

Delaware Purchase and Sale Issues for Buyers

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DELAWARE COURTS traditionally afford parties broad and deferential freedom of contract. In Delaware, a commercial real estate purchase and sale agreement (referred to herein as a “PSA”) is no exception—buyers and sellers are free to arrange PSAs in a wide variety of forms. Still, Delaware custom and law provide important limitations and guidance that an attorney should review before drafting and negotiating a Delaware PSA.

This article serves as a non-exhaustive guide to Delaware’s most important local law and custom for commercial PSAs. Its aim is to be a helpful start for an out-of-state attorney (or a Delaware attorney unfamiliar with commercial real estate transactions) on specific Delaware state law issues in drafting and negotiating a PSA for Delaware real property. Many issues that arise in a PSA generally arise from a purchaser’s perspective. As such, this article may be most helpful to attorneys representing the purchasers in these transactions.

As we will describe, some content that generally should be included in a Delaware PSA is not necessarily

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intuitive. In particular, the attorney's role in a settlement and as a title insurance agent has some unique characteristics. As always, independent research and consulting a local expert is advisable to supplement the information contained in this article.

1. TITLE INSURANCE AND ESCROW

1.1 Title Insurance

1.1.1 Generally. Delaware courts define a title insurance policy as “a contract of indemnity under which the insurer for a valuable consideration agrees to indemnify the insured in a specified amount against loss through defects of title to, or liens or encumbrances upon realty in which the insured has an interest.”¹ In Delaware, attorneys can be licensed title insurance agents and issue such policies. Accordingly, attorneys frequently act as both the title insurance agent and the buyer's attorney in the same real estate transaction. It is generally understood that this practice does not constitute a conflict of interest for the attorney, but no formal Delaware ethics opinions are directly on point. As title insurance agents, attorneys usually prepare the commitment and make recommendations with respect to the removal of exceptions. Delaware attorneys typically do not conduct title searches, although some attorneys do provide this service. An attorney is also specifically authorized to act as a settlement agent, an act often delegated by law or custom to title companies in other states.²

1.1.2 Title Matters to Consider. A PSA in Delaware will often have tight time frames for a purchaser to object to title issues. A purchaser will usually be required to send the seller, within a specified period of time (such as thirty days after the execution of the PSA), a title objection letter based on a draft title commitment. The seller then reviews this objection letter and will be required (usually within three to five business days) to determine how to handle any objectionable items. Generally, if a purchaser fails to object to title issues, the PSA will provide that such defects are therefore implicitly accepted by the purchaser. Thus, paying attention to deadlines under the PSA becomes crucial. Since the same attorney might be tasked with creating the commitment *and* reviewing it, an attorney for a purchaser in Delaware should keep in mind realistic time frames to handle both tasks when drafting a PSA.

1.2 Escrow

1.2.1 Escrow Funds. Delaware has unique requirements with respect to settlement funds for a property. Under Delaware law, the flow of funds related to a Delaware real estate settlement must go through an account of a Delaware attorney that complies with Rule 1.15 and 1.15A of the Delaware Rules of Professional Conduct.³ Accordingly, if an escrow account will be used for receiving and disbursing settlement funds (which is common practice in commercial real estate transactions in Delaware), such account must be compliant with state ethics laws, meaning that such funds must go through the account of a Delaware attorney. While deposits do not have to be held in such an account, upon being released for

¹ *Pioneer Nat. Tit. Ins. Co. v. Child, Inc.*, 401 A.2d 68, 69 (Del. 1979) (citing *Ocean View Land Co. v. West Jersey Title Co.*, 61 A. 83 (N.J. 1905)).

² See Section 3.1, *infra*.

³ *In re Matter of a Member of the Bar of the Supreme Court of Delaware*, (No. 313) (Del. 2006); see also *In the Matter of Mid-Atlantic Settlement Services, Inc.* (No. 102) (Del. 2000).

a settlement, the deposits must also be disbursed through the Delaware attorney's account.

1.2.2. Escrow Agent. A purchaser's attorney could act as an escrow agent in Delaware. To preserve neutrality, however, most transactions will use outside escrow agents, traditionally and most frequently a realtor. The title company for the transaction can also fill this role and is increasingly used as an escrow agent in Delaware. Delaware PSAs typically also contain provisions regarding the distribution of the deposit, including dispute resolution procedures and exculpation of liability for escrow agents. Also, the PSA should designate whether the deposit will bear interest in escrow.

