

# Unsettled: The Legal Aftermath of Failure to Close



BY

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*BCCAR  
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# Notice



- This course does not constitute legal advice or the formation of an attorney client relationship.
- We can still be friends.
- Course Identification/Reference Number is: **C20160478**

# Introduction



- When Things Go Wrong, as They Sometimes Will, ...
  - Is it a breach of contract or not?
  - Is it major breach or a minor breach?
  - What is the appropriate response?
    - ✦ Given the likelihood of recovery?
    - ✦ Given the likely cost of recovery?

# Breach of Contract or Not?



- Breach of Contract defined in layman's terms:
- "To establish its contract claim against the defendant, plaintiff must prove that:
  1. The parties entered into a contract containing certain terms.
  2. The plaintiff did what the contract required the plaintiff to do.
  3. The defendant did not do what the contract required the defendant to do. This failure is called a breach of the contract.
  4. The defendant's breach, or failure to do what the contract required, caused a loss to the plaintiff.

If you find plaintiff proved these four elements, then your verdict must be for the plaintiff. If you find that plaintiff has not proved these elements, then your verdict must be for the defendant."

- New Jersey Model Civil Jury Charges 4.10 BILATERAL CONTRACTS, A. The Contract Claim -- Generally (5/98).

# Material Breach - Factors



- Extent to which the injured party will be deprