as between the parties."

2. DUE DILIGENCE TERMINATION RIGHT

It is the market standard in Illinois for buyers to have the right to decide whether or not to proceed with a purchase during the due diligence period. However, when a buyer is granted an absolute right to terminate the contract during the diligence period, as a matter of general contract law, there may be a question as to whether or not there is sufficient consideration such that the parties to the purchase agreement have an enforceable contract. See, e.g., Hartbarger v. SCA Services, Inc., 558 N.E.2d 596, 604 (Ill. App. Ct. 5th 1990) (citing Restatement (Second) of Contracts, § 71) (stating that for there to be sufficient consideration, "a performance or a return promise must be bargained for."). To avoid running afoul of the laws of contracts, it is considered common practice to include some nominal form of independent consideration, such as $100, in the event that buyer terminates the purchase agreement during the diligence period.

3. TITLE INSURANCE AND ESCROW

3.1 Regulation of Forms and Rates

The most commonly used form of title insurance in Illinois is an owner's policy of title insurance. In Illinois, title insurance premiums are not regulated. 215 Ill. Comp. Stat. 155/19 (2016). The rate for title insurance is therefore negotiable with the title company and dependent on the relative bargaining power of the parties. In the purchase and sale context, the seller will typically pay for the title policy while the buyer will pay for endorsements as discussed below. Whether or not the seller pays for the cost of extended coverage is a matter of negotiation. The cost is modest.

3.2 Customary Forms and Policy Endorsements

In Illinois, it is more typical for a buyer to pay for endorsements (other than extended coverage and those required to cure a title defect which are typically paid for by the seller). Extended coverage refers to the title company's removal of certain exceptions to the title policy that are considered general exceptions which may not be discovered by a title search, such as unrecorded leases, matters which would be reflected on an accurate survey of the property, unrecorded easements, mechanics liens and special assessments.

Because title insurance in Illinois is not regulated, there is an extensive list of standard endorsements in Illinois that a buyer may consider requesting for its title policy with respect to both improved and unimproved commercial property, including coverage for the following matters:

- Zoning requirements, including parking;
- Environmental issues, including any environmental protection liens;
- Covenants, conditions and restrictions affecting the property;

- Private rights (including insuring against offers to purchase, rights of first refusal or rights of prior approval of future purchasers or occupants);
- Access and entry to the property;
- Utility access to the property;
- Taxes with respect to the property;
- Contiguity (if there are multiple parcels);
- Location of the property, including the address of the property and a description of major improvements thereon;
- The accuracy of the property description vis-à-vis the survey, and the accuracy of the survey itself;
- Subdivision of the property;
- Encroachments generally and for blanket easements or other rights affecting improvements or buildings located on the property;
- Mineral rights, if applicable.

Note, however, that the above list is a non-exclusive list of potential property matters to be addressed with policy endorsements and that a buyer's diligence review may reveal the need for additional endorsements, which the buyer should raise with the title insurer as needed.

3.3 Title Commitments

Buyers in Illinois should receive, at the very least, a title insurance commitment prior to closing. In Illinois, a title company will be obligated to issue a policy based on the title commitment. Provided that the title commitment is obtained prior to acquiring the property, the commitment should be enforceable against the title company where the title commitment references a named insured and provides an adequate dollar amount for the insured property. Cf. W.E. Erickson Constr. v. Chicago Title Ins. Co., 641 N.E.2d 861 (Ill. App. Ct. 1st 1994) (in which a buyer was barred from recovering damages from the title insurer that failed to note an exception to title where the title commitment was obtained *after* the buyer acquired title to the property (emphasis added)).

3.4 Property Tax Liens

In Illinois, the only tax liens arising as exceptions to title will typically be for general real estate taxes. To the extent there are any special assessments on the property, such assessments must have been levied in order to become exceptions to title.

Real estate taxes are paid in arrears in Illinois and assessments are typically made by the county, unless otherwise provided by statute. See Ill. Dep't of Revenue, "The Illinois Property Tax System, a general guide to the local property tax cycle," available at http://tax.illinois.gov/publications/localgovernment/ptax1004.pdf. The assessment process is a two-year cycle: in the first year ("Year 1"), property is assessed and assigned a value that reflects its value as of January 1 of that year. 35 Ill. Comp. Stat. 200/9-95 (2016). In the second year ("Year 2"), the first installment for Year 1 property taxes, which is 55 percent of the Year 1 total tax, will (in Cook County) be mailed in January of Year 2, and will be payable no later than March 1 (in Cook County) of Year 2. (The timing of mailing and the due dates differ by county.) Therefore, buyers in Illinois will be happy to note that their purchase of the property in Illinois will not, as in some states, trigger a reassessment of the property, although the property will eventually be assessed pursuant to the assessment cycle.

In Cook County, property taxes are due in two installments every year. See Cook County Treasurer's Office, "Tax Dates—Important Dates," available at https://www.cookcountytreasurer.com/duedates.aspx (last visited February 1, 2018). The first installment payable in 2018 is due March 1, 2018, but is attributable to the first installment of 2017 taxes. Currently, the amount of the first installment is 55 percent of the prior year's total tax. 35 Ill. Comp. Stat. 200/21-30 (2016). The second installment due date varies because the value relies on the delivery of various sets of data by other state and county agencies. Unlike the first installment, the second installment bill reflects the new assessed values, assessment appeals, exemptions, the state equalization factor, and taxing district tax rates. All of these data are prepared by other state and county agencies. Payment of the second installment is due not later than 30 days after the issuance of the bills for the second installment in Cook County. (The payment due date varies from county to county.)

In a buyer-friendly market in Illinois, a buyer will generally receive a credit for unpaid taxes on an "accrual basis" up to the date of closing; assuming that a closing will occur in 2018, a buyer would generally receive a credit at closing in the amount of the unpaid 2017

Property tax bill (which will be estimated if it has not yet been issued based upon the 2016 final tax bill, and often "grossed up" (e.g., 105 percent of the 2016 final tax bill) to accommodate anticipated increases. The credit would be readjusted or re-prorated upon receipt of the final 2017 tax bill for the Property in the summer of 2018, less amounts paid by the seller prior to closing, which the buyer would then be responsible for paying when due. The buyer would also receive a credit for 2018 taxes (payable in 2019) attributable to the period from January 1, 2018 through the closing date (which will also be estimated based upon the 2017 final tax bill, or, if not available at the time of closing, the 2016 final tax bill, grossed up and re-prorated upon receipt of the final 2018 tax bill for the Property in the fall of 2019). However, in Illinois, and particularly in Chicago, in a seller-friendly market, with respect to leased office, retail and industrial properties, a buyer and seller may agree to allocate real estate taxes on a cash basis rather than an accrual basis, meaning that the seller would pay all amounts due and payable before the closing date and the buyer would pay amounts due and payable on or after closing. Tax prorations in commercial transactions involving residential properties are usually not made on a cash basis.