2. OTHER DUE DILIGENCE CONCERNS

2.1 Environmental Concerns

2.1.1. Environmental Tests. As in all other states, an attorney drafting a PSA in Delaware should be particularly aware of environmental issues with the land or buildings included with the subject property. In Delaware, it is common for a purchaser to require provisions in the due diligence paragraphs related to study periods to be as broad as possible, so that the purchaser will have free reign to conduct as many tests as it requires. Usually, a purchaser will expressly enumerate its ability to perform a Phase I or Phase II environmental site assessment. Additionally, a purchaser should request all environmental reports in the seller's possession, which is common practice in Delaware.

2.1.2. Environmental Laws. There are a number of federal, state and local laws that affect land use in Delaware. As in other jurisdictions, a PSA will address both federal and state laws dealing with hazardous or toxic wastes (e.g., CERCLA and Delaware's Hazardous Substances Cleanup Act, Del. Code Ann. tit. 7 § 9101, et seq.). Common Delaware practice is to include a representation and warranty from the seller that the property was not used for the dumping of toxic substances or waste and the seller has no knowledge of the presence of such substances or waste on the property. Other environmental laws can be problematic for particular projects. For example, purchasers of industrial property or raw land for industrial development in the eastern portion of the state should be aware of the Coastal Zone Act, Del Code Ann. tit. 7 § 7001, et seq. This act imposes various stringent requirements on manufacturing in coastal areas, which has significantly affected the industrial real estate market in Delaware. Another issue could be the presence of underground storage tanks on the property. Delaware regulates underground storage tanks through the Delaware Underground Storage Tank Act ("DUSTA"), Del Code Ann. tit. 7 § 7401. The Delaware Department of Natural Resources and Environmental Control ("DNREC") also has regulations with respect to underground storage tanks.⁴ It may be difficult for an attorney unfamiliar with Delaware real estate transactions to know every environmental law applicable to the property. As such, a purchaser will often try to include seller representations and warranties (in addition to those mentioned above regarding toxic and hazardous substances) to address other potential environmental problems with the property.

2.1.3. DNREC Permits. If a PSA contemplates construction and/or renovations, DNREC may need to be involved in some circumstances. Working with DNREC for environmental permits and approvals is

⁴ See 7 Del. Admin. Code § 1351-A-1.0 et seq.

a time-consuming process and can take months to complete. The PSA should afford ample but reasonable time to obtain these approvals.

2.2. Zoning. In all three of Delaware's counties (New Castle, Sussex and Kent), zoning for unincorporated areas is handled on the county level, and many of the incorporated municipalities have their own zoning codes and planning departments. Many of these codes and zoning maps are available online, but some are not.⁵ A purchaser may also want to obtain a zoning certificate from the governing body, which sometimes may be required. In the City of Wilmington, for example, sellers of virtually all commercial properties are required to get a zoning certificate prior to sale and include the same in the agreement or instrument of sale or conveyance.⁶

2.3. Code Inspections. Depending on the type of property transferred, there may also be local requirements in Delaware for code inspections. For example, in the City of Wilmington, it was once a requirement that any residence transferred in the city would need to be inspected, but such requirements have been changed.⁷ Wilmington still, however, requires periodic inspections of rental properties, which could affect a commercial transaction involving apartments.⁸ Other inspection requirements may arise if the transaction involves a change in use. In the City of Newark, for example, a certificate of occupancy must be obtained for any change in use of a property.⁹ To obtain this certificate, an inspection is required.¹⁰

2.4. Risk of Loss. Unless contracted otherwise, Delaware courts generally follow the doctrine of equitable conversion with respect to risk of loss to equitable owners.¹¹ In other words, once the PSA is signed, the risk of loss is on the purchaser. As such, purchasers' attorneys pay particular attention to provisions in the PSA related to loss and damage to the property prior to settlement. These provisions are customarily negotiated in Delaware, so there is certainly room for a purchaser to contract out of some of its equitable obligations with respect to property damage.

2.5. Seller's Disclosures. There are no statutory requirements for sellers of commercial property to make disclosures. The Delaware Buyer Property Protection Act places certain requirements on residential sellers, but this act applies only to residential property and not to commercial property.¹² In fact, it is

⁵ Wilmington's zoning map, for example, can be found here: <http://www.ci.wilmington.de.us/home/showdocument?id=364>. Certain Delaware municipal codes can be found here: <https://www.municode.com/library/de>.

