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HOME BUYER ALERT: Important Changes in the Law Every Home Buyer Should Know

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TODAY'S LAW

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Offer to Purchase Real Estate Is Binding Contract

The first legal document signed by both the buyer and seller in the home buying process is the offer to purchase. The most widely used offer to purchase is a pre-printed form published by the Greater Boston Real Estate Board. According to a recent court decision, a signed offer to purchase, using the Greater Boston Real Estate Board form, is a binding legal contract between the buyer and seller even if a more formal contract, known as a purchase and sale agreement, is never signed.

According to a recent decision of the Massachusetts Supreme Judicial Court, the state's highest court, an offer to purchase real estate alone is a binding contract, despite a provision in the offer

requiring the execution of a purchase and sale agreement, when the offer to purchase states the material terms of the transaction, and contains a notice stating that it creates binding obligations.

In *McCarthy v. Tobin, et al.*, the buyer executed an "Offer to Purchase Real Estate" on a printed form published in 1994 by the Greater Boston Real Estate Board which is widely used by brokers throughout Eastern Massachusetts. The completed form contained all the material terms of the transaction, including the property description, purchase price, deposit, and expiration date of the offer. In addition, the offer also provided that i) the parties would execute a purchase and sale agreement by a specified date, ii) time was "of the essence", iii) the sale was subject to the execution of a mutually satisfactory purchase and sale agreement, and iv) the parties should be on notice that the offer was a "legal document that creates binding obligations. If not understood, consult an attorney."

After the offer was accepted by

the seller, the attorneys for the buyer and seller exchanged drafts of a purchase and sale agreement and engaged in negotiations regarding its terms. During the course of negotiations, the deadline for executing a purchase and sale agreement stated in the offer expired. Nevertheless, negotiations continued without reference to the missed deadline.

When a final draft of the purchase and sale agreement was agreed upon, the buyer executed the agreement and arranged for its delivery to the seller for execution. In the meantime, the seller accepted an offer from a third party for a higher price. The following day, the seller refused to sign the purchase and sale agreement because it was late and informed the buyer that he had signed a second offer with a third party.

The seller sought to repudiate the offer and sell the property to a third party, arguing that the buyer was not entitled to force the sale because a purchase and sale agreement was never executed by the parties. The Supreme Judicial Court, however, found that the offer to purchase, which stated all the material terms and conditions of the transaction and stated on its face that the instrument created "binding obligations", was a binding agreement which bound both the seller and buyer, and that a purchase and sale agreement was not necessary to bind the parties.

The Court noted that, although the purchase and sale agreement was not necessary to bind the parties, the provision in the offer to purchase requiring the execution of a purchase and sale agreement was nevertheless enforceable. However, the Court found that the seller had waived the deadline for execution of a purchase and sale agreement, and that the buyer's tender of an

executed purchase and sale agreement after the deadline was timely and within reason.

As a result of this decision, any offer to purchase may be binding upon the parties as an enforceable contract, even if a purchase and sale agreement is not subsequently executed.

In view of the increased legal significance of the offer to purchase, sellers and buyers alike should have any offer to purchase reviewed by an attorney prior to signing the offer.

Liquidated Damages Clause in Purchase and Sale Agreement is Enforceable

When a prospective home buyer repudiates a purchase and sale agreement, the seller is entitled to retain as liquidated damages the buyer's deposit, under the agreement's liquidated damages clause, regardless of whether or not the seller suffered an actual loss from the buyer's breach, according to a recent decision of the Massachusetts Supreme Judicial Court.

In *Kelly v. Marx*, the buyer and seller signed a purchase and sale agreement containing a clause stating, "If the Buyer shall fail to fulfill the Buyer's agreements herein, all deposits made hereunder by the Buyer shall be retained by the Seller as liquidated damages." The Buyer paid a deposit equal to five percent of the purchase price at the time the purchase and sale agreement was executed.

The Buyer was subsequently

unable to purchase the property because they were unable to sell their current home. Shortly thereafter, the Seller accepted a higher offer from another prospective buyer, and eventually sold the property to the new buyer within three weeks after the closing date set forth in the purchase and sale agreement with the original Buyer. Nevertheless, the Seller retained the deposit paid by the original Buyer as liquidated damages for the Buyer's breach.

The Buyer sued the Seller for the return of the deposit on the grounds that the Seller was not entitled to the deposit because they suffered no actual damages as a result of the Buyer's breach. The Court, however, held that the liquidated damages clause was enforceable and the Seller was entitled to keep the deposit, regardless of whether they suffered any actual loss.

As a result of the decision in *Kelly v. Marx*, it is now clear that a liquidated damages clause in a purchase and sale agreement will be enforced even in cases where the Seller suffers no actual damages. Therefore, any prospective home buyer must be prepared to comply with all the terms of the purchase and sale agreement or risk losing a substantial deposit in the event of a breach. For this reason, a home buyer should consult with an attorney prior to signing the purchase and sale agreement.

The concepts described in this newsletter are general in nature. One must seek competent counsel before implementing any of the ideas described in this newsletter. This newsletter may be deemed advertising under the rules governing lawyers' conduct in Massachusetts.