3.5 Escrows

Illinois real estate purchases typically involve an escrow for purposes of holding the earnest money deposit and to consummate the closing. The most common closing alternative, namely a "table" closing (in which the parties meet face to face to close the transaction) is rarely used to close an Illinois purchase transaction. "Gap" closings, known as "New York style" closings in Illinois (even if parties do not meet face to face), in which the agent will disburse closing escrow funds and documents upon issuance of a signed title commitment or a policy, and thereby cover the "gap" from closing to recordation, are common. See 3 Friedman on Contracts and Conveyance of Real Property § 13:4 (7th ed. 2015) for a description of a table closing.

3.6 Role of Attorneys

In Illinois, unlike some states (e.g., Florida), attorneys are not used as title agents in commercial transactions and, although permitted by law, attorneys typically do not function as closing escrow agents (although arrangements between counsel to hold executed signature pages or counterparts pending closing or further instruction are common). See, e.g., NAIC Title Insurance Task Force, Survey of State Insurance Laws Regarding Title Data and Title Matters (November 2015), available at http://www.naic.org/documents/committees_c_title_tf_related_title_survey.pdf.

4. CLOSING DOCUMENTS AND OTHER CLOSING CONSIDERATIONS

4.1. Transfer Instruments

In Illinois, there are four instruments that parties typically use to transfer real property:

4.1.1. General Warranty Deed

A general warranty deed provides the grantee with the broadest protection for claims against title and is most commonly used in residential transactions. See E. Leone, S. Schonfeld and S. Nackeeran, "Real Estate Ownership: Illinois," Prac. Law (Jan., 2016), available at http://www.pircher.com/media/publication/68_Real%20Estate %20Ownership%20 Illinois%20_w-000-4107_.pdf. The general warranty deed warrants that: (1) the grantor was the lawful owner of an indefeasible estate in fee simple; (2) the grantor has good right and full power to convey the estate; (3) the estate is free from all encumbrances, and (4) the grantor will defend the grantee's title from claims of third parties. 765 Ill. Comp. Stat. 5/8-9 (2016).

4.1.2. Special Warranty Deed

A special warranty deed provides the grantee with certain limited warranties and covenants and is most commonly used in commercial transactions. Although the special warranty deed, as a general matter, protects the buyer from acts of the seller, it is commonly accepted to include any encumbrances on the property as well; therefore, a special warranty deed may warrant the grantor's clear fee title subject to certain specified exceptions and encumbrances typically taken directly from the exceptions in the final title policy. See E. Leone, S. Schonfeld and S. Nackeeran, "Real Estate Ownership: Illinois," supra. To avoid confusion, it is considered best practice for the buyer to confirm that the exceptions listed in the title commitment match the exceptions in the final title policy (especially if any of the exceptions were created by the seller).

4.1.3. Quitclaim Deed

A quitclaim deed does not contain any covenants from the seller as to title. The grantor simply conveys

whatever interest grantor has in the property (i.e., quits its claim to such property). 765 Ill. Comp. Stat. 5/10 (2016).

4.1.4. Land Trust

"A land trust is a simple, inexpensive method for handling the ownership of real estate." Ill. Dep't of Fin. and Prof'l Regulation, "Banks and Trust Companies – Tips," available at http://www.idfpr.com/banks/consumer/tips/TRUSTS.ASP. Land trusts, while not unique to Illinois, are generally utilized in only a handful of states, including Illinois. The land trust structure "is a legal arrangement in which the trustee holds legal and equitable title to real property, but all managerial, decisional, and operational powers over the trust assets remain under the control of the trust beneficiaries." John C. Murray, "The Use of Land Trusts and Business Trusts in Real Estate Transactions," ABA Section of Real Property, Probate and Trust Law (April 18, 2007), available at http://www.americanbar.org/content/dam/aba/publishing/rpte_ereport/RPArticles4_07ereport.authcheckdam.pdf. Chief among the benefits of the land trust arrangement is privacy for the beneficiaries, as title is only recorded in the name of the trust. See Lisa A. Danielson, "Installment Land Contracts: The Illinois Experience and the Difficulties of Incremental Judicial Reform," 1986 U. Ill. L. Rev. 91 (1986). Buyers should be aware, however, that if they are purchasing an interest in real property from a land trust, the beneficiary may need to be joined to the contract for purposes of providing specific covenants, representations and warranties. See John W. Morse & Daniel J. Slattery, "Commercial Real Estate Sales Contracts," Ill. Inst. for Continuing Legal Educ., Commercial Real Estate § 1.22 (2011 & Supp. 2013).

4.2. Security Deposits

Buyers purchasing real property that is subject to residential leases should be cognizant of potential liability for security deposits held by the seller and to be received as part of the purchase and sale of the property. In Chicago, a landlord is required to hold tenant security deposits separate from any of its other assets. Chi. Mun. Code § 5-12-080(e). Furthermore, under Illinois state law, a transferee of residential real property will be liable to any lessee with respect to any security deposit received by the seller (lessor) from a lessee; provided, however, that the transferor will remain jointly and severally liable with the transferee to the lessee for the amount of the security deposit. 765 Ill. Comp. Stat. 710/1.1 (2016).

4.3. State Tax Withholding Certificates

Sellers in Illinois are not required to deliver any state tax withholding form or non-foreign state status certificate; however, the purchase agreement should require sellers to provide a federal withholding form pursuant to the Foreign Investment in Real Property Tax Act, commonly known as a "FIRPTA." Notwithstanding the foregoing, a portion of the purchase price in a commercial real estate transaction may need to be withheld pursuant to the bulk sales rules discussed in Section 10, Property and Transaction Specific Matters—Bulk Sales Liability.