⁶ Wilmington City Code § 48-35. The only properties not included in this requirement are those being used as a one-family dwelling or those belonging to and being used for the immediate purposes of a bona fide and regularly operating church or religious organization. *Id.* at § 48-35(e)(1)-(2). *See also* Newark City Code § 32-102, *et seq.* (describing the "buyer information package" that must be disclosed to any purchaser of real property in the City of Newark, including, *inter alia*, zoning information, and requiring purchaser to sign an affidavit certifying that purchaser has reviewed the same).

⁷ Wilmington City Code § 48-32.

⁸ *Id.* at § 48-35.

⁹ Newark City Code § 32-77(a).

¹⁰ *Id.* at § 32-77(b).

¹¹ *See, e.g., Briz-Ler Corp. v. Weiner*, 171 A.2d 65, 67-69 (Del. 1961). Some courts have found that a condition precedent in a contract can make the contract not subject to the doctrine of equitable conversion. *Id.*

¹² Del. Code Ann. tit. 6, § 2572 (requiring "a seller transferring residential real property" to disclose defects in writing). The Buyer Property Protection Act can be found at Del. Code Ann. tit. 6, § 2570, *et seq.*

only within the past twenty years that PSAs have begun to address physical conditions of property at all. The condition of a property will likely be included in an “as-is” clause, wherein the purchaser and seller can negotiate how the condition of the property will be described in the PSA. Still, sellers might not be inclined to make edits on this clause. Therefore, the condition of the property could also be addressed by the purchaser in the seller’s representations and warranties in the PSA or during due diligence. Also, Delaware, like many other jurisdictions, imposes an implied covenant of good faith and fair dealing in contractual performance and enforcement.¹³ A party cannot “unfairly tak[e] advantage of the other party” in a contract disclosure.¹⁴ Thus, any material misstatement with respect to the property in a contract is likely actionable under Delaware law.

2.6. Ownership Entities. Delaware law offers a variety of ownership entities for commercial real estate transactions, including, among others, a limited liability company (LLC), a limited partnership (LP) and a corporation. LLCs are very common. Unlike some neighboring states, there are no special taxation benefits granted to an LP for property ownership as opposed to an LLC.¹⁵ If a purchaser is entering into a PSA through a parent or the like, it will ensure that the PSA is freely assignable to a separate property ownership entity. Such assignment provisions are customarily negotiated in Delaware PSAs.

3. SETTLEMENT PROCEDURE

3.1. Settlement Must Be Conducted by an Attorney. Unlike many states, an attorney licensed to practice law in Delaware is required to conduct a settlement of Delaware real property.¹⁶ The Supreme Court of Delaware confirmed as a matter of law this longstanding tradition by affirming an opinion of the Board on the Unauthorized Practice of Law of the Supreme Court of the State of Delaware (the “Board”) in 2000.¹⁷ Reviewing a complaint against a settlement services company, the Board found that there were certain determinations within a real estate settlement that required “legal judgments” and, as such, could only be performed by an attorney.¹⁸ Therefore, at least one attorney licensed in Delaware must be present at an in-person settlement of Delaware real property. If settlement is instead a “paper” settlement, and not in person, the transaction must still be conducted by a licensed attorney in Delaware.

3.2. Deeds

3.2.1. Generally. The PSA should designate which form of deed will be used,¹⁹ and it is common practice in Delaware to append a draft deed as an exhibit. For a deed to be legally enforceable in Delaware it must (i) be in writing, (ii) be signed by the party to be charged, (iii) contain a sufficient description of the property (so that one could determine the boundaries of the property), (iv) name the grantor and grantee,

¹³ See, e.g., *Wilgus v. Salt Pond Inv. Co.*, 498 A.2d 151, 159 (Del. Ch. 1985).

¹⁴ *Coca-Cola Bottling Co. of Elizabethtown v. the Coca-Cola Co.*, 668 F. Supp. 906, 918 (D. Del. 1987).

¹⁵ For example, limited partnerships are a common vehicle in Pennsylvania for state tax reasons. See Gary S. Lewis, *Issues in Ownership of Real Estate - U.S.A. - Pennsylvania*, Lex Mundi (2008), available at www.lexmundi.com/Document.asp?DocID=1777.

