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Part One: A Brief History of New Jersey's Attorney Review Clause

Most New Jersey residents, and certainly those who have participated in a residential real estate transaction since 1983, are well aware of it - the three day attorney review period clause. This clause has become fundamental to residential real estate transactions and their contracts since first introduced in 1983. This article will briefly examine the history of the attorney review clause.

In a case titled State v. Bander, 56 N.J. 196, 265 A.2d 671 (1970), the defendant, a licensed real estate broker who had negotiated the sale of certain real property between a buyer and seller, was charged with the disorderly person offense of having engaged in the unlawful practice of law, in violation of N.J.S.A. 2A:170-78, when he prepared a form contract for sale of the property and submitted it to the buyer and seller for their signatures.

The New Jersey Supreme Court held that the defendant's conduct was not a disorderly person offense. But because of an inadequate trial record, the Supreme Court reserved the question of whether defendant's acts amounted to the unauthorized practice of law. The court suggested that an answer might be obtained in a separate suit for an injunction against the type of acts undertaken by the defendant or for a declaratory judgment.

Acting on the suggestion, the New Jersey State Bar Association filed an action titled New Jersey State Bar Association v. New Jersey Association of Realtor Boards, 186 N.J.Super. 391 (Chan.Div 1982) against licensed realtors as a class seeking a declaratory judgment and injunctive relief. In essence, the complaint sought a ruling that the preparation of contracts for the sale of real estate or leases by licensed real estate

brokers or salespersons constituted the unlawful practice of law, even though the broker or salesperson had negotiated the sale or lease.

The Bar Association and the principal defendant, New Jersey Association of Realtor Boards, held extensive discussions concerning the possibility of settling the matter. Terms of a tentative settlement were worked out and accepted by both associations. The agreement proposed a court rule which would have created a standing Supreme Court committee of five attorneys and five realtors to administer the preparation and utilization of standard form contracts pertaining to the sale of one- to four-family homes, building lots and residential leases. Such forms could then be used in the preparation of a contract or lease by the realtor who had negotiated the sale or lease of residential property. The settlement made no provision for the inclusion of an attorney review option clause in either the contract or lease.

The proposed settlement was submitted to the Supreme Court and before a public hearing. At the

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Law Firm Briefs

Great Quotations ...

"Great people are those who make others feel that they, too, can become great." - Mark Twain

"As soon as you trust yourself you will know how to live." - Goethe

hearing representatives of several bar associations appeared and opposed the proposed settlement. The opposition by the local bar caused plaintiff to have second thoughts about the terms of the settlement. Plaintiff withdrew its approval of the settlement and asked that the matter go to trial.

In August 1981 the Supreme Court by order remanded the case for trial and transferred venue to the Superior Court, Chancery Division, Monmouth County. Actual trial commenced on March 22, 1982. On the third day of trial, and after considerable testimony and documentary evidence had been presented, counsel for the two associations notified the court that new terms of a settlement had been discussed and were being submitted to their respective boards of trustees for approval.

Basically, the new settlement would allow realtors who had negotiated sales of one- to four-family properties and vacant one-family lots, to prepare the contracts of sale, provided an attorney review option clause was included in each contract, and conspicuous notice of the option placed at the head of each contract. The settlement eliminated the previous recommendation that the Supreme Court establish a standing bipartisan committee of attorneys and realtors to prepare standardized forms of contracts and leases. Both associations, through their respective boards of trustees, approved the new settlement.

Upon submission of the proposed settlement for court approval, a public hearing was scheduled for 10 a.m. Monday, April 26, 1982 at the courthouse in Freehold. Several communications were received from individual attorneys. A few opposed the settlement in its entirety as not being in the public interest or as permitting the unlawful practice of law by lay persons. Other letters suggested changes in certain terms of the settlement. At the public hearing one attorney and two county bar associations (Monmouth and Bergen, through representatives) appeared and, while not opposing the settlement, suggested changes in some of its terms.

In essence, the terms of the proposed settlement provided that licensed realtors shall be permitted to prepare contracts for the sale of residential real estate containing one to four dwelling units and for the sale of vacant one-family lots in transactions in which they have a commission or fee interest, provided each contract contains a clause making it subject to review by an attorney for the buyer or seller within three business days. If neither buyer nor seller exercises the right to have an attorney review the contract within the time

permitted, the contract will be legally binding as written. If the attorney for the buyer or seller disapproves of the contract, he must notify the broker named in the contract within the time permitted. The parties may agree in writing to extend the time for attorney review. Each contract is to contain a conspicuous notice at the top of its first page as follows: THIS IS A LEGALLY BINDING CONTRACT SUBJECT TO REVIEW BY AN ATTORNEY OF YOUR CHOICE IF YOU SO ELECT WITHIN THE TIME SET FORTH BELOW.

The attorneys for both associations, in explaining the meaning of the attorney review clause, represented that it should be given a broad construction enabling an attorney to disapprove a contract or lease for any reason or reasons which would not be subject to review.

The Chancery Court considered and rejected the objections of those opposed to the settlement in its entirety stating: "The basic question is how is the public interest best served. In the sale or lease of residential real property the functions of realtors and attorneys overlap. Many nonlawyers, in connection with their business activities, give advice and do things which have legal consequences. However, this does not necessarily mean that they are engaged in the unlawful practice of law. In the instant case defendants assert without contradiction that "[n]o State in the Country has prohibited Brokers from completing form contracts in connection with residential property sales."

Part Two of this Article appears in the Summer 2003 issue of The Advocate.



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