4.4. Transfer Taxes Declarations

In Illinois, transfer taxes may be imposed at the state, county and municipal level. In order for a deed to be recorded, it must be accompanied by a transfer tax declaration. At the state level, the transfer tax declaration is known as a "PTAX Form." There may be separate declaration forms required by the county and municipality in which the property is located. Buyers should be particularly cognizant of jurisdictional requirements that may delay the filing of transfer tax returns as well as the potential cost associated with municipal tax returns. Transfer taxes are discussed in further detail at Section 9, Entity, Transfer and Sales Taxes—Transfer Taxes.

5. CERTAIN REMEDIES AND DEFENSES

A buyer will "generally wish to protect the right of specific performance and may also seek to retain the ability to sue for damages." John W. Morse & Daniel J. Slattery, "Commercial Real Estate Sales Contracts," Ill. Inst. for Continuing Legal Educ., Commercial Real Estate § 1.67 (2011 & Supp. 2013). The seller, on the other hand, will seek to restrict the right of a buyer to recover monetary damages under a purchase contract for real property. The seller may do so by providing for monetary damages only in the event that specific performance is not available as a remedy and limiting buyer's monetary damages to recovery of the earnest money deposit and, in some instances, the buyer's actual out-of-pocket costs (which may be subject to a negotiated cap).

5.1. Liquidated Damages

As stated above, most purchase agreements in Illinois typically include a provision requiring that any earnest money on deposit with the seller will be retained as

"liquidated damages," if a buyer breaches its obligation to close the transaction.

In Illinois, a liquidated damages provision will be "valid and enforceable in a real estate contract, when: (1) the parties intended to agree in advance to the settlement of damages that might arise from the breach; (2) the amount of liquidated damages was reasonable at the time of contracting, bearing some relation to the damages which might be sustained; and (3) actual damages would be uncertain in amount and difficult to prove." See Karimi v. 401 N. Wabash Venture, 952 N.E.2d 1278, 1285 (Ill. App. Ct. 1st 2011), (citing Grossinger Motorcorp, Inc. v. Am. Nat'l Bank & Trust Co., 607 N.E.2d 1337 (Ill. App. Ct. 1st 1992)). Accordingly, the purchase and sale of real estate often lends itself to liquidated damages because the compensation associated with "real estate contracts is by its nature difficult to estimate." Jameson Realty Grp. v. Kostner, 813 N.E.2d 1124, 1132 (Ill. App. Ct. 1st 2004) (quoting Larson-Hegstrom & Assocs. v. Jeffries, 701 P.2d 587 (Ariz. Ct. App. 1985)).

Courts in Illinois will generally allow parties to recover liquidated damages and pursue equitable remedies. See e.g., Brian McDonagh S.C. v. Moss, 565 N.E.2d 159, 161 (Ill. App. 1st 1990). Note, however, that this general rule is subject to additional exceptions that are beyond the scope of this article. Notwithstanding the foregoing, a more typical bar to enforcement of a liquidated damages clause in real estate contracts arises when a purchase agreement allows a party to elect either liquidated damages or actual damages at its option. If such a scenario arises, the majority of recent appellate cases in Illinois have found the liquidated damages provisions to be unenforceable because the liquidated damages are no longer considered to have been agreed upon in advance, and the wronged party will be limited to its actual damages. See, e.g., Grossinger Motorcorp, Inc. v. Am. Nat'l Bank & Trust Co., 607 N.E.2d 1337, 1346 (Ill. App. Ct. 1st 1992). Contrary to more recent precedent, a handful of earlier decisions have permitted enforcement of such an option for actual or liquidated damages based on the "clear language of the contract." See, Gryb v. Benson, 406 N.E.2d 124, 126 (Ill. App. Ct. 1st 1980). Accordingly, although there exists some precedent in Illinois allowing the optional approach to liquidated damages, in the authors' view, there is a risk that a court would find such a provision to be unenforceable given the recent trend in case law.

5.2. Specific Performance by Seller

While liquidated damages clauses are relatively commonplace in purchase agreements, provisions relating to specific performance as a buyer's remedy are a little less common and a buyer generally must insist on this remedy. In comparison, a seller's right to obtain specific performance is fairly rare. The right to specific performance need not be expressly stated in a contract in order for a buyer in Illinois to assert the right. See O'Shield v. Lakeside Bank, 781 N.E.2d 1114, 1120 (Ill. App. Ct. 1st 2002). In order to truly remove the remedy, the parties will need to include language expressly prohibiting specific performance. See id. at 1120-1121.

5.3. Survival of Limits

Once a seller's representations and warranties have been negotiated, a buyer's next concern is how long the seller's obligations will remain outstanding following a closing in the event of a breach of those representations and warranties.

Unless separately negotiated with the seller in the contract, the statute of limitations for a breach of a written contract in Illinois is 10 years from the date on which the cause of action accrues. 735 Ill. Comp. Stat. 5/13-206 (2016). Parties to a contract may agree upon a shortened contractual limitation period in place of the applicable statute of limitations. However, the period of time must be "reasonable." See Medrano v. Prod. Eng'g Co., 774 N.E.2d 371, 376 (Ill. App. Ct. 1st 2002) (citing Florsheim v. Travelers Indemnity Co. of Ill., 393 N.E.2d 1223 (Ill. App. Ct. 1st 1979)).

Under the doctrine of merger in Illinois, any contracts or agreements between the parties with respect to the conveyance of real property are deemed to have "merged" into the deed upon closing, meaning that the terms of the contract, including any representations and warranties, may be nullified. Covenants intended by the parties to be performed post-closing should not be nullified, and courts in Illinois have drawn distinctions whereby certain representations and warranties related to the quality of the property being transferred, as opposed to the requirements for conveying the property, are considered "incidental to the main purpose of the contract (conveyance of real estate)." See Lanterman v. Edwards, 689 N.E.2d 1221, 1224 (Ill. App. Ct. 5th 1998) (agreeing with the order of the trial court).

5.4. As-Is Provisions; Buyer Anti-Sandbagging Rules

5.4.1. As-Is Provisions

Real estate contracts often contain language to the effect that the buyer acknowledges that the property is being conveyed "as-is" without any further representations and warranties regarding the condition of the property from the seller. While this type of language is meant to shield the seller from potential liability for defects at the property, such language will not shield the seller from liability for fraud or concealing known defects. See Bauer v. Giannis, 834 N.E.2d 952, 962 (Ill. App. Ct. 2d 2005) (in which plaintiffs asserted claims for both fraudulent misrepresentation and fraudulent concealment with respect to a residential real estate transaction).