¹⁶ *In the Matter of Mid-Atlantic Settlement Services, Inc* (No. 102) (Del. 2000) (adopting and filing the opinion of the Board on the Unauthorized Practice of Law of the Supreme Court of the State of Delaware).

¹⁷ *Id.*

¹⁸ *Id.* at 17.

¹⁹ See Section 3.2.2, *infra*.

(v) contain an acknowledgment, and (vi) be delivered to the grantee.²⁰ A seal is not required for a deed to be binding,²¹ but best practice in Delaware is to do so, because contracts under seal in Delaware enjoy a twenty-year statute of limitations.²² A deed does not need to be recorded to be effective between the parties, but recording a deed gives it priority with respect to third parties.²³

3.2.2. Forms of Deeds. Delaware has three types of deeds that are used in real estate transactions: general warranty deeds, quitclaim deeds and special warranty deeds.

3.2.2.1. General Warranty Deeds and Quitclaim Deeds. General warranty deeds and quitclaim deeds in Delaware do not differ from those of most other jurisdictions. A general warranty deed expressly provides good title from the seller and contains a number of covenants available under common law.²⁴ A quitclaim deed conveys to a purchaser whatever interest (if any) the seller has in the property.²⁵

3.2.2.2. Special Warranty Deed. The special warranty deed, on the other hand, is commonly used in Delaware real estate sales, and Delaware law provides for an abbreviated form of special warranty deed. The special warranty deed conveys property to a purchaser with two specific covenants: first, the seller covenants that it has not conveyed the real estate to anyone apart from the purchaser, and second, the seller covenants that the estate is free from any title claims created by the seller.²⁶ This type of deed is obviously more attractive to a seller than a general warranty deed because it limits the covenants made by the seller in the conveyance. If the parties have agreed to convey property with such a special warranty deed, the deed may contain the words “grant and convey” in the granting clause, which has the effect of making the deed a special warranty deed notwithstanding the absence of express warranty language.²⁷ The failure to include these words, in the absence of express warranty language, could alter the type of deed being conveyed.

3.3. Transfer Taxes. A transfer of ownership in Delaware of real property will be subject to realty transfer taxes unless there is an applicable exception.²⁸ Almost all commercial real estate transactions will therefore require the payment of transfer taxes.²⁹ Specific government-mandated transfer tax affidavits must be filed with both the state and the county or city in which the real property is located.³⁰ These affidavits must be filed at the time the conveyance of the real property is recorded, or the parties to the

²⁰ See, e.g., Del. Code Ann. tit. 25, § 121(a). For a proper form of acknowledgment, see Del. Code Ann. tit. 29, § 4328.

²¹ Del. Code Ann. tit. 25, § 131.

²² See, e.g., *Garber v. Whittaker*, 2 A.2d 85 (Del. Ch. 1938).

²³ 25 Del. C. § 153.

²⁴ *Warranty Deed*, Black's Law Dictionary (10th Ed. 2014).

²⁵ See *State ex rel. Dept. of Transp. v. Penn Central Corp.*, 445 A.2d 939, 946 (Del. Super. 1982) (“The grantee of a quitclaim deed acquires no better interest than the grantor had.”).

²⁶ See Del. Code Ann. tit. 25, § 121(b).

²⁷ *Id.*

²⁸ Del. Code Ann. tit. 30, § 5401, *et seq.*

²⁹ The exceptions are listed in Del. Code Ann. tit. 30, § 5401(1). Exceptions include husband/wife conveyances, § 5401(1)(g), conveyances to nonprofit conservation organizations, § 5401(1)(u), transfers between siblings, § 5401(1)(w), etc.

³⁰ Del. Code Ann. tit. 30, §§ 5402; 5409.

transfer could face penalties.³¹ In the absence of an agreement to the contrary, the seller is responsible for transfer taxes.³² However, transfer taxes are customarily split between seller and purchaser in Delaware.

