

The Hidden Trap of “Subject To” Deals: The Doctrine of Implied Assumption

By Matthew S. Chan

(Excerpt from “The TurnKey Investor’s “Subject To” Mortgage Handbook”)

When we buy any property (“subject to” mortgage or not), we take our financial commitments to lenders very seriously. We treat “subject to” mortgages and pay on them as seriously as if they were our own.

Unfortunately, not everyone who engages in “subject to” mortgage transactions does so. To make matters worse, there seems to be a prevailing belief in certain circles that if you buy a “subject to” mortgage and the deal somehow goes bad, there is very little risk to you.

Of course, how widespread this belief is depends on the state or community in which you work, but I will say that I do not entirely agree with this belief. There is the matter of personal and business reputation if you work in a smaller city community as we do. But there is also a legal risk.

According to James Karp’s and Elliot Klayman’s textbook, Real Estate Law, 5th Edition, a number of states have extended responsibility to the buyer if the buyer engages in a “subject to” mortgage transaction under the Doctrine of Implied Assumption.

Under this Doctrine, although we have not formally assumed the loan, by virtue of having the property in our name, taking over the loan payments, and profiting

from it, we are considered, as buyers, to have assumed the terms of the loan and could suffer liability if something were to go wrong.

Of course, this assumption would have to be proven in a court of law, but nevertheless the risk exists for anyone who chooses to buy a property with a “subject to” mortgage. We may not have formally assumed the loan, but what we do can very well fall within the realm of implied assumption.

Naturally, you should consult your local real estate attorney in such matters if you are truly curious about this issue.

However, we take a conservative approach. We simply assume that once we buy someone’s property with a “subject to” mortgage, we are on the hook for the loan and the responsibility fully lies with us. This thought is a great motivator for us to enter into only profitable deals and to continue to be financially responsible.



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