5.4.2. Buyer Anti-Sandbagging Provisions

"Sandbagging" is the practice whereby a buyer: (i) knows of a material breach by the seller; (ii) proceeds to close; and (iii) asserts a claim for the breach following the closing. Many states, including Illinois, treat closing of the transaction as evidence of a buyer's waiver of any known defects, thereby nullifying a buyer's ability to obtain damages from the seller in a sandbagging scenario. See Charles K. Whitehead, "Sandbagging: Default Rules and Acquisition Agreements," Cornell Law Faculty Publications, Paper 919 (2011), available at http://scholarship.law.cornell.edu/facpub/919.

6. SPECIAL QUALIFIERS

In negotiating contracts for the sale of real property, the parties typically end up including certain qualifying language as to the level of effort a party must exert to perform some covenants under the agreement and the level of knowledge required for purposes of some representations and warranties. However, these buzzwords, which consistently appear in real estate contracts, are often terms of art that may affect the parties' abilities to enforce their rights under the contract.

6.1. Good Faith

Under Illinois law, every contract implies good faith and fair dealing between the parties. Black's Law Dictionary defines 'good faith' as "[a] state of mind consisting in: (1) honesty in belief or purpose; (2) faithfulness to one's duty or obligation; (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage." 713 (8th ed. 2004). In Illinois (and elsewhere), however, "the legal standard for good faith performance is notoriously unclear." See Rob Park, "Putting the 'Best' in Best Efforts," 73 U. Chi. L. Rev. 705, 708 (2006) (citing Steven Burton, "Breach of Contract and the Common Law Duty to Perform in Good Faith," 94 Harv. L. Rev. 369, 369 (1980)).

An "operational standard that distinguishes good faith performance from bad faith performance" is yet to be articulated by Illinois courts. Rob Park, "Putting the 'Best' in Best Efforts," 73 U. Chi. L. Rev. 705, 708 (2006). Instead, the meaning of "good faith" in a particular contract is contingent on both the context within the agreement and the court making the determination (as such a determination could involve an objective test (i.e., good faith under a reasonableness standard), a subjective test (i.e., good faith under a review of the honesty in fact with respect to the conduct of the applicable party), or both). See Watseka First Nat'l Bank v. Ruda, 552 N.E.2d 775, 778-779 (Ill. 1990) (discussing certain objective and subjective tests for "good faith" under the Illinois Uniform Commercial Code). Accordingly, if the term "good faith" is utilized in an Illinois purchase agreement, it is in the best interest of the buyer to define this term.

6.2 Best Efforts

Usage of the term "best efforts" is similarly considered ambiguous by the courts. Kenneth A. Adams, "Understanding 'Best Efforts' and its Variants (Including Drafting Recommendations)," Prac. Law. 11, 15 (Aug. 2004). See also Martin v. Monumental Life Ins. Co., 240 F.3d 223, 233 (3rd Cir. 2001) (stating that "best efforts has been widely held to be an ambiguous contract term"). Courts determining whether sufficient efforts have been made by a party will generally rely on the circumstances of the case. See Kenneth A. Adams, "Understanding 'Best Efforts' and its Variants (Including Drafting Recommendations)," supra (citing Martin, 240 F.3d at 233 (stating that "best efforts depends on the factual circumstances surrounding an agreement.")). In other words, "'[b]est efforts' can only be defined contextually," Victor P. Goldberg, "Great Contracts Cases: In Search of Best Efforts: Reinterpreting Bloor v. Falstaff," 44 St. Louis L.J. 1465, 1465 (2000), and "cannot be defined in terms of a fixed formula." Triple-A Baseball Club Assocs. v. NE Baseball, Inc., 832 F.2d 214, 225 (1st Cir. 1987).

While courts in the majority of jurisdictions have held best efforts provisions to be enforceable, a principal

exception happens to be Illinois, where courts have held that "a promise to use best efforts is too vague to be binding if the parties fail to indicate the performance such phrase requires." See Kenneth A. Adams, "Understanding 'Best Efforts' and its Variants (Including Drafting Recommendations)," Prac. Law. 11, 17 (Aug. 2004) (citing Kraftco Corp. v. Kolbus, 274 N.E.2d 153, 156 (Ill. App. Ct. 4th 1971) for the statement that "the mere allegation of best efforts is too indefinite and uncertain to be an enforceable standard."). Thus, "for a best efforts provision to be enforceable, a contract must contain a clear set of guidelines against which to measure performance of the party making the efforts; failure to include such guidelines would likely. . . result in a court holding that an efforts provision is unenforceable. The way to avoid these problems would be to specify by contract what sort of efforts must be made by a party that is under an obligation to make efforts to accomplish a particular contract goal." Kenneth A. Adams, "Understanding 'Best Efforts' and its Variants (Including Drafting Recommendations)," Prac. Law. 11, 17–18 (Aug. 2004). In other words, it is in a buyer's best interest to define the term.

6.3. Knowledge

Although it is not the preference of the buyer, the seller will attempt to limit its representations and warranties by making such statements subject to knowledge qualifiers, the most common of which refer to "knowledge," "actual knowledge" or "best knowledge." The author is not aware of any law in Illinois that establishes the meaning of these terms in a real property purchase agreement when they are not defined. Buyers should be aware, however, that knowledge qualifiers may provide a convenient loophole to sellers, because a seller will not have liability to the extent it "did not have knowledge or notice of the relevant fact or circumstance." See John W. Morse & Daniel J. Slattery, "Commercial Real Estate Sales Contracts," Ill. Inst. for Continuing Legal Educ., Commercial Real Estate § 1.56 (2011 & Supp. 2013).

7. SUPPLEMENTING AND MODIFYING THE WRITTEN AGREEMENT

7.1. Integration Clause

While courts in some states (such as California) do not treat integration clauses as dispositive, Stevens A. Carey, "California Purchase and Sale Issues for Buyers," Prac. Real Est. Law. 38, 53 (July 2016), certain other states, including Illinois, New York and Delaware, have been more inclined to accept integration clauses at face value. See Steven Atlee, Eva Davis & Justin Trapp, "California, Delaware, Illinois and New York contractual boilerplate: Same provisions, different results?", Inside Couns. (Aug. 26, 2014), available at http://www.insidecounsel.com/2014/08/26/california-delaware-illinois-and-new-york-contract?slreturn=1482874093. More specifically, the courts in Illinois have stated that the purpose of an integration clause "is to serve as an indication that the parties intended their written contract to be the final expression of their agreement replacing all prior expressions and discussions of their agreement." See David J. Lloyd, Integration Clauses in Illinois Construction Contracts, https://rohlfingassociates.wordpress.com/2014/05/22/integration-clauses-in-illinois-construction-contracts/ (last visited February 1, 2018).

