



What is estoppel? - by Thomas Kearns

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While real estate professionals should be familiar with the term “estoppel,” the legal doctrine of estoppel has a surprisingly wide reach. Estoppel is a legal principle that prevents someone from denying a fact that they previously agreed to. In real estate, the most common use of the term is in connection with lease estoppels. Every sophisticated lease has a provision which requires the tenant to deliver an estoppel certificate as to various matters including a recital of the documents that make up the lease, that the lease has not been further amended, the current rent, that the landlord is not in default, etc.

But estoppel clauses are very common in other areas. For example, if a mortgagee ever agrees to modify an existing mortgage, the modification agreement always contains a statement that the borrower acknowledges that the existing loan documents are binding and in full force and effect and that the borrower has no defense to the existing obligations.

Likewise, amendments to LLC agreements contain similar language with respect to the LLC agreement. The typical LLC amendment clause has all members agree that the LLC agreement as amended remains in full force and effect.

Estoppel provisions are also helpful in situations where a full release may not be appropriate. For example, in the LLC amendment example above, it may not be appropriate to insist on a full release from all members when executing an amendment to an LLC agreement but the managers often ask for a statement from members that the LLC managers are not in default to the knowledge of the members. Estoppel provisions with a knowledge qualifier are a common way for the parties to proceed with agreements without a full release but with comfort that the managers will not be hit with a lawsuit the day after the amendment is signed. These types of estoppel provisions are particularly helpful when there is existing tension or a history of litigation or claims between the parties or their affiliates.

A recent case involving an LLC dispute illustrates the effectiveness of the estoppel doctrine. In this case, the manager disagreed with a person’s allegation that they owned an interest in the LLC. However, it turned out that the LLC’s tax returns in previous years had, in fact, included the claiming person as holding an interest in the LLC. The court held that this is a so-called “tax estoppel” meaning that the tax documents, which are, of course, certified to the federal government, can’t later be denied by the filer on the basis of mistake or misunderstanding.

These types of contractual estoppels are usually upheld by courts in the absence of fraud or contravening statute. Sophisticated real estate operators should insist on the appropriate estoppel provisions in the right circumstances.

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