

BEWARE THE ROFR

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COUNSEL'S CORNER
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Cecil Hicks gave Tim Castille a right of first refusal (“ROFR”) to buy a four acre parcel of land in Wheeler County, Texas. A small portion of the four acres was leased to American Tower. To trigger Castille’s ROFR, Hicks sent Castille a letter providing that Hicks intended to sell only the small portion of the property that was leased to American Tower, for \$50,000.

Castille did not exercise his ROFR, but instead brought a lawsuit claiming that Hicks had no right to subdivide the four-acre parcel and sell pieces. Instead, Castille argued, the ROFR applied to all four acres. Predictably, Hicks did not read the RFOR in that manner.

The Wheeler County trial court agreed with Castille and refused to allow Hicks to subdivide his acreage. So Hicks appealed.

The Amarillo Court of Appeals reviewed Texas cases that generally disfavor restraints against a property owner’s ability to mortgage, lease or sell it. As well there was no language in the ROFR prohibiting Hicks from partitioning his property or otherwise permitting Castille to require a sale of all four acres and nothing less.

Simply put, the ROFR did not address the issue.

On April 14, 2010, the Amarillo Court of Appeals reversed the decision of the Wheeler County court, holding that Hicks had the right to sell all or less than all four acres, as Hicks determined was appropriate, provided the third party (American Tower’s) offer was: (a) commercially reasonable; (b) submitted in good faith; and (c) not designed specifically to defeat Castille’s ROFR.

Bottom line:

1. ROFRs, purchase and lease options, ROFOs and similar provisions can be (and usually are!) difficult to properly draft.
2. Texas Courts are reluctant to overly burden property owners.
3. Sometimes commercial brokers are accused of finding a “straw” buyer or tenant to feign an interest in property, so that a ROFR, option or ROFO is triggered and the option holder is forced to buy or lease. If the offer of the “straw” buyer or tenant is not legitimate or does not meet the three-part test described in this case, then the ROFR, option or ROFO may not be properly triggered.

Questions or Comments – Contact:

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