7.2. Implied Covenant of Good Faith and Fair Dealing

Consistent with many other states, and as discussed above, every contract under Illinois law imposes a duty of good faith and fair dealing in the contract's performance and enforcement. See Dayan v. McDonald's Corp., 466 N.E.2d 958, 971 (Ill. App. Ct. 1st 1984). In Illinois, this implied covenant of good faith and fair dealing is "intended to prevent opportunism and enable a party to bargain without being unduly suspicious of his [or her] contracting partner," see Rob Park, "Putting the 'Best' in Best Efforts," 73 U. Chi. L. Rev. 705, 707 (2006) (citing Restatement (Second) of Contracts § 205 (1981)), and "requires the party vested with contractual discretion to exercise that discretion reasonably and with proper motive, not arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties." Resolution Trust Corp. v. Holtzman, 618 N.E.2d 418, 424 (Ill. App. Ct. 1st 1993).

As one Illinois court has explained, "[w]hile this obligation [of good faith and fair dealing] exists in every contract in Illinois, it is essentially used as a construction aid in determining the intent of the parties where an instrument is susceptible of two conflicting constructions." Resolution Trust, 618 N.E.2d at 424. For example, where a party is granted the ability to make decisions at its discretion under the contract, absent further specification by the parties, the implied covenant of good faith and fair dealing requires that the party "exercise the discretion reasonably." N. Trust Co. v. VIII S. Mich. Assocs., 657 N.E.2d 1095, 1104 (Ill. App. Ct. 1st 1995). However, the duty of good faith and fair

dealing will not act to modify the express terms of the contract. Id. Illinois law is fairly unique in this regard, as parties are allowed to include an "express disavowal" of the implied covenant of good faith and fair dealing in their contract. See Bass v. SMG, Inc. 765 N.E.2d 1079, 1090 (Ill. App. Ct. 1st 2002) (citing Prudential Ins. Co. v. Van Matre, 511 N.E.2d 740 (Ill. App. Ct. 5th 1987) for the proposition that "'a covenant of good faith and fair dealing' is implied in every contract as a matter of law, absent an express disavowal"). See also Foster Enters., Inc. v. Germania Fed. Sav. & Loan Ass'n, 421 N.E.2d 1375, 1380 (Ill. App. Ct. 3d 1981). In order to do so, "the disavowal must be explicit." See also Hentz v. Unverfehrt, 604 N.E.2d 536, 539 (Ill. App. Ct. 5th 1992) (stating that "the Illinois Court of Appeals found that a provision for termination with or without cause did not constitute a disavowal and that the implied covenant still applied to the discretion afforded under the contract"). Buyers should be aware, however, that Illinois courts may not enforce a broad waiver of "all claims or defenses" as a waiver of the duty of good faith and fair dealing. RBS Citizens, Nat'l Ass'n v. RTG-Oak Lawn, LLC, 943 N.E.2d 198, 204 (Ill. App. Ct. 1st 2011) (finding that "[t]he waiver of defenses … did not specifically address the duty of good faith and fair dealing, and therefore … there was [not] an express disavowal of the duty.").

7.3. Oral Modifications

In order to be enforceable, the Illinois statute of frauds, 740 Ill. Comp. Stat. 80/2 (2016), generally requires any contract for the sale of land and any contract for a term longer than one year to be memorialized in writing, and courts will typically require a written contract in order for a person to enforce the agreement. See Prodromos v. Poulos, 560 N.E.2d 942, 946 (Ill. App. Ct. 1st 1990). However, a simple oral contract may be enforceable pursuant to the statute of frauds in Illinois, but only in fairly specific situations, for example, where "the party against whom enforcement is sought admits in [his or her] pleading, testimony or otherwise in court that a contract . . . was made." See R.P. Lumber Company, Inc. v. Tony Green, 2016 IL App (5th) 150060-U (citing 810 Ill. Comp. Stat. 5/2-201(3)(b) (2016)). Furthermore, in certain circumstances (typically where an oral modification is then followed by conduct of the parties in accordance with such modification), Illinois courts may not enforce a contract provision that purports to preclude subsequent oral modifications. See Consolidated Bearings Co. v. Ehret-Krohn Corp., 913 F.2d 1224 (7th Cir. 1990) (citing Falcon, Ltd. v. Corr's Natural Beverages, 520 N.E.2d 831, 835 (Ill. App. Ct. 1st 1987)); Monarch Coaches v. ITT Indus. Credit, 818 F.2d 11, 12 (7th Cir. 1987); Mayer Paving & Asphalt v. Carl A. Morse, Inc., 365 N.E.2d 360, 365 (Ill. App. Ct. 1st 1977). However, where two parties "ma[k]e an oral modification to an agreement," but fail to "formalize the modification in writing, the [Illinois] statute of frauds" may bar the parties from recovery on any "claims connected to the modification." R.P. Lumber Company, Inc. v. Tony Green, 2016 IL App (5th) 150060-U.

8. TIMING

8.1. Time is of the Essence

In Illinois, although timing restrictions may be inferred by the circumstances and actions of the parties, it is best practice to include an express provision that "time is of the essence" in the contract and negotiate particular deadlines on which the parties intend to rely. However, when parties seek to enforce such a provision, courts typically interpret a "time is of the essence" clause in accordance with general contracts law. Therefore, the court will look to the intention of the parties to determine whether or not such a provision will be strictly enforced. See Prime Grp., Inc. v. N. Trust Co., 576 N.E.2d 841 (Ill. App. Ct. 1st 1991); Anest v. Bailey, 556 N.E.2d 280 (Ill. App. Ct. 2d 1990); and Cantrell v Kruck, 324 N.E.2d 260 (Ill. App. Ct. 2d 1975).

9. ENTITY, TRANSFER AND SALES TAXES

Whenever a buyer intends to conduct business or own property in a state, it is prudent for the buyer to understand the taxing regime it may encounter, in order to anticipate potential tax charges and to structure its ownership vehicle in order to maximize efficiencies within the state's taxing system, both at the entity and member levels. In Illinois, as in many states, there are three major taxing regimes applicable to real estate transactions: entity taxes, transfer taxes and sales taxes.