3.4. Income Tax. Sellers of real property, whether a resident or nonresident of Delaware, may be subject to state income tax on the gains received.³³ Both residents and nonresidents are also required at settlement to fill out a form issued by the Director of the Division of Revenue, typically a Form 5403,³⁴ and record the same with the deed.³⁵ A nonresident (which includes the nonresident owner of a so-called pass-through entity such as a limited liability company) is additionally required at the time of the sale to remit the amount of taxes due, which are to be withheld from the sales proceeds payable to the seller for the purpose of paying the nonresident's Delaware income tax on that gain.³⁶ Out-of-state sellers should therefore be prepared to withhold their Delaware state taxes at the time of closing. If there is any discrepancy between the amount withheld and the amount of taxes actually owed at the end of a tax year, this can be remedied at the time of filing the tax return filing.

3.5. Prorations. Delaware is no different from many other jurisdictions in how prorations are customarily handled in PSAs. For commercial properties, the necessary prorations could be complicated, so the purchaser will often use the due diligence period to thoroughly review all utilities and other services provided to the property. In most transactions, such prorated charges will typically include real estate taxes (excluding rollback taxes, which the purchaser will often try to have fully paid by the seller, as described below),³⁷ water and sewer fees, condominium fees or other lienable charges. The parties are free to apportion such costs how they wish, but the Delaware custom is *pro rata* as of the date of settlement, with the seller paying the day before the date of transfer and the purchaser being responsible starting on that day.

3.6. Other Concerns at Settlement. It is typical in Delaware transactions to list on the PSA the documents that must be presented at settlement and to designate which party bears the responsibility for those documents (e.g., transfer tax affidavits, FIRPTA affidavits). For fully occupied buildings, parties

should consider how to handle all leases and licenses related to the property. Delaware PSAs also often include a form of assumption and assignment appended to the PSA for any leases or service contracts that the purchaser has agreed to assume or assign.

4. REMEDIES/DAMAGES

³¹ See Del. Code Ann. tit. 30, § 5410.

³² Del. Code Ann. tit. 30, § 5412. *But see*, Del. Code Ann. tit. 30, § 5402(a) for a seemingly contrary requirement.

³³ For residents, *see, e.g.*, Del. Code Ann. tit. 30, § 1105 (individuals); for nonresidents, *see, e.g.*, Del. Code Ann. tit. 30, § 1121 (“A tax is hereby imposed for each taxable year on the taxable income of every nonresident individual of this State equal to the tax determined...as if such individual were a resident....”).

³⁴ This form can be found at http://revenue.delaware.gov/services/current_bt/5403.pdf.

³⁵ For nonresidents, this requirement is found in 30 *Del. C.* §§ 1126 (individuals), 1606 (pass-through entities), 1909 (corporations).

³⁶ Del. Code Ann. tit. 30, § 1126.

³⁷ See Section 5.5, *infra*.

4.1. Generally. PSAs are governed by customary contract law, and therefore typical contractual remedies are available in any PSA. It has been customary in Delaware for a purchaser to seek to limit the seller's remedies to retention of the deposit. As discussed below, Delaware has particular rules with regard to such liquidated damages provisions. The purchaser's remedies for a seller's breach vary from transaction to transaction, though they usually include specific performance. Specific performance is not guaranteed in Delaware and, as described below, can sometimes be difficult to obtain.

4.2. Liquidated Damages. Liquidated damages are available under Delaware contract law "[w]here the damages are uncertain and the amount agreed upon is reasonable."³⁸ A deposit in a PSA serves as a perfect liquidated damage mechanism for certain breaches. For example, a purchaser might not fulfill its settlement obligations. If a seller were to sue for damages, a court might struggle to determine the extent of damages. After all, the seller can always turn around and sell the property to another willing purchaser tomorrow. Thus, allowing the seller to keep the deposit becomes a reasonable way for both parties to walk away from the deal and move on.

4.3. Specific Performance. As noted above, a seller will usually include a right of specific performance in the PSA. A party can obtain specific performance, and other equitable remedies, in Delaware's equity court, the Court of Chancery. However, specific performance in Delaware is an "extraordinary remedy," and a court "will not award it lightly."³⁹ A party looking to enforce a contract through specific performance must show that "(1) a valid contract exists, (2) he is ready, willing and able to perform, and (3) that the balance of equities tips in favor of the party seeking [specific] performance."⁴⁰ Accordingly, although specific performance may be available through the contract, it is not a guaranteed remedy in Delaware.

