

PART I THE CONTRACT OF SALE

SECTION 1: PRELIMINARY CONSIDERATIONS

SECTION 1.1 ATTORNEY REVIEW

A contract of sale for residential real estate is a binding agreement between the purchaser and seller which imposes and defines the legally enforceable rights and obligations of the parties.

Many parties to such transactions realize the importance of obtaining competent legal advice before entering into such an agreement. However, even sophisticated parties often sign a contract prepared by a broker or a salesperson without realizing that by doing so they have incurred binding legal obligations. The common misconception is that the document signed is not a contract of sale but merely a “binder,” a “memorandum,” or a “deposit receipt” by which the parties demonstrate their good faith and their intention to sign an actual contract in the future. They presume that they will have the opportunity to consult an attorney who will adequately protect their interests before they sign a “binding” contract of sale. These people do not realize that what they have already signed constitutes a contract if it includes only the barest essentials of a contract, despite the fact that it may cover only a few of the points which should be covered in a well-drafted contract of sale, and even though it may substantially misstate the true understanding of the parties.

The contract of sale is the key to the real estate transaction. It is the critical document which fixes the fundamental rights and obligations of the parties from the time it is signed through the closing of title and, in many cases, even beyond. It is thus unfortunate that such a large percentage of purchasers and sellers of residential real estate in New Jersey sign contracts of sale without the advice of a lawyer.

Many attorneys have long contended that the preparation of contracts of sale of real property by brokers and the explanation of the terms of such contracts to both buyers and sellers by brokers constitute the unauthorized practice of law. They also assert that an inherent conflict of interest prevents brokers from giving unbiased assistance to all parties, especially since the broker is the agent of the seller. They argue that because contract law is such a complex subject, only attorneys have the requisite education and training to perform such services and only a licensed attorney can properly assume the responsibility for the preparation of the contract. The attorney is the person who is ultimately called upon to resolve the problems which result from a poorly prepared instrument.

Many real estate brokers, on the other hand, contend that the preparation of such contracts is a mere incident to the practice of their profession for which they possess adequate skill and competence. They also claim that the public interest is not properly served when the preparation and execution of contracts is

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delayed until attorneys prepare them. Brokers argue that the nature of the transaction is usually such that the parties desire to sign the agreement at the climax of negotiations, that is, when they agree upon the price and other basic terms. This usually occurs in the evening or on weekends, when attorneys and their staffs are not in their offices.

State courts throughout the country have taken varying positions on the rights of brokers to prepare contracts of sale. At one end of the spectrum, some courts have held that brokers may freely draft contracts. At the opposite extreme, the Supreme Court of Arizona held that even the selection of a printed form by a broker constituted the unauthorized practice of law and was prohibited.* Some courts have taken a middle ground and held that brokers may complete standardized forms without specific definition as to the nature of such forms or the extent to which they may be modified. Many state courts have held that brokers may complete such standardized forms by filling in the blank spaces with factual data only.

In 1970, a New Jersey real estate broker appealed his conviction for disorderly conduct under *N.J.S.A. 2A:170-78* for the preparation of a contract of sale between a buyer and seller of real estate. *State v. Bander*, 56 N.J. 196 (1970). In that appeal, both the New Jersey State Bar Association and the New Jersey Association of Realtors sought to have the Supreme Court of New Jersey determine whether the preparation of real estate contracts by brokers constituted the unauthorized practice of law.

The Supreme Court, however, decided only that the state legislature never intended by *N.J.S.A. 2A:170-78* to make the brokers' preparation of such contracts disorderly conduct. Thus the court did not reach the question of whether such conduct constituted the unauthorized practice of law. The Supreme Court did, however, make the following suggestion:

Due to the above findings, we need not reach the question whether defendant's actions constituted an unauthorized practice of law. This opinion is not to be understood to mean that what defendant here did, does not constitute the practice of law or that such conduct by one not a member of the Bar of this State is authorized or condoned by this Court. The question of whether defendant's acts amounted to the unauthorized practice of law was partially explored at the oral argument of the matter *sub judice*. It developed that the problem has so many ramifications that it could not be intelligently considered on the present record. As to that issue it is suggested that an answer might be obtained in a separate suit

*The state constitution of Arizona was subsequently amended to remove this issue from the jurisdiction of Arizona courts.

**Repealed L.1994, C47, section 2. See now *N.J.S.A. 2C:21-22*.

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for an injunction against the type of acts undertaken by defendant or for a declaratory judgment. In this manner a complete and detailed record could be made disclosing, *inter alia*, the extent, length of existence, effect and result of the performance of similar acts by real estate brokers generally and the public need for such service. This Court could then give a valued and intelligent reply to such an inquiry.

State v. Bander, supra, at 202-203.

In 1972, in response to this suggestion, the New Jersey State Bar Association filed a suit against the New Jersey Association of Realtor Boards as a class action to enjoin all licensed brokers from preparing agreements for the sale of real estate and from otherwise practicing law. The Bar Association also asked for a declaratory judgment determining the extent to which the conduct of brokers constitutes the unauthorized practice of law.

During the course of preliminary pre-trial conferences, the attorneys for both sides suggested to the court that the Supreme Court of New Jersey could best resolve the matter by exercising its rule-making power and establishing a procedure for the use of form contracts by brokers in a way that would not constitute the unauthorized practice of law. Specifically, the parties proposed that the Supreme Court create a standing committee composed of attorneys and brokers which would be charged with drafting and administering standard contract forms for the sale of one- to four-family residential real estate and vacant lots, and lease forms for residential real estate. Each form would contain a prominent notice that the form is a binding legal agreement when signed and that the broker may complete the form by filling in the blank spaces with factual data, but may not explain the legal significance of any provision to the parties. The notice would further state that the broker is prohibited from adding to or deleting from the form. The parties would be specifically advised to consult a lawyer before signing if they are uncertain as to the meaning and legal effect of any provision.

This proposal was considered by the litigants' counsel to be a fair compromise in the public interest. Brokers would be able to supervise execution of binding agreements in most transactions. The proposed agreements would be substantially complete and well-drafted and would contain appropriate warnings to the parties.

Many individual attorneys and local bar associations objected to the proposal on the ground that no matter how well-drafted and complete the contract, the practice of allowing brokers to complete the form will in no way diminish the danger to the public of being bound to a legal agreement by one who is not licensed to practice law.