

### When Is A Deal A Deal? Or, Can an Illusory Agreement Later Become Irrevocable and Enforceable?

Fumi Knox

The California Supreme Court weighed in on these questions with a recent ruling that has some real estate investors, brokers, and attorneys revising their forms for options and purchase and sale agreements. The Court ruled on March 18, 2010, in the case of *Steiner v. Thexton* (48 Cal.4th 411), that when a buyer can cancel a purchase agreement in his sole and absolute discretion and get his deposit fully refunded, the agreement is an option agreement, but it is one that is illusory because it lacks consideration. The agreement can, however, later become irrevocable and bind the seller to sell to the buyer, once the buyer gives bargained-for consideration to the seller. This decision is causing a stir in both commercial and residential real estate -- particularly with those involved in commercial transactions, where contracts that allow the buyer to back out of a contract in her sole and absolute discretion are common.

#### The Situation.

Steiner, a real estate developer, entered into an agreement whereby he had

three years in which to decide whether he wanted to buy Thexton's property at a fixed price set in the agreement. The three-year period was to allow Steiner to determine the financial feasibility of subdividing the property and to gain entitlements from the County to develop the property. During that period, Steiner could, in his sole and absolute discretion, elect not to continue the transaction, in which event the purchase contract would be null and void and Steiner would get his deposit back. Thexton was willing to enter the agreement because a previous prospective buyer had wanted Thexton to pay all the costs of subdividing the property, whereas Steiner was willing to pay those costs himself.

After the parties signed the contract, Steiner put his \$1,000 deposit into an escrow account. About a year into the feasibility period, after Steiner had spent thousands of dollars and applied for a tentative parcel map, Thexton decided he no longer wanted to sell the property and tried to cancel escrow. Steiner proceeded to obtain the ten-

tative parcel map, opposed canceling the escrow, and then sued Thexton for specific performance, i.e., to make Thexton sell the property to him.

#### The Decision.

The court looked through the form of the agreement, which was titled, "Real Estate Purchase Contract," to rule that the agreement was not a normal purchase transaction, but rather a classic

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option agreement, because the seller was obliged to hold open an offer to sell the property for a given price for a fixed period of time, while the buyer had the power to accept or decline the offer in his sole discretion. But it also ruled that, because the \$1,000 deposit was fully re-



fundable, and the buyer could decline for any reason, whether or not he had done any investigations on the property, the agreement was “illusory” and not enforceable at the time it was made. The court’s reasoning was that for an agreement to be enforceable, consideration must be given. Consideration is given when a party either suffers a detriment or confers a benefit on the other party. Conducting investigations could be considered a detriment that would constitute consideration. And paying \$1,000 would certainly confer a benefit. However, if a party can get out of an agreement without doing anything, and he can get back all the money he paid, he hasn’t actually given any consideration. So, the “deal” wasn’t really a “deal” at all. It was illusory.

The court went on to say, however, that an agreement that is initially illusory may later become enforceable when bargained-for consideration is rendered. The court explained that “bargained for” means that the consideration must have induced the other side to agree to the deal. In other words, a buyer cannot simply investigate for his own satisfaction if the investigation had nothing to do with getting the seller to agree to sell. In this case, Steiner’s agreeing to pay for the subdivision actually was an inducement to Thexton’s agreement to sell; as noted,

Thexton rejected a prior offer because he would have had to pay those costs. Thus, the option contract became irrevocable and enforceable when Steiner undertook the expense and effort to subdivide the property – i.e., he gave bargained-for consideration that he couldn’t get back. Therefore, court ruled that Thexton was required to sell the property to Steiner.

### Implications.

What should we take away from this decision? Most obviously, that an option agreement must clearly provide for consideration specifically for the option, and it should not be in the form of a refundable deposit. In purchase and sale transactions, if a buyer will be able to terminate the agreement in his sole discretion, consideration that is not a refundable deposit is likewise necessary; otherwise the agreement could be deemed to be an option without consideration. Attorneys are beginning to revise their forms to address this in commercial transactions. The California Association of Realtors has already revised its forms for residential sale transactions to state that termination by the buyer must be only for a contingency specifically provided for in the agreement. (This is one way to avoid having the sale agreement being deemed an option contract, based on the buyer’s right to cancel in his sole and absolute discretion.) And remember that any consideration must be bargained for – it must be something that induces that seller to sell. Mere due diligence that benefits the buyer but not the seller would not constitute “bargained-for” consideration.