4.4. Alternative Dispute Resolution. Alternative dispute resolution ("ADR") is not common for PSAs in Delaware. However, if either party wishes to include such a procedure in the PSA, the recently enacted Delaware Rapid Arbitration Act permits a swift and efficient process for resolving a dispute.⁴¹

5. OTHER DELAWARE-SPECIFIC CONSIDERATIONS

5.1. Governing Law Provisions. Delaware courts follow the "most significant relationship test" as provided in the Restatement (second) of Conflict of Laws § 145(1) (1971).⁴² It is fairly clear, without an exhaustive review of this test, that Delaware would bear the most significant relationship to a contract for the sale of real property in Delaware. Still, the purchaser or seller of such property might not be a Delaware resident, and certain parts of the contract (like representations and warranties) might invoke the law of another jurisdiction. Parties should therefore determine which law will govern in a governing law provision. Choice of law provisions are customary in Delaware PSAs. Under Delaware law, parties to certain contracts can elect for Delaware law to apply even if the parties do not have significant ties to Delaware.⁴³

³⁸ *Brazen v. Bell Atlantic Corp.*, 695 A.2d 43, 48 (Del. 1997) (quoting *Lee Builders v. Wells*, 103 A. 2d 918, 919 (Del. Ch. 1954)).

³⁹ *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010).

⁴⁰ *Id.*

⁴¹ See Del. Code Ann. tit. 10, § 5801, *et seq.*

⁴² *Sinnott v. Thompson*, 32 A.3d 351 (Del. 2011).

⁴³ Del. Code Ann. tit. 6, § 2708(a).

5.2. Rights of First Refusal. The classic law school nemesis, the rule against perpetuities, still lurks in Delaware and is applicable to both options to purchase and rights of first refusal.⁴⁴ Thus, a purchaser entering into a PSA with either of these rights should take care to determine that the rule against perpetuities is satisfied. If there is no particular period of exercise for such rights, Delaware agreements of sale will typically pick an arbitrary class of persons then alive, such as “the grandchildren of President George H. W. Bush.” Also, as in other jurisdictions, it is advisable that the beneficiary of such rights (e.g., a seller that retains a first refusal right over the property being sold) should record a memorandum in the land records to put third parties on notice of these rights.

5.3. Unimproved Land. Delaware has a statutory notice requirement that must be included in any contract for the sale of unimproved land.⁴⁵ This notice is to the purchaser and states that the “buyer should consult with the appropriate public authorities to ascertain whether central sewerage and water facilities are available,” or, if not, whether the property will be approved by “appropriate public authorities” for the installation of a well and a sewer system.⁴⁶ If such facilities are not available, there are certain contingencies in the notice that the parties must complete.⁴⁷ In lieu of actually reprinting the statutorily prescribed notice, Delaware PSAs often incorporate the notice by reference. For example, a contract might provide: “Purchaser and Seller hereby agree that the notice provision required to be included in this Agreement pursuant to Del. Code Ann. tit. 25 § 313 is by reference incorporated herein.” However, even if the actual statutory notice is not fully printed in the contract, the parties should still be familiar with the requirements and how to fulfill them. The contingencies provided for in this notice may be modified by the parties or waived by the purchaser, but only by a signed addendum to the PSA. Because these statutory requirements might be deemed to have been incorporated into the PSA as a matter of law, sellers in particular should take care to ensure that the requirements have been properly waived by the purchaser.

5.4. Purchase Money Transactions. The PSA may be structured as a purchase money transaction, wherein the seller will finance the sale by taking a note and mortgage from the buyer. Under Delaware law, purchase money transactions must include certain factual information, most notably an amortization schedule, or else the PSA may be voided by a party.⁴⁸ Such harsh statutory guidelines make it crucial that parties to a purchase money transaction heed all of the statutory requirements. Parties to transactions that might closely resemble a purchase money transaction may also want to include language that attempts to remove any requirements imposed by law, like a waiver, but there is no case law to suggest whether such a waiver would be enforceable. There is also a little-understood provision of Delaware law to the effect that a PSA that includes purchase money financing may only remain executory for six months, the violation of which allows either party to void the contract.⁴⁹

5.5. Agricultural Land. If the property being sold is agricultural land that is subject to an agricultural lease, which could be the case where farmland is being purchased for development, the PSA must include notice to the purchaser of the existence and terms of the lease and of the provisions of Delaware law regarding the renewal of agricultural leases.⁵⁰ Also, purchasers of agricultural property should be aware that such property is often entitled to reduced tax liability under Delaware law.⁵¹ If the land is purchased and employed for a purpose other than agriculture, the purchaser could be subject to “rollback taxes” that

⁴⁴ See *Stuart Kingston, Inc. v. Robinson*, 596 A. 2d 1378, 1383 (Del. 1991).

