

Louisiana Purchase Agreements

from the desk of David M. Touchstone

In Act 333 of 2006, the Louisiana legislature enacted a supplement to the Louisiana Real Estate License Law, adding a provision that requires a state mandated purchase agreement form (also sometimes called buy/sell agreement). If you don't have a copy of this statute, you can read the Louisiana Real Estate License Law by going to the Louisiana Real Estate Commission's website, click on "forms", then click on "Standardized Real Estate Forms", then click on "R. S. 37:1449.1". The portion of the statute (R. S. 37:1449.1) which contains the meat and potatoes states:

"A licensee representing either the buyer or the seller of residential real property shall complete the purchase agreement form prescribed by the Louisiana Real Estate Commission in making an offer to purchase or sell residential real property. No person shall alter the purchase agreement form; however, addendums or amendments to the purchase agreement form may be utilized."

Lawyers can always think of multiple questions regarding the meaning and effect of newly minted laws and this one is certainly open to questions. Let's talk for a minute about some of the questions that are closed. The first questions that come to my mind are its time aspects. The answers here are clear: The Louisiana Real Estate Commission was tasked by the statute to pro-



DAVID M. TOUCHSTONE
First Commerce Title, President

found a form to implement the statute no later than July 1, 2007; this has been done and you can obtain a copy of the form from the Commission's website. Further, according to the statute, agents may begin using this form immediately, but are under no obligation to use it until January 1, 2008, by which time, agents are obligated to use the Commission's form.

The next question that comes to my mind is the scope of application of the statute. Mostly this question is answered simply by reading it. It applies to "residential real property" which it defines as "real property consisting of one or not more than four residential dwelling units which are buildings or structures each of which are occupied or intended for occupancy as single family residences". Therefore, the statute is not applicable to any transaction involving solely

farmland, timberland, commercial buildings, apartment complexes having more than four units and any other type of property that is not available for use as a single family residence. But what about mixed use properties such as a house located on a farm or a house located on a 100 acre timber tract? The statute gives no answers to these questions. However, these questions do not trouble me greatly because in most instances the Commission's form will work just fine for mixed use properties and, in these cases, it is certainly advisable that agents stick to the Commission's form. More troubling, though, is the issue of newly constructed homes or houses that are still under construction. It certainly appears that the statute is applicable to newly constructed homes and even to partially constructed homes inasmuch as it is applicable to residential structures "*intended for occupancy as single family residences*". Some of my builder clients are likely to be unhappy about the effect of this provision. I have assisted some of these folks in drafting their own buy/sell agreements in order to maximize the rights available to them under available law. No doubt some of you have come into contact with builders who have strong feelings about writing the buy/sell agreement on their own contract forms. What are you going to do when you encounter a recalcitrant builder on the one hand, but on the other hand, the statute says "thou shalt" write the contract on the Commission's form? Or what if the builder is a licensed agent and his residential contractor's license is in his personal name? I don't know the answer to this dilemma, but I have an idea for a clunky resolution to this problem. The statute allows "addendums" to be attached to the Commission's form. If you can convince your builder client to go along with you, I suggest that you fill out the Com-

mission's form in a manner as compatible with the builder's form as possible, then attach the entire builder's form, also completely filled out, as "Exhibit A", to the Commission's form, with a statement at the beginning of Exhibit A to the effect that any provision in Exhibit A that is in conflict with the Commission's contract shall overrule and take precedence over the Commission's contract.

The next question I have about the mandatory contract rule pertains to *what happens* when the rule is violated by writing a contract on a form other than the Commission's form. As to this point, it should first be noted that the statute requires the "licensee" to write the offer on the Commission's form. I, therefore, assume that this law is applicable only to offers being written by licensed real estate agents and brokers, and does not pertain to FSBO transactions. This distinction is suggestive of the direction a court might take if presented with a case in which a Commission contract should have been used but wasn't. The particular statute (R.S. 37:1449.1) which requires that the licensee use the Commission contract is silent as to the legal treatment to be meted out when the proper form is not used. However, R.S. 37:1458 states: "Whoever violates any of the provisions of this *chapter* shall be fined not more than two thousand dollars or imprisoned not more than five years, or both". Since both 37:1449.1 (the mandatory Commission contract statute) and 37:1458 (the penalty statute) are in the same "*chapter*", I think the jurisprudential remedy for noncompliance will most likely be limited to imposition of the criminal penalty set forth in 37:1458. Additional light can be shed on this question by comparing the mandatory contract provision to the Louisiana

Residential Property Disclosure Law (you know, the one that requires the seller to give a buyer a property disclosure on a form prepared by the Louisiana Real Estate Commission). This statute puts the onus of disclosure on the “seller” whether or not the seller is represented by a real estate agent; the penalty for noncompliance with the obligation of disclosure will be the Court’s refusal to enforce the buy/sell agreement in the event of a balk by the buyer. The reason I am laboring this point is that it is possible that a court may refuse to enforce a contract that should be written on the Commission’s form, but isn’t. A refusal to enforce will be much more damaging than a simple criminal enforcement under 37:1458, although I wouldn’t want to be the agent with a criminal charge accompanied by the sure to follow disciplinary hearing administered by the LREC. The general policy of the law in Louisiana is one of contractual libertarianism, that is, the courts allow citizens to make whatever contracts they wish and the courts will enforce those contracts as long as they do not violate public policy. My guess is that a court confronted with a party balking at performing on a buy/sell agreement by asserting the technical argument that it should have been written on a Commission form, but wasn’t, will not prevail. I think the court in such an instance will not find that the violation of public policy, i.e., the failure to use the required form chafes public policy to the extent that the court will refuse to enforce the contract. On the other hand, if a balking party can satisfy the Court that there is a linkage between a specific issue that really matters to the balking party and a provision in the Commission form that would have protected the balking party’s interest as to that specific issue, whereas the contract form sought to be enforced does not protect him as to that issue, well then, he might be able to

induce the Court to decide against enforcement of the contract.

One of the things I find somewhat odd in the wording of the mandatory contract statute (37:1449.1) is its prohibition that “... no *person* shall alter the Purchase Agreement Form...”. First, I am not sure what the law means when it says “alter”. This word could mean that one is prohibited from modifying and reprinting the printed boilerplate language in the Commission’s form. On the other hand, the prohibition against altering the Commission’s contract could refer to striking through and initialing over the printed language in the Commission’s form. Very likely, it refers to both kinds of alterations and both kinds of alterations are prohibited. To be on the safe side, I recommend that you neither change and reprint the form, nor should you strike over any of the language in the Commission’s form. The other thing that troubles me about this provision is the use of the word “person”. 37:1449.1 starts off by addressing its requirements to “licensees”. Why the statute shifted to the use of the word “person” is confusing and raises the possibility, though somewhat remote, that the statute could be applied to FSBO transactions.

Bottom line: if you are a real estate agent or broker, you better take this law seriously and start writing all your contracts on the Commission’s form. And NOW would be a good time to study up on it. This sucker is ten pages long; you need to know what every line in it means and you need to be able to explain it to your clients. Next newsletter, I will be your tour guide on an exciting journey through the Commission’s form, pointing out places of interest and making comparisons to the most recent MLS form you all have been using. Hold on to your hats!