9.1. Entity Taxes

The majority of entities involved in domestic real estate transactions today are formed as limited liability companies or limited partnerships in Delaware. Delaware law is typically considered the gold standard of business law, which, although potentially more expensive for a buyer entity, provides much desired certainty to the buyer and is often required in order to obtain certain types of financing. If a purchaser does not form a limited liability company (or other vehicle) in Illinois, the entity, including a Delaware limited liability

company, acquiring and operating real property in Illinois must be qualified to transact business in Illinois and may be subject to a personal property replacement tax at the entity level. 35 Ill. Comp. Stat. 5/201 (2016). See also Ill. Dep't of Revenue, Local Government – Personal Property Replacement Tax, available at http://tax.illinois.gov/localgovernment/overview/howdisbursed/replacement.htm (last visited Feb. 1, 2018). Practitioners should therefore review the form of entity that a buyer may use to acquire real property in Illinois and the potential entity-level taxes which could be imposed as a result of its entity choice. Additionally, the buyer entity's members will generally be taxed on any income that is earned or received by such entity in Illinois. 35 Ill. Comp. Stat. 5/101 (2016).

9.2. Transfer Taxes

9.2.1. State and County Transfer Taxes

State and county transfer taxes are collected by the applicable county recorder's office through the sale of revenue stamps. 35 Ill. Comp. Stat. 200/31-15 (2016), 55 Ill. Comp. Stat. 5/5-1031 (2016). In order to record a deed or other transfer document, the parties, typically the seller, must, unless the transaction is otherwise exempt from tax, purchase the applicable revenue stamps and affix such stamps to a deed or other transfer document to be recorded. Additionally, upon the earlier of 3 business days after the transfer or the date on which the transfer document is presented for recording, the parties must also provide a declaration, the "PTAX Form," signed by a seller and buyer, containing statutorily required information about the transfer, including the purchase price, legal description and property address. 200 Ill. Comp. Stat. 200/31-25 (2016). Provided the real estate is located in a participating county, the PTAX Form can be filed and tracked electronically using the "MyDec" website. See MyTax Illinois, MyDEC at MyTax Illinois: Online Real Property Transfer Tax Declarations, available at https://mytax.illinois.gov/MyDec/_/ (last visited February 1, 2018). A list of participating counties is available on the MyDec website and includes Cook County. The City of Chicago requires electronic filing; however, not all counties and municipalities will accept electronic filing.

A state tax is imposed on each transfer of (a) title to real estate located in Illinois, (b) a beneficial interest in real property located in Illinois, and (c) a controlling interest in a real estate entity owning property located in Illinois, at the rate of fifty cents ($0.50) per five hundred dollars ($500) of value or fraction thereof, as provided on the PTAX Form. 35 Ill. Comp. Stat. 200/31-10 (2016). The "value" for purposes of the tax is generally defined as "the amount of the full actual consideration for the real property or the beneficial interest in real property located in Illinois, including the amount of any lien on the real property assumed by the transferee." 35 Ill. Comp. Stat. 200/31-5 (2016). The principal amount of assumed mortgages may be deducted from the value for purposes of calculating the transfer tax.

Counties may impose a tax on transfers at the rate of 25 cents ($ 0.25) per five hundred dollars ($500) of value or fraction thereof as provided on the PTAX Form. 55 Ill. Comp. Stat. 5/5-1031 (2016). Most counties in Illinois, including Cook County, impose this tax.

Buyers should be aware that the deed or other transfer document will not be recorded until the requirements for filing and paying transfer taxes are satisfied in accordance with the applicable state, county and municipal statutes.

9.2.2. Municipal Transfer Taxes

In addition to state and county transfer taxes, municipalities may impose transfer taxes as well, and typically in amounts that exceed the state and county taxes. Whether a buyer or seller pays municipal transfer taxes depends on the municipality. For example, in Chicago, the buyer and seller are typically responsible for certain portions of the tax. Additionally, certain municipalities require specific forms of payment for transfer tax stamps (such as cash or certified checks).

In Chicago, transfer taxes are imposed at a rate of $3.75 per five hundred dollars ($500) of the transfer price, or fraction thereof, plus an additional $1.50 per five hundred dollars ($500) of the transfer price, or fraction thereof. Chi. Mun. Code §§ 3-33-030 (A), (F). Typically the main portion of the transfer tax is paid by the buyer (i.e., the $3.75 per $500.00 tax), and the supplemental portion is paid by the seller (i.e., the $1.50 per $500.00 tax). Pursuant to Section 3-33-020 of the City of Chicago Municipal Code, the "transfer price" includes "the consideration furnished for the transfer of title to, or beneficial interest in, real property, valued in money, whether paid in money or otherwise, including cash, credits and property, determined without any deduction for mortgages, liens or encumbrances, and specifically including the amount of any indebtedness or obligation canceled or discharged in connection with the transfer."

9.2.3. Water Department Certifications

As in many Illinois municipalities, Chicago transfer stamps will not be issued unless the parties, typically the seller or seller's counsel, obtains a certificate indicating that as of the most current billing cycle, all water and sewer assessments relating to the parcel have been paid in full. Chi. Mun. Code § 3-33-040(C). In order to obtain a "Full Payment Certificate" as the certification is known in Chicago, parties must submit certain information and pay a fifty dollar ($50.00) fee. It may take the Chicago Department of Finance up to 10 business days to process the application. Therefore, buyers and sellers should be aware of the potential timing with respect to payment of transfer taxes in order to avoid recording delays.

9.3. Sales Taxes

When personal property is being transferred together with real estate, it is worthwhile for a buyer to consider whether sales tax should be paid on the transfer of such personal property; however, as a general matter, and as discussed in further detail below, buyers should be able to rely on the "occasional sale" rules of the Illinois revenue statutes to avoid paying sales tax.