### About the Author



*Fumi Knox is a partner in the law firm of Greene Radovsky Maloney Share & Hennigh LLP, where her practice areas include real estate, finance and corporate law.*

## CREW Network Committed to Strong Chapters, Successful Members

Denise Kahler

As the commercial real estate industry continues to slug its way out of one of the greatest recessions of our time, CREW Network President Kristin Blount reminded delegates during the 2010 Spring Leadership Summit and Council Meeting in Minneapolis that CREW Network is focused on two key areas this year: keeping chapters strong and supporting member success.

### Building our Brand

Addressing both the need to keep its chapters strong and members successful, CREW Network is working to strengthen the overall CREW Network brand. Delegates were reminded of CREW Network’s new branding statement: “At CREW Network, we exist to influence the success of the commercial real estate industry by advancing the achievements of women.” It is important that all chapters communicate and incorporate this branding statement at the local level so that this organization builds cohesive messaging.

### Strong Chapters

Providing chapters the right tools and resources is critical to maintaining a healthy network. Among its newest resources, CREW Network announced the development of two new chapter playbooks scheduled to be released later this year. The first, Chapter Administration Playbook, will cover everything from chapter startup to finances, governance, insurance and more – everything needed to run an effective chapter. Additionally, CREW Network’s Career Outreach Playbook will provide chapters everything they need to know to successfully launch a career outreach program such as CREW Careers, UCREW and eMentoring.

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Attendees of the Spring Leadership Council participated in strategic roundtable discussions addressing two key areas for chapters: membership recruitment and retention, and programming. Delegates and chapter leaders were broken down into small work groups to discuss these two issues and how they relate to the overall branding of CREW Network. The types of programs chap-

CREW Network launched its University Leadership Series earlier this year. This series, sponsored by Studley, brought in professors from some of the top real estate programs in the United States such as Harvard, Stanford, Columbia, Cornell, and Wharton to present webinars, at no charge to members, on topics ranging from real estate finance to entrepreneurship, transaction and deal structures, and more.



ters offer and the makeup of members within a chapter all impact the CREW Network brand. Delegates discussed the need for having several committees work together to create greater synergy; the need for diversity on the program committee, including diversity of discipline, seniority and more; understanding the needs of a chapter's members and providing them with what they want; and the need to get new members active within the chapter immediately. A complete list of roundtable outcomes will be available later this month.

### Successful Members

With members continuing to search for deals and looking for ways to increase their knowledge and marketability within the industry, CREW Network has responded with several new programs.

Also this year, CREW Network launched its much anticipated CREWbiz™ business networking site. CREWbiz provides every member a personal marketing page to promote business expertise, areas of specialties, deals completed, presentations given, and more – all designed to foster networking among all 8,000 members of the CREW Network organization. While deals may be slow to produce, they are happening across North America and CREWbiz provides an opportunity for members to find the right person to bring onto their teams. The CREWbiz tool will only be success-

ful when every CREW Network member has populated her/his personal profile page. Delegates were charged with encouraging every member within their chapters to participate in CREWbiz.

### Industry Research Preliminary Findings

CREW Network's industry benchmark study conducted in 2005 was one of the most important resources provided to members and to the industry – offering concrete analysis of the achievements of women in the industry. Industry Research Committee Board Liaison Diane Butler presented delegates with some of the preliminary findings from CREW Network's 2010 industry benchmark study to be released in October. Overall, while gaps do still exist, progress is being made.

Among some of the report highlights, disparity continues to exist in compensation levels for men and women in similar positions with similar years of experience. In 2005, 58 percent of men reported incomes in excess of \$150,000, while only 24 percent of women reported incomes at the same levels. While that gap has narrowed, the 2010 numbers still favor men with 48 percent men and 28 percent women reporting incomes in excess of \$150,000.

While not surprising, given the current economic climate, significantly more respondents now indicate they would consider a position with 100 percent commission. Specifically, the percentage of women willing to be compensated under a 100 percent commission plan increased from 17 percent reported in 2005 to 41 percent reported in the current study.

