

## In Practice

# Be careful using form real estate contracts

By James W. Martin

Florida lawyers frequently use the real estate sales contract forms sold by The Florida Bar and the Florida Association of Realtors, commonly known as the FAR/Bar and FAR contract forms. Both contract forms include a default clause that allows a nonbreaching seller a choice of remedies: retain the buyer's deposit or pursue other remedies.

An April 2004 First District Court of Appeal opinion found such a clause to be invalid and required the seller to return the deposit based on a 1991 Florida Supreme Court opinion holding the essentially identical clause to impose an unlawful penalty rather than liquidated damages because the seller cannot have the right to choose between liquidated damages and suing for damages.

Some of the same wording appears in the current FAR/Bar and FAR contract forms, although the language is a bit varied. Whether a court will hold the specific default clause in those contract forms to be invalid remains to be seen, but the cautious practitioner will consider revising the default clause to delete the seller's choice and instead provide either the remedy of retaining the deposit or the remedy of suing for damages or specific performance under the contract.

The recent First District case is *Cloud v. Schenck*, 2004 Fla. App. Lexis 4550, Case No. 1D03-2023 (Fla. 1st DCA, April 6, 2004), and its default clause reads as follows: "If BUYER fails to perform this contract within the time specified, the deposit paid by BUYER may be retained by or for the account of SELLER as agreed upon liquidated damages, consideration for the execution of this contract and in full settlement of any claims; whereupon BUYER and SELLER shall be relieved of all obligations under contract; OR SELLER at SELLER's option, may proceed to enforce SELLER's rights under this contract."

The 1991 Florida Supreme Court case is *Lefemine v. Baron*, 573 So. 2d 326 (Fla. 1991), and its default clause reads as follows:

"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 any 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."

The current FAR/Bar contract default clause reads as follows: "If Buyer fails to perform this Contract within the time specified, including payment of all deposits, the deposit(s) paid by Buyer and deposit(s) agreed to be paid, may be recovered and retained by and for the account of Seller as agreed upon liquidated damages, consideration for the execution of this Contract and in full settlement of any claims; whereupon, Buyer and Seller shall be relieved of all obligations under this Contract; or Seller, at Seller's option, may proceed in equity to enforce Seller's rights under this Contract."

As one can see, the 1991 contract form allowed the seller the option of keeping the deposit or suing "at law or in equity," which meant the seller had a choice of keeping the deposit or suing for damages. The current FAR/Bar form omits the remedy of suing "at law" and leaves only the remedy of suing in equity (specific performance, rather than damages). Thus, the current FAR/Bar contract form seems to pass muster with the test in *Lefemine* and, therefore, the test in *Cloud*. Unfortunately for the seller in the recent *Cloud* case, the clause in that case does not limit the seller to its rights in equity.

The *Cloud* case is a friendly reminder for Florida lawyers that forms are just the starting point; the lawyer must exercise independent professional judgment when using them.

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