Sales taxes are imposed in Illinois under two income tax acts: (i) the Retailer's Occupational Tax Act (35 Ill. Comp. Stat. 120/1 et seq. (2016)., "ROTA") and (ii) the Use Tax Act (35 Ill. Comp. Stat. 105/1 et seq.(2016), "UTA"). ROTA imposes a tax on "persons engaged in the business of selling at retail, tangible personal property…" 35 Ill. Comp. Stat. 120/2 (2016). A "sale at retail" generally means any transfer of ownership or title to tangible personal property to a purchaser for the purpose of consumption (and not resale). 35 Ill. Comp. Stat. 120/1 (2016). Practically speaking, although retailers owe this tax to the Department of Revenue, the cost of this tax is passed on to the purchasers as a "sales tax" tacked onto the price of the goods being purchased. UTA imposes a tax on purchasers for the privilege of using tangible personal property in the State of Illinois. 35 Ill. Comp. Stat. 105/3 (2016). This provision acts as a "catch-all" requiring purchasers in the State of Illinois to pay sales tax on out-of-state purchases from retailers that may not collect and remit sales tax to the state. See Ill. Dep't of Revenue, Sales and Use Taxes, available at http://tax.illinois.gov/businesses/taxinformation/sales/rot.htm (last visited Feb. 1, 2018). "When a single purchase occurs, Illinois retailers collect both forms of sales tax from the consumer. However, if the retailer pays the ROTA tax to the State, he or she does not have to pay, and may keep, the use tax … If the retailer is outside Illinois and therefore has no ROTA or UTA obligations, the purchaser-user in Illinois must pay the use tax directly to the State." Weber-Stephen Prods., Inc. v. Dep't of Revenue, 756 N.E.2d 321, 343 (Ill. App. Ct. 1st 2001). However, if the out-of-state seller would not be taxable under ROTA in the event all elements of the sale occurred in Illinois, then UTA will not apply. 35 Ill. Comp. Stat. 105/3-65 (2016).

An exemption exists under ROTA and UTA that is colloquially referred to as the "Occasional Sales Rule." Specifically, an "isolated or occasional sale of personal property at retail by a person who does not hold himself out to be engaged (or who does not habitually engage) in selling such property at retail is exempt from the provisions of ROTA and UTA. 35 Ill. Comp. Stat. 105/2 (definition of "Retailer") (2016); 35 Ill. Comp. Stat. 120/1 (definition of "Person") (2016). Although the Occasional Sales Rule is generally understood to apply as an exemption to personal property sold in conjunction with the sale of real estate, the activities of the seller and the seller's affiliates should be carefully reviewed to determine whether activities would disqualify it from this exemption.

10. PROPERTY AND TRANSACTION SPECIFIC MATTERS

In addition to the issues discussed above, certain additional issues may arise depending on the type of real property being purchased or the circumstances of the seller or other third parties.

10.1. Bulk Sales Liability

Illinois and other states have passed "bulk sales" tax rules to address concerns over taxpayers selling the majority of their assets and disappearing with unpaid taxes still owed to the state. Ill. Pvt. Ltr. Rul. IT 88-0259 (Sept. 22, 1988). The bulk sales rules impose an obligation on the *buyer* of such business or assets for the unpaid taxes of the seller. Buyers should be aware of these rules, as real estate transactions often fall within the purview of the bulk sales regime when the real estate being sold and purchased represents the majority or substantially all of the assets of the selling entity.

In Illinois, the bulk sales provisions arise in three separate Acts: (i) ROTA, (2) the Illinois Income Tax Act, and (3) the Illinois Unemployment Insurance Act. Furthermore, counties and municipalities may enact their own bulk sales regimes, as discussed in further detail below.

10.1.1. Bulk Sales Liability Under ROTA and the Illinois Income Tax Act

ROTA typically applies to persons engaged in the business of "selling tangible personal property at retail," who are required to file a return, and which if not filed, subjects the party to liability. 35 Ill. Comp. Stat. 120/5 (2016). Note that a sale "at retail" is generally a sale that is for the purpose of "use or consumption" and not for further resale. 35 Ill. Comp. Stat. 120/1-1 (2016). The statute itself is subject to numerous exceptions and qualifications; however, certain types of property, such as hotels, resorts and office buildings with operating retail businesses will generally be subject to the return filing requirements thereunder. See Larry N. Woodward, "Evaluating Bulk Sales Liability in Real Estate Transactions," 54 ISBA Real Property Newsletter 5, Jan. 2009, at 2. Bulk sales reporting obligations under ROTA arise with respect to any taxpayer that sells or transfers the major part of its inventory, furniture, fixtures and equipment, or real property which are subject to ROTA (i.e., considered "tangible personal property at retail") outside the ordinary course of business. 35 Ill. Comp. Stat. 120/5j (2016).

The Illinois Income Tax Act (35 Ill. Comp. Stat. 5/1 et seq. (2016)) imposes a reporting obligation with respect to any "taxpayer" that sells or transfers the major part of the real property of any business "outside the usual course of his business." 35 Ill. Comp. Stat. 5/902(d) (2016). The Illinois Income Tax Act applies to a broader range of transactions. However the reporting obligations under each of the Illinois Income Tax Act and ROTA are generally the same, as discussed in further detail below. 35 Ill. Comp. Stat. 5/902(d) (2016); 86 Ill. Admin. Code § 130.1701; see 54 ISBA Real Property Newsletter 5, Jan. 2009.

10.1.2. Reporting Obligations Under ROTA and the Illinois Income Tax Act

As discussed above, and as a general matter, a transaction is subject to the bulk sales notification rules when the sale covers all or substantially all of a seller's assets. 35 Ill. Comp. Stat. 5/902(d) (2016); 35 Ill. Comp. Stat. 120/5j (2016). If a transaction is subject to the bulk sales rules, the buyer must file (or require the seller to file) a notice of the sale or transfer with the Chicago office of the Illinois Department of Revenue (the "Department") on Form CBS-1, "Notice of Sale, Purchase, or Transfer of Business Assets," disclosing the: (i) name and address of the seller; (ii) the name and address of the purchaser; (iii) the date of the sale; and a (iv) a copy of the sales contract and financing arrangements including a description of the property sold, the amount of the purchase price or other consideration and any other information reasonably required by the Department (the "Bulk Sales Notice"). 35 Ill. Comp. Stat. 5/902(d) (2016); 86 Ill. Admin. Code § 130.1701. See also Ill. Dep't of Revenue, "Got Questions? What Do I Do If I Sell or Purchase a Business?", available at http://tax.illinois.gov/QuestionsAndAnswers /750.htm.

