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REPORT FROM COUNSEL
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WHAT IS A REIT?

If investing in real estate appeals to you but you are not so well-heeled that you can go shopping for investment properties like they were appliances, you may want to give some thought to investing in one or more real estate investment trusts (REIT). As you would with shares of common stocks, you can buy and sell different REITs, and having REITS in your portfolio of investments could be a good way to add some diversification. Another attraction for REITs is that you can invest in them with relatively small amounts of money, as compared with the sums required to buy the real estate itself.

There are two basic categories of REITs, although even within each category there are variables to consider. An equity REIT owns a mix of stocks and one or more pieces of property, often specializing in a particular type of real estate, such as shopping centers. As the name suggests, a mortgage REIT owns debt instruments, buying existing mortgages, collecting payments on them, then passing on the money to investors.

The fortunes of the two kinds of REITs rise and fall with the markets in different ways. Equity REITs prosper in a strong real estate market and when the values of stocks are on the rise. Shares in mortgage REITs, combining the features of real estate and bonds, tend to trade with the bond market, so that when interest rates rise, mortgage REIT shares generally fall along with bond values.

The federal tax code requires a REIT to pay investors at least 90% of its taxable income each year. This means that REITs pay little or no corporate income tax, thus improving on the tax treatment of dividends, which can be taxed twice, with both the company and the shareholders owing taxes on them.

The end result is that REITs potentially can have relatively high returns. Within the general category of REITs, there are significant differences in such features as levels of risk and the limitations on when an investor can sell his or her shares. As with any investment, you should collect and understand all information for any REITs being considered before investing.

E-MAIL IS BINDING

In law as in society at large, signing contracts on paper in ink (and maybe in triplicate) now seems so 20th century. If your reflex is still to regard e-mail communications as only informal give and take, think again. A recent case demonstrates that if the necessary terms for an agreement are present in e-mails, a binding agreement will result. If you don't want that outcome, you are well advised to make it clear in the e-mail itself that no party will be bound until a final agreement is signed by all parties.

Eric signed an agreement to buy a truck stop. The agreement included a financing contingency and required Eric to make a large refundable deposit that would be held in escrow. When Eric could not secure the necessary financing, he terminated the purchase and sale agreement and asked for his deposit back. The owner declined, saying that Eric had broken the agreement in bad faith.

After Eric sued the truck stop owner in federal court and was hit with a counterclaim, the parties, through their attorneys, engaged in settlement negotiations by e-mail. Ultimately, Eric's attorney accepted the owner's settlement offer involving a division of the deposit money between the parties. Eric's attorney concluded an e-mail by saying, “To move this along, I will send you a draft settlement agreement (and other documentation) tomorrow.” The next day the owner's lawyer replied in another e-mail, saying, “Glad we were able to get it done. Thanks.”

About a week later, when the settlement had been reduced to writing and was ready for signatures, the defendant owner of the truck stop was placed into receivership by a state court. The receiver refused to follow through with the settlement agreement. Eric went back before the federal court, where his motion to enforce the settlement was granted.

Rejecting a contention made by the defendant, the court ruled that because all of the material parts of a settlement had been set out in, and agreed to, in the exchange of e-mails, there was a binding and enforceable settlement, even though in their e-mails the parties had alluded to a later writing that would embody the agreement. When the parties executed that written agreement, they were merely “memorializing” the terms of the settlement, not creating them. The agreement was complete and binding when the attorneys clicked “Send” to exchange their last e-mails finalizing the settlement.