

Court Decisions on Attorney Review Will Affect Your Practice

by Barry S. Goodman, Esq., NJAR Legal Counsel

Just when you thought you understood how attorney review works, New Jersey Courts rendered three decisions recently interpreting attorney review. These decisions will greatly affect the rights of buyers and sellers, as well as how real estate licensees and attorneys must deal with attorney review.

The first case deals with whether attorneys for buyers and sellers can agree to shorten the attorney review period. The second case squarely confronts whether there can be separate attorney review periods for the buyer and for the seller. Finally, in the third decision, the Court decided whether attorney review ever began where the seller agreed to, but never signed, the contract and the attorneys for the buyer and seller then agreed that a binding contract existed.

Background of Attorney Review

A real estate licensee can prepare contracts for the sale of residential property containing one- to four-dwelling units and for the sale of one-family lots, as well as residential leases for a term of one year or more, in which the licensee has a commission or fee interest as long as the contract includes the mandatory attorney review provisions. If real estate licensees prepare any other contracts or do not include the mandatory language, they could be subject to criminal charges for the unauthorized practice of law, as well as sanctions by the Real Estate Commission.

Cases decided in the past have set forth many guidelines explaining how attorney review should be applied. Examples of these guidelines include the following:

- Attorneys who timely serve a Notice of Disapproval can disapprove the contract for any reason or no reason at all.
- The attorney review provision only has to be included in a contract or an amendment to the contract if it is prepared by a real estate licensee, not if

it is prepared by an attorney.

- Notice of Disapproval must be sent by the buyer's or seller's attorney to the other party and the broker(s). Otherwise, it will be ineffective and the contract will be binding at the end of the three-day period.
- Attorney review does not begin if a broker delivers the fully executed contract to a party's attorney but not to the party, even where the party instructed the broker only to send it to the attorney.

Can the Three-Day Attorney Review Period be Shortened?

In March 2003, the Appellate Division squarely decided for the first time whether or not attorneys can agree to shorten the attorney review period. In *Romano v. Chapman*, a fully executed contract prepared by a real estate salesperson was delivered to the buyer and seller on Wednesday. On Friday, the attorneys agreed in letters faxed to each other that the attorney review period was over. On Monday, the seller finalized a better deal with another buyer and hand delivered a letter to the original buyer's attorney disapproving the contract.

The Court explained that the purpose of attorney review is to allow attorneys to provide advice to the buyer and seller. Once the attorney has provided that advice and approved the agreement, with or without changes, the client cannot back out of the agreement, even if it is within the three-day period. Interestingly, the Court also stated that, once one of the attorneys approves the agreement, the agreement is binding on his or her client unless the attorney for the other party makes a change that is unacceptable within a three-day period.

As a result, attorneys for the parties now can agree to shorten the attorney review period. In addition, the attorney for the buyer or seller can agree to bind his or her client to the contract, even if the other party is not bound by the contract.

Can There be Separate Attorney Review Periods for the Buyer and Seller?

In *Gordon Development Group v. Bradley*, the trial court held that there may be separate attorney review periods for the buyer and seller that begin to run when the fully executed contract is delivered to each of them. However, the case was appealed.

In this case, the fully executed contract prepared by a real estate licensee was delivered to the seller on Tuesday. On Thursday, it was delivered to the buyer. On Monday, the seller's attorney disapproved the contract. The buyer claimed that the seller's attorney review period concluded on Friday and the Notice of Disapproval therefore was ineffective.

In July 2003, the Appellate Division rejected the buyer's argument and unequivocally held that there only is one attorney review period that begins to run when the fully executed contract has been delivered to both the buyer and the seller. The attorney review period therefore began to run on Thursday and the Notice of Disapproval terminating the contract was effective.

Can Attorney Review Begin if the Seller has not Signed the Contract?

The Appellate Division was confronted in this case with whether attorney review ever began where the seller agreed to but never signed the contract and the attorneys for buyer and seller then agreed there was a contract. In *Morton v. 4 Orchard Land Trust*, the buyer signed the contract prepared by a real estate salesperson but the seller did not. After extensive negotiations, the attorneys for both parties approved the terms of the contract on behalf of their clients. However, the seller then decided to accept another offer. The original buyer therefore sued for specific performance.

In July 2003, the Court held that the original contract was never executed and

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therefore did not satisfy the statute of frauds. As a result, no fully executed contract was delivered to the buyer and the seller, attorney review never began, and mutual approval by the attorneys could not create a contract.

The Court explained that, under the statute of frauds, there must be clear and convincing evidence that the parties intended to be bound to their agreement without a signed document. However, there was no evidence that a signed document was unnecessary to bind the parties. As a result, there was no agreement between the parties that ever came into existence to begin the attorney review period during which the attorneys could bind the buyer and seller.

Conclusion

As a result of these three recent decisions, attorneys for buyers and sellers now can, for the first time, shorten the attorney review period. In addition, it now is clear that there is only one attorney review period for both the buyer and the seller that begins to run when the fully executed contract has been delivered to both of them. Finally, there can be no question that there is no attorney review period unless a fully executed contract is delivered to both parties. ♣

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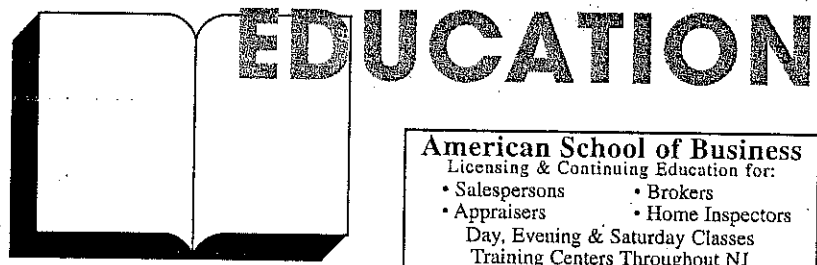
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