Avoid risky leases

Country Counsel

By ROBERT MOORE

OHIO law requires contracts involving real estate, including leases, to be in writing. Verbal contracts for real estate are not enforceable, meaning either party can back out. For example, a landowner verbally agrees to lease his farm to a tenant. Then, the landowner receives a better offer from another farmer. Because the lease is not in writing, the landowner can back out of the verbal agreement and lease the farm to the higher bidder. The tenant is not able to enforce the verbal lease. This is true no matter how much time has elapsed between the initial verbal agreement and the subsequent higher offer.

Partial performance

As with many areas of the law, there are exceptions. The primary exception to verbal leases is a concept call "partial performance." This occurs when the tenant takes certain actions as part of his or her rights and obligations of the lease. Consider this scenario: Landlord and tenant verbally agree to a lease on Oct. 1 for the following crop year. In November, the tenant performs fall tillage and applies fertilizer. In March, the tenant pays one-half of the rent. The tenant has performed, in part, on the lease, indicating that the tenant believed there to be a lease in place. This partial performance may be enough to cause the verbal lease to become enforceable by the tenant. However, courts have interpreted partial performance very differently and inconsistently. There is no guarantee that a court would decide in favor of the tenant because these types of cases are decided on a case-by-case basis. A tenant should never rely on partial performance as a means of enforcing a verbal lease; a written lease is always preferable.

There are obvious terms to include in a written lease, such as the names of the parties, identification of the land being leased and rental amount. A provision that is sometimes overlooked in written leases is the termination provision. For example, a landowner and tenant enter into a written lease for two years. After the end of the initial two years, neither the landowner nor the tenant addresses the lease for the following year. The tenant assumes he will be farming it again next year and makes preparations. In early April, he discovers the landowner has leased the farm to another person.

The problem with this example is there was no clear statement as to what would happen at the conclusion of the initial two-year term. The lease should have stated that either the lease terminated at the end of the initial term, or the lease renewed for another year (or two) unless either party provided written notice prior to Oct. 1. Either of these provisions would have made it clear to both landlord and tenant as to the other's intention before the tenant began preparing for the next year.

As these examples show, typically the tenant is more at risk with verbal leases. Tenants should try to convince their landlords that putting a lease in writing provides protection to both parties and is a good business practice. A well-drafted written lease can avoid many problems and create a more productive and profitable relationship for both the tenant and the landowner.

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Farm Management

2 types of adviser

On the Money

By JOHN OTTE

Key Points

- Advisers held to a fiduciary standard must offer advice that is best for you.
- Advisers held to a suitability standard may offer advice that is better for them.
- Needs for advice change as farms and farm businesses progress through life.

AS life progresses, people, including farmers, go through financial phases, such as asset accumulation, asset preservation and distribution. Numerous advisers and planners are eager to help you manage your money for a piece of the action.

"When selecting investments, understanding the different types of advisers is crucial," says Jeff Bucher, Citizen Advisory Group and adviser representative of AlphaStar Capital Management.

Fiduciary vs. suitability

Different types of advisers operate under different sets of rules. The investment adviser is held to a fiduciary standard. The other type includes registered representatives and insurance professionals. They are held to a suitability standard.

"Understanding the difference and how advisers are compensated are crucial parts of the adviser and investment selection process," says Bucher.

A fiduciary standard is a legal obligation where advisers must act in the best interest of their clients and put the client's best interest ahead of their own. It is the highest standard of care available under law. For example, suppose an adviser has two identical products that have different fees. An adviser held to the fiduciary standard must recommend the one that is lower in cost. Fiduciary advisers cannot recommend products that make more money for them or their company.

Fiduciary advisers are often paid by a quarterly fee that is calculated as a percentage of assets. Fiduciary advisers can be regulated by the Securities Exchange Commission or state regulators.

The suitability standard requires that a registered representative or insurance professional have a reasonable basis to believe a recommended transaction or investment strategy involving a security or securities is suitable for the customer. No requirement exists to find the best investment — only ones seemingly suitable.

Such advisers offer a range of products for sale carried by the company he or she represents. They get paid by commissions calculated as a percentage of money invested into the product.

Asset preservation as part of a retirement plan and distribution as part of an estate plan call for more than investment advice. Issues include income planning, which encompasses Social Security planning, tax planning, planning against inflation and health care planning. Developing and implementing retirement and farm business transition plans may require a team. Key players may be family members, business partners, tax professionals, legal counsel and an insurance agent.

Otte is farm management editor for Farm Futures magazine. See FarmFutures.com.

Common retirement planning issues

- How will we create an income and asset distribution plan that will be reliable and sustainable for as long as we live?
- How do we select a Social Security filing strategy that will best meet our needs?
- How will we protect our standard of living from inflation?
- How will we manage our tax obligations?
- How will we position our assets to still have the liquidity we need for emergencies and related discretionary spending?
- How can we position things to have the income stream we need, yet maintain flexibility to handle life's unknowns?
- How can we protect against the risks of a long-term illness?
- How do we select the right health care plan to best meet our needs and resources?
- How do we protect the legacy we want to leave to our heirs?