Regarding the areas of success and satisfaction, when asked to list the top five most important job characteristics, both men and women agreed that job enjoyment, challenging job and co-worker respect were within their top five. However, whereas women rounded out their top five with maximize earnings potential and career achieve-



ment, men listed level of decision making and (for the first time) time for family among their top five – a potentially interesting finding for employers.

### Strong Chapters, Successful Members

The months ahead will continue to challenge every professional within the commercial real estate industry. CREW Network remains poised and committed to providing chapters and members the right resources and tools to ensure chapters remain healthy and members remain successful. To do this takes a commitment from every chapter and every member within this Network to effectively communicate the CREW Network brand and to communicate your needs back to the Network. We're here. We're listening. We're responding.



#### About the Author

Denise Kahler is the Marketing and Communications Director with CREW Network.

## Professional Development Opportunities for CREW SF Members

Sarah Collick

There is great news for new entries into the ranks of commercial real estate professional and for seasoned professionals. Scholarship funds are now in place to support educational opportunities for both. Under the leadership of Sarah



Collick, CREW SF is currently expanding a scholarship program for its members. The program will be designed to allow active CREW SF members to take courses and pursue similar activities to enhance their careers. Scholarship funds raised by CREW SF will be available for a variety of different courses, classes and other activities that are helpful to the careers of individual members of CREW SF. The Community Affairs Team of CREW SF will develop a database of the types of courses, classes and other activities that might be suitable, but applicants will not be limited to the activities listed in that database. CREW SF members who desire to use scholarship funds will be required to submit an application describing how they propose to use the funds and how the particular activity will be rewarding to the applicant's career.

Please stay tuned for this exciting new program!

## CREW Network Scholarships

Mary Hedley

On the national level, the CREW Network Scholarship program is for women pursuing an education that will lead to a career in the commercial real estate industry, and offers an internship in brokerage to encourage women to consider that career choice. The scholarships are awarded on the basis of academic excellence and interest in a commercial real estate career. The scholarship is intended to help finance the educations of female undergraduate students during their junior or senior years. Each scholarship is for up to \$10,000, to cover tuition and books. Following the academic year for which a scholarship was awarded, the scholarship recipient is expected to complete an internship at a commercial real estate brokerage firm and participate in CREW. This year's Bay Area CREW Network scholar is Emily Jones.

Emily (pictured above), who has been awarded a CREW Network Scholarship for 2010, is a senior at Stanford Univer-



sity majoring in Urban Studies. Emily became interested in real estate when interning at a commercial real estate brokerage after her freshman year. When she returned to Stanford, she was disappointed to find that there were very few ways for undergraduates to learn about real estate. To learn more about the field, Emily is taking graduate level real estate courses. She is the president of the undergraduate real estate club, Association of Students Promoting Innovation in Real Estate (ASPIRE), and she is the student representative on the Board of Directors for Stanford Professionals in Real Estate (SPIRE). Emily hopes to work in real estate development and is especially interested in the development of mixed-use, mixed-income communities and the redevelopment of infill sites.



## CREW Network to Participate in Real Estate Roundtable

Commercial Real Estate Women (CREW) Network has announced its upcoming participation in the fall Real Estate Roundtable meeting, which will include a discussion on the industry's key economic issues, credit markets, the public policy proposals that have been put forward, and the potential impact of the upcoming elections.

The prestigious Real Estate Roundtable meeting will be attended by roughly 100 of the industry's true leaders -- chairmen, CEOs or Presidents of public and private real estate entities, or the managing di-

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rectors of the industry's financial institutions. In addition, leaders of all the major commercial real estate professional associations will attend.

"Our attendance at this meeting represents another critical turning point for CREW Network," said CEO Gail Ayers, who will attend the meeting with 2010 CREW Network President Kristin Blount. "We are happy to participate and represent CREW Network as we demonstrate the value women bring to the industry. Elevating the stature of women in commercial real estate is a critical part of our mission and we accept this coveted invitation to join the CEOs who make key decisions that impact our industry."

The meeting will be held September 28, 2010 in Washington, DC.

