



Attorney Approval Clauses in Real Estate Contracts

By Mandy Combs, Mcombs@lotsharp.com, 618-242-0246

When parties to a proposed real estate transaction agree that their “contract” may be reviewed and approved or disapproved by attorneys, have they *really* formed a contract?

That issue has bedeviled courts – and parties to such transactions – for many years. It arises because form contracts made available to laymen by real estate agents and others typically have such clauses. Historically the clauses have served several purposes, such as to deflect charges that realtors were practicing law, to obtain bar association approval of the forms, and to enable the parties to delay the expense of attorney review until they have determined that the basics of the transaction are sufficiently acceptable as to justify the attorney’s expense.

Illinois courts have applied two different theories in interpreting the effect of such clauses. One theory treats the attorney review as a “condition precedent” – *i.e.*, until the attorneys have blessed the contract, or the time for them to do so has run, no contract has been made. The other treats the clause as a “condition subsequent” – the contract is binding when signed, subject to being modified or cancelled through the attorney review process. **One key impact of the theory used is that if no contract has been made – the “condition precedent” approach – a requested modification can be treated as a counter-offer, which is a rejection of the previous offer.** Under the condition precedent approach, on receipt of the “rejection” a party may walk away. In contrast, under the “condition subsequent” approach, the contract remains in force as signed until the parties agree on contrary terms or until one attorney announces it is cancelled.

Exemplifying the “condition subsequent” approach is the recent case of *Patel v. McGrath*, 374 Ill.App.3d 378, 872 N.E.2d 537 (2d Dist. 2007), where the clause provided:

The respective attorneys for the Parties may approve, disapprove, or make modifications to this Contract. . . . If . . . agreement on proposed modification(s) cannot be reached by the Parties, this Contract shall be deemed null and void If written notice is not served within the time specified, this provision shall be deemed waived . . . and this Contract shall remain in full force and effect.

The court determined that a contract was formed on acceptance of the initial offer and that the clause made attorneys’ requested modifications mere suggestions and not counter-offers. Similar logic was used in *Hubble v. O’Connor*, 291 Ill.App.3d 974, 684 N.E.2d 816 (1st Dist. 1997), where the clause provided:

This contract is contingent upon the approval hereof as to form by the attorney(s) for Buyer and Seller within 5 Business days after Seller’s acceptance of this contract. Unless written notice of disapproval is given within the time period specified above, then this contingency shall be deemed waived and this contract will remain in full force and effect. [¶] If written notice of disapproval is given within the time period specified above, this contract shall be null and void and the earnest money shall be returned to the Purchaser.

On the other hand, *Olympic Restaurant Corp. v. Bank of Wheaton*, 251 Ill.App.3d 594, 622 N.E.2d 904 (2d Dist. 1993), held that a review clause was a condition precedent. The clause there stated:

The parties agree that their respective attorneys may review and make modifications, other than stated purchase price, mutually acceptable to the parties, within ten (10) business days after the date of the Contract acceptance. If the parties do not agree and written notice thereof is given to the other party within the time specified, then this Contract will become null and void, and all monies paid by the Purchaser will be refunded. IN THE ABSENCE OF WRITTEN NOTICE WITHIN THE TIME SPECIFIED HEREIN, THIS PROVISION WILL BE DEEMED WAIVED BY ALL PARTIES HERETO AND THIS CONTRACT WILL BE IN FULL FORCE AND EFFECT.

The court noted letters between the attorneys stating that the contract as executed was not acceptable. Both sides proposed modifications that required the other to agree in order to render the agreement binding. ***The court said the attorneys' letters amounted to counter-offers, which operated as rejections of the original agreement and proposals for a new agreement.*** Also applying "condition precedent" logic was *Groshek v. Frainey*, 274 Ill.App.3d 566, 654 N.E.2d 467 (1st Dist. 1995), where the clause provided:

It is agreed by and between the parties hereto as follows: That their respective attorneys may approve or make modifications, other than price and dates, mutually acceptable to the parties. Approval will not be unreasonably withheld, but if within [five business] days after the date of acceptance of the Contract, it becomes evident agreement cannot be reached by the parties hereto, and written notice thereof is given to either party within the time specified, then this Contract shall become null and void, and all monies paid by the Purchaser shall be refunded.

The court said invocation of that clause would trigger a rejection and at times a counter-offer. It said that use of "or" after the word "approve" meant that either attorney could reject the contract outright without proposing any modification. Furthermore, the contract did not require the rejecter to set forth reasons for disapproval; the attorney's simple notice of disapproval made the contract of no legal effect.

Given such divergent approaches, when one is presented with a "contract" which needs modification, he or she is left with more questions than answers as to the effect a modification request will have on the contract. This is demonstrated by *Jennings v. Baron*, No. 2-06-0826 (Ill. App. 2d Dist. July 26, 2007), which contained the same clause and reached the same decision as in *Patel*, only to have the opinion withdrawn and rehearing granted earlier this year. However, several over-arching issues can be noted:

▶ No single set of language is used in all such clauses, and as in any case of contract law, the language of the particular document is important.

▶ In considering how much to fear that a modification proposal may result in the other side walking away, one should consider whether the "contract" is not yet enforceable *on other grounds*. Have required property condition disclosures been delivered? Is there an inspection clause which has not yet run? Is there such ambiguity as to the legal description that a court might find the contract unenforceable?

▶ What is the other side's view on the threshold question? Perhaps a phone call can result in an agreement, *before* modifications are proposed, that they will be treated as suggestions, not counter-offers.

▶ How significant are the modifications which are desired? Without them, will the contract be illegal (and hence unenforceable)? Without them, will performance be unlikely?

▶ How much is at stake? If changes are not made and the client is unable to perform, will he or she only lose a modest deposit or may the consequence be more draconian? The greater the ultimate risk, the more likely it makes sense to propose changes at the outset – even at the risk of "losing" the contract if need be.

linda/sharppoffice/sharptinking/issue6.

THE SHARP LAW FIRM, P.C.

1115 Harrison, P.O. Box 906, Mt. Vernon, IL 62864 • Telephone 618-242-0246 • Facsimile 618-242-1170

Business Transactions • Litigation • Financial Law • Problem Finances • Real Estate • Corporate • Commercial Disputes • Creditors' Rights • Arbitration & Mediation • Estate Planning • Probate

Terry Sharp: law@lotsharp.com; *John T. Hundley*: Jhundley@lotsharp.com; *Mandy Combs*: Mcombs@lotsharp.com; *Real Estate Closing and Title Services*, see <http://sharptitleservices.com>.