

REAL ESTATE LAW



“If Your Contract is Improperly Written, the Deposit May Not Be Retained in the Event of a Default.”

In the ordinary real estate transaction, the buyer expresses his interest in a property by executing a contract. One routine provision is to require the seller to put up a good faith deposit. The deposit serves several purposes. One purpose is to ensure that the buyer is serious by putting money at risk. The second purpose is to afford the seller a pot of money for potential recovery in the event of a default.

Real estate contracts afford remedies upon the event of default including retaining a deposit as a liquidated damage. Liquidated damage clauses are inserted in order to limit the remedies available and to avoid litigation. However, a realtor must be aware of real estate contracts that afford the seller an election of remedies. If the contract affords the seller a choice of whether to retain the deposit as liquidated damages or sue for actual damages, the clause is void.¹

The Florida Supreme Court held that a liquidated damages clause is invalid if the seller may either retain the deposit or bring an action for damages. Although the case was decided over ten (10) years ago, Appellate Courts routinely invalidate liquidated damages clauses which have not been changed.

Accordingly, it would behoove each agent, seller or buyer to review the contract language to make sure that the liquidated damages clause is enforceable.

The Supreme Court case of Lefemine v. Baron, 573 So.2d 326 (Fla. 1991) discusses this issue. The liquidated damages clause at issue in Lefemine is as follows: Default by buyer: if buyer fails to perform the contract within the time specified, the deposit(s) made or agreed to be made by buyer may be retained or recovered by or for the account of seller as liquidated damages, consideration for the execution of the contract and in full settlement of all claims; whereupon all parties shall be relieved of all obligations under the contract; or seller, at his option, may proceed at law or in equity to enforce his rights under the contract.



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