*About the Real Estate Roundtable: The Real Estate Roundtable brings together leaders of the nation's top publicly-held and privately-owned real estate ownership, development, lending and management firms with the leaders of major national real estate trade associations to jointly address key national policy issues relating to real estate and the overall economy.*



## CREW SF Golf Tournament

Samantha Low

The 9th Annual CREW SF Golf Tournament was held on June 24, 2010 at the Presidio Golf Course. Despite the cold winter weather during summer, 120

golfers attended the event. This year's tournament raised nearly \$20,000. We would like to thank our sponsors –

Boston Properties, Recology Golden Gate, Hathaway Dinwiddie Construction Company, NOVO Construction, Trinity Building Services, ARUP, Lockton Insurance Brokers, LLC, RN Field Construction, American Asphalt, Service West, Inc., The CRE Group, Gill Reprographics, BCCI Construction, Artesa Vineyards & Winery, CORT Furniture, Commercial Casework, Inc., NorthStar Risk Management, Rucker Fuller/One Workplace/Steelcase, Renoir Staffing Services, Inc., Tres Agaves Products, Inc. GCI, Haworth, First American Exchange Company, Baker's Floor Care, Isetta Data & Communications, The CAC Group, Allen Matkins Leek Gamble Mallory & Natsis and Kwan Henmi Architecture/Planning. Without your support this year, we wouldn't have raised such a generous amount for the scholarship program. A thank-you also to our wonderful volunteers, who made it all possible, including Samantha Low, Patricia Lowther, Sarah Collick, Candida Curridori, Cheryl Johnson, Christie White, Claire Currie, Erin Naegele, Gerry Zalkovsky, Jan Hanson (event photographer), Jennifer Fitzgerald, Lissette Morales, Kathy Mattes, Michelle Martenea, Nicole Dubee, Robin Freeman, Robyn Isom, Roseanne Bangco, Sarah Vallette, Siobhan Vigoles and Tina Essegian. We will see you next year (with better weather)!

Golf Photos courtesy of Jan Hanson



# WOMEN IN THE NEWS



**Jean**  
Bertrand  
Partner  
Schiff Hardin LLP

**Jean Bertrand.** Jean, CREW SF Secretary and Board Liaison to Membership, was named as one of the 2010 Northern California Super Lawyers and one of the Top 50 Women Lawyers. Jean is a partner at Schiff Hardin LLP, where she practices primarily in the areas of real estate, toxic torts, and commercial litigation. In addition to trial and appellate experience, she has had extensive experience in the administration of complex litigation, emphasizing cost containment techniques.



**Dena**  
Cruz  
Senior Counsel  
Holme Roberts &  
Owen LLP

**Dena Cruz.** Dena, Immediate Past President of CREW SF, was also named as a 2010 Northern California Super Lawyer. Dena is Senior Counsel at Holme Roberts & Owen LLP, where she is a member of the firm's Real Estate, Development, Land Use and Finance Practice Group. Dena focuses her practice on general commercial real estate, leasing and secured transactions. Prior to joining Holme Roberts & Owen, Dena was in-house counsel in the commercial division of First American Title Insurance Company.



**Catherine**  
House  
Director  
Sperry Van Ness

**Catherine House.** The SF Business Times named Catherine as one of the "Most Influential Women in Business in the Bay Area" for 2010. Additionally, Catherine has been named by CREW Network as one of this year's "20 Under 40" women in commercial real estate. These women have been singled out as trail blazers and who are poised for senior leadership positions in the industry. Winners will be acknowledged during the 2010 CREW Network Convention & Marketplace scheduled for October 20-23, 2010 in San Francisco, CA.



**Walt Disney**  
Museum  
Image  
by Cesar Rubio

**Walt Disney Family Museum.** This noteworthy project has won awards for the California Preservation Foundation Preservation Design Award (2010), AIA San Francisco Chapter Merit Award, Historic Preservation & Innovation in Rehabilitation (2010), and the SF Business Times Best Rehabilitation/Renovation Award (2009). Four firms who are actively involved in CREW SF were involved in the success of the project:

1. Page + Turnbull (Debra Leifer)
2. Flack + Kurtz (Diane Fischer)
3. BKF Engineers (Devon Kurcina)
4. Treadwell & Rollo, Inc. (Julie Frankel)

CREW SF is proud of its members' accomplishments on this project.

**Editor's Note.** We hope that you enjoy the new look for the View. The updated format is the result of several months of planning, designing, and implementing a new template. CREW SF aims to provide its members with industry news and other information that will be useful to our members in their professional lives.

