

## The Magic of “Commercially Impracticable”

By Judith I. Johannsen

Wouldn't it be great to have a “get out of jail free” card for real life so when you make a mistake and you're supposed to “pay” for it, all you would have to do is produce your magic card and in a snap your problem disappears? And what if you could have a card like that for real estate contracts you've entered into but then something happens to make you want to get out of it?

Well, that fantasy is great, but there is no such card, and if you are in a real estate contract, you cannot unilaterally decide you're “done”; rather, you'll need to reach an agreement with the other party to terminate the agreement.

However, there is this contract concept known as “commercially impracticable” and in a recent Superior court case, this was the theory a buyer offered up to be excused from his obligation to perform under a purchase and sale agreement.

Here's what happened. In the summer of 2008, B agreed to buy S's commercial property for \$205 million and B paid S a deposit of \$15 million. The closing was scheduled for November 2008, but then the nation's financial markets tumbled and B could not obtain financing.

While S rebuffed B's requests to restructure the transaction, he did agree to extend the closing date to June 2009. Then, for assurance that B was still willing to go forward, S demanded B to increase his deposit to \$22.5 million. When B was still unable to close due to the financial markets' unforeseen continued deterioration, S took the \$22.5 million deposit.

Courts rarely discharge one party's obligation to perform simply because financing is less favorable or available as originally thought, but B asked the courts for relief anyway, claiming these extraordinary and unexpected financial circumstances made it commercially impracticable for him to close.

B reasoned he should be excused from closing on the property because: 1) the financial market crash made his ability to obtain financing, if not impossible, commercially impracticable; 2) a crash of the financial markets was a wholly unexpected circumstance that neither B or S contemplated in their negotiations, nor became a basic assumption by the parties to the contract; and 3) the impracticability of the situation happened through no fault of his own.

The court agreed with B, concluding that commercial impracticability discharged B's obligation to perform under the purchase and sale agreement as the fundamental assumption (that B would be able to obtain financing) on which the contract was based no longer existed due to unforeseen circumstances and, furthermore, could not be done without unreasonable and excessive cost to B.

While there is no magic “get out of jail free” card for a buyer's cold feet in real estate transactions, this was a case between two sophisticated parties where an insurmountable difficulty not contemplated at the time their contract was entered into crippled the buyer's ability to consummate the transaction. Fortunately, the law provides a party with a viable argument and a court a legal basis on which to fashion an equitable remedy.

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