

DEAL POINTS SHORT TAKES 2021.01: USE OTHER PARTIES' DEAL LEVERAGE

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Happy New Year, and welcome to our new “Deal Points Short Takes.” Like the “Deal Points” in our Whitepapers and Advisories such as “Raising Capital through Private Placements” and “An International Joint Venture Agreement Checklist,” Deal Points Short Takes will periodically offer practical tips for winning issues that arise in real transactions, but in a shorter, bite-sized format. Along with the Whitepapers and Advisories, they will be available on our website at <https://kurtinlaw.com/articles-whitepapers/>. Here’s our first – please let us know what you think, give us any suggestions, and let us know if there are any topics that you’d like to see tackled going forward!

Deal Point: Use Other Parties’ Deal Leverage

When negotiating a transaction against a counterparty that thinks it’s in the driver’s seat, has greater leverage than you, and can dictate “take it or leave” terms, review the deal terms of any other parties on your side of the deal who may have more leverage than you. If they have gotten better terms, you may have more luck negotiating with your counterparty to extend the same terms to you, on the grounds that they are already on the hook for them to the other party. The other party may even support your request to the counterparty. It sounds obvious, but the tactic is often overlooked. It’s similar to “most favored nation” deal status, but focused on specific terms instead of prospective general treatment.

Explanation and Takeaways

This came up in a real estate development project that we negotiated on behalf of a private equity group investing in the project. Our clients’ investment was a significant minority piece of the project, more than 25% of the equity/debt package. The developer refused to extend reasonable representations and warranties to us until we noticed that it was offering ones similar to those we wanted to the construction lender it had obtained debt financing from, a larger and indispensable piece of the overall project financing. We pointed out that the developer was already on the hook for representing and warranting to the lender the same current and prospective facts, asking “you’re doing it for the lender; why can’t you do it for us? Aren’t you confident they’re true?” The developer agreed to extend the representations and warranties to us, significantly increasing our clients’ protections. It’s also worth looking at the counterparty’s comparable past deals to see if it has been more accommodating on other occasions, which can also be a negotiation wedge: “you did it before; why can’t you do it now?”

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