If you have news to share, or ideas for articles, please contact any of the View volunteers who are listed in the sidebar on page 8 of this issue. We would appreciate your input, whether you would like to write an article or have a success story you would like to publicize. Don't be shy ... we are members of CREW in order to promote one another, after all.

*Mary Hedley*



**Mary**  
Hedley  
Editor  
the View

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Let CREW SF promote your successes and contributions to the industry. Tell us about your member-to-member networking experiences, the role you played in closing that big deal, any transactions or business relationships that resulted from your CREW affiliation, and more. You have a story to tell and we want to hear it!

Send information to [news@crewsf.org](mailto:news@crewsf.org)

# EVERYTHING EVENTS

## Paramount Theater Tour

August 5, 2010

The Art Deco palace known as the Paramount Theatre was the fascinating setting for a joint networking event on August 5 with CREW East Bay. Participants were treated to a private tour that highlighted the unique architecture and sumptuous materials that went into creating this Oakland landmark. After the tour, members repaired to Ozuma for cocktails and appetizers. And networking, of course!



## 2010 Network Convention & Marketplace

October 20-23, 2010

The 2010 CREW Network Convention and Marketplace will be like no other. With this year's theme focusing on "Leading to Change," CREW Network has teed up many unique sessions that will not only inspire you to think about your role in commercial real estate, but will challenge you to become a leader for change. Join over 40 industry exhibitors and 1,000 attendees as the convention kicks off with an evening of high energy networking and deal making at the Network Marketplace. Following will be two full days of high level industry driven educational sessions, learning excursions, and networking. Enjoy a taste of

San Francisco one of the optional Dine Arounds held at some of San Francisco's finest restaurants.

## Walt Disney Family Museum Tour

May 12, 2010

More than fifty CREW SF members and guests attended the May 12th presentation of the Walt Disney Family Museum at the Presidio. Led by the project architects, Page & Turnbull, the group enjoyed the insider tour of two historic buildings and learned about the design and construction of this rehabilitation and adaptive reuse project. Housed in an 1897 brick barracks building, the museum tells a rich story of the legendary cartoonist, director and theme park impresario through the mediums of film, music, drawings and photos. The tour, organized by CREW SF Programs Committee, and generously sponsored by DLA Piper, started at the museum theater, then took participants on a journey through ten themed galleries dedicated to Walt's



personal and professional achievements. The attendees shared their impressions of the museum during a reception following the tour, which was catered by Wolfgang Puck. The event was extremely well received and was named one of the most successful programs of the year.

*Images by Cesar Rubio Photography, courtesy of Walt Disney Family Museum.*

## Mark Your Calendar

### 2011 Planning Session

Members Only  
September 8, 2010  
5:30-8:30PM

### Strategic Thinking for the Savvy Planner

September 15, 2010  
11:30AM-1:30PM

### Upclose with Connie Moore

September 23, 2010  
5:30-7:30PM

### Innovation in Sustainability: Symposium

September 28, 2010  
1:30-6:30PM

### ULI: High Speed Rail and Development

September 23, 2010  
8:00AM-4:30PM

### 2011 CREW Member Renewals Open

September 15, 2010

### CREW Network Convention & Marketplace

October 20-23, 2010

### 2011 Economic Forecast

November 10, 2010  
11:30AM-1:30PM

### Annual Holiday Lunch and Auction

December 8, 2010  
11:00AM-1:30PM

Register online at  
[www.crewsf.org/currentevents](http://www.crewsf.org/currentevents)

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## A WORD FROM OUR SPONSORS

AND THAT WORD IS...

# {EXCELLENCE}

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Boston Properties (NYSE: BXP) is a self-administered and self-managed real estate investment trust boasting a total portfolio of over 48 million square feet of class A office and retail space. The company is one of the largest owners, acquirers and developers of office properties in the U.S., with a significant presence in Greater Boston, Midtown Manhattan, Princeton, the Washington D.C. metropolitan area and Greater San Francisco.



**About the Author-**Steve Colvin is Senior Vice President of Property Management for Boston Properties, LP in the San Francisco Region. With over 24 years of management experience in the real estate business, Colvin is presently responsible for Boston Properties' property management operations on the West Coast. He oversees a portfolio of over 6 million square feet of space, including the Embarcadero Center, the Gateway Commons located in South San Francisco and properties located in the Silicon Valley.

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