Within 10 business days of the Department's receipt of the Bulk Sales Notice, the Department will issue an order, commonly known as a "Bulk Sales Stop Order," detailing the amount, if any, that the buyer should withhold from the purchase price to satisfy the seller's outstanding tax obligation, subject to a minimum amount as designated by the statute. If the sale or transfer is for no consideration, the purchaser must withhold performance of the condition that constitutes the consideration for the sale. However, the buyer may notify the Department up to 10 business days before the date of the sale or transfer so that the Department may make a withholding determination in time for the sale. 35 Ill. Comp. Stat. 5/902(d) (2016); 86 Ill. Admin. Code §130.1701(a)(4). The Department will then issue a final determination of the seller's tax liability within 60 business days of the issuance of the initial order. The buyer will have to continue to withhold the portion of the purchase price or its performance of the closing condition until the buyer receives a certificate from the Department showing that the tax liability (including penalty and interest) has been satisfied, or that there is no tax, penalty or interest due from the seller under the Illinois Income Tax Act or the Retailer's Occupation Tax Act, as applicable. 35 Ill. Comp. Stat. 5/902(d) (2016); 86 Ill. Admin. Code § 130.1701(b).

If the seller fails to pay the tax, penalty and interest due, the Department may make a claim against the buyer to pay to the Department the amount withheld from the purchase price. 35 Ill. Comp. Stat. 5/902(d) (2016); 86 Ill. Admin. Code § 130.1701(d). However, the buyer is relieved of any duty to continue to withhold payment if the Department fails to notify the purchaser within the 10 business day and 60 business day time periods discussed above. 35 Ill. Comp. Stat. 5/902(d) (2016); 86 Ill. Admin. Code § 130.1701(c). If a buyer fails to provide the Bulk Sales Notice within 10 days after the sale date, the buyer may be held liable for any of the seller's tax liability to the Department "up to the amount of the reasonable value of the property acquired by the purchaser or transferee." 35 Ill. Comp. Stat. 5/902(d) (2016); 86 Ill. Admin. Code § 130.1701(a)(4).

10.1.3. Bulk Sales Liability and Reporting under the Unemployment Insurance Act

The Unemployment Insurance Act (820 Ill. Comp. Stat. 450/1 et seq. (2016)) (the "UIA") differs slightly from the other bulk sales provisions in that it does not impose an obligation as a result of a sale of real estate. Instead, the UIA imposes a reporting obligation on a purchaser acquiring the business, the stock of goods, furniture and fixtures, machinery and equipment or the goodwill of any "employing unit." 820 Ill. Comp. Stat. 405/2600 (2016). An "employing unit," means any employer of one or more persons performing service within the State of Illinois. 820 Ill. Comp. Stat. 405/204 (2016). Accordingly, any time a buyer is acquiring furniture or fixtures in conjunction with real property, it should analyze the seller and review its potential liability under this Act.

Under the UIA, a seller is required to notify the Director of the Department of Employment Security (the "Director") of such a sale at least 7 days prior to the date of the sale, and provide information regarding the sale and the parties, as provided on Form UI-2600. 820 Ill. Comp. Stat. 405/2600 (2016). See also Form UI-2600, available at http://www.ides.illinois.gov/IDES%20Forms%20and%20Publications/UI-2600_LE-10.pdf. The seller is also required to file a "Notice of Change" report on Form UI 50A to the Director within 10 days of the sale and pay the contributions, interest and penalties owed under the UIA. 820 Ill. Comp. Stat. 405/2600 (2016). See also Ill. Dep't of Emp. Sec., Illinois Unemployment Insurance Law Handbook, page G-38 available at http://www.ides.illinois.gov/IDES%20Forms%20and%20Publications/CLI106L.pdf. The buyer is required to withhold an amount sufficient to cover any contributions, interest and penalties due and unpaid by the seller, or, if there is no consideration involved, withhold performance of the condition constituting consideration for the transfer. If the seller fails to pay the required contributions, then the purchaser must pay the amount so withheld to the Director, or continue to withhold performance of the closing condition, or risk being held personally liable to the Director for the seller's unpaid amounts in an amount up to the reasonable value of the property acquired. Id. at A-99.

10.1.4. County and Municipal Bulk Sales Liability

In addition to bulk sales risk at the state level, buyers should be vigilant in understanding potential bulk sales liability at the county and local level as well. For example, a buyer purchasing real estate in Chicago will also have to contend with the imposition of bulk sales reporting requirements under Section 34-92 of the Cook County Ordinance and the Uniform Revenue Procedures Ordinance under Section 3-4-140 of the City of Chicago Municipal Code, each of which requires the seller to provide notice of the sale at least 45 days prior to the date of sale or transfer and, in a similar fashion as the Illinois statute, imposes liability on a buyer. Cook County Ordinances 34-92(b)(3) and 34-92(c)(5); Chi. Mun. Code §§ 3-4-140(B)(3) and 3-4-140(C)(5).

10.2. Chicago Driveway Permits

Buyers in Chicago should be aware of a little-known, but potentially costly, rule in the City of Chicago, which imposes liability on a property owner for unpaid permit fees for driveways and curb cuts. See Andrew P. Scott, "A Due Diligence Tip for Chicago Land Purchasers – Beware of the Driveway Permit," LEXOLOGY (Apr. 12, 2016), available at http://www.dykema.com/resources-alerts-a-due-diligence-tip-for-chicago-land-purchasers-beware-of-the-driveway-permit_04-11-2016.html.

10.3. Commercial Real Estate Broker Lien Act

Commercial real estate brokers are entitled to place a lien on commercial real estate in the amount due to the broker under a written agreement with the seller, or if applicable, the buyer. 770 Ill. Comp. Stat. 15/10(a) (2016). Furthermore, unless sufficient funds are escrowed at closing to release all liens against the real estate, the broker is not required to release its liens against the property. 770 Ill. Comp. Stat. 15/20 (2016). See also W. Suburban Bank v. Attorneys' Title Ins. Fund, Inc., 761 N.E.2d 346 (Ill. App. Ct. 2d 2001). The buyer usually addresses the potential for a lien by requiring a broker, including the seller's broker, to provide a lien waiver.

10.4. Hotel Operators' Occupation Tax Act

The Hotel Operators' Occupation Tax Act (35 Ill. Comp. Stat. 145/1 et seq. (2016), "HOTA") is imposed on persons "engaged in the business of renting, leasing or letting rooms in a hotel." 35 Ill. Comp. Stat. 145/3(a) (2016). This tax is in addition to any other occupancy or privilege taxes imposed by the State of Illinois or any municipality. 35 Ill. Comp. Stat. 145/1 (2016). Buyers should also be aware that HOTA incorporates by reference the bulk sales provisions under ROTA. 35 Ill. Comp. Stat. 145/7 (2016). Furthermore, the City of Chicago imposes an additional tax on similar activities within the City of Chicago. Chi. Mun. Code § 3-40-470.