⁴⁵ Del. Code Ann. tit. 25, § 313.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See Del. Code Ann. tit. 25, § 314.

⁴⁹ Del. Code Ann. tit. 25, § 314(c)(e).

⁵⁰ Del. Code Ann. tit. 25, § 315.

⁵¹ Del. Code Ann. tit. 9, § 8329, *et seq.*

recapture some of the tax benefits that the property received as agricultural land.⁵² In land contracts, a purchaser will typically want to specify that these taxes be borne by the seller, so that the purchaser is not facing a large tax liability upon settlement. On the other hand, the seller may want the purchaser to bear the tax liability that is triggered by the purchaser's decision not to continue the agricultural activity on the land.

5.6. Broker's Lien. Delaware allows a broker to place a lien on commercial real estate that is subject to a "brokerage agreement for the unpaid amount of compensation due the broker as stated in the brokerage agreement."⁵³ In order to place such a lien, the brokerage agreement must expressly "(1) [s]tate the amount or the method of calculating the amount of compensation for the services of the broker; and (2) [s]tate that the brokerage agreement is a binding contract under state law; and (3) [i]dentify the real estate that is covered by the brokerage agreement by description and/or tax parcel number."⁵⁴ If the brokerage agreement was with the purchaser of real property, that lien will attach to that purchaser's interest in the commercial real estate once the "document conveying the commercial real estate to the [purchaser is recorded]."⁵⁵ If a broker was used for a transaction, a purchaser (or any party) may want to require the broker to file an affidavit that states that the broker has been fully paid and that no lien will be filed. A Delaware attorney can require the broker to sign such an affidavit under Delaware law.⁵⁶ The affidavit must also state that if a notice of lien was filed, the broker authorizes "the filing of a written release or satisfaction of the lien by the settlement attorney."⁵⁷ Delaware PSAs often also include a provision that states that parties have not dealt with any brokers (or any brokers other than those specifically stated in the PSA), and if any claims arise that the parties will indemnify each other. The purchaser would want that clause to survive the PSA so that the seller could assist with resolving any broker's liens filed against the subject property.

5.7. Survival. Delaware follows the merger doctrine, meaning that once a deed is "executed and delivered pursuant to a Contract of Sale of realty, the latter merges with the former and becomes void."⁵⁸ In other words, any provisions in a PSA will be extinguished by the signing of the deed, unless such provisions are specifically designated to survive. As noted above, the typical statute of limitations for a contract in Delaware, unless under seal, is three years. Those provisions in a PSA designated to survive (most notably, representations and warranties) will therefore survive for three years. However, under a recent amendment to Delaware law, any contract that involves at least \$1,000,000 will enjoy a twenty-year statute of limitations, even without a seal.⁵⁹ Therefore, negotiating survival of representations and warranties has become even more important for a purchaser, especially if there are defects on the land known by the seller that may not be uncovered by the purchaser for more than three years.

CONCLUSION

This article provides a general overview of the most common local laws and customary provisions likely to arise when negotiating commercial real estate contracts in Delaware. All attorneys inexperienced with Delaware PSAs should proceed with caution. As this article demonstrates, these contracts are not necessarily intuitive, and pitfalls exist. As a reminder to out-of-state attorneys, many Delaware firms provide Delaware counsel for real estate issues. It may be beneficial to send a fully negotiated PSA to a Delaware real estate attorney for review to ensure that no local state law requirements or customs have been missed.

⁵² Del. Code Ann. tit. 9, § 8335.

⁵³ Del. Code Ann. tit. 25, § 2603.

⁵⁴ *Id.*

⁵⁵ Del. Code Ann. tit. 25, § 2604(b).

⁵⁶ Del. Code Ann. tit. 25, § 2613(d).

⁵⁷ *Id.*

⁵⁸ *Re v. Magness Const. Co.*, 117 A.2d 78, 79 (Del. 1955).

⁵⁹ Del. Code Ann. tit. 10, § 8106(c). Subsection (c) was added in 2014 by 79 Laws 2014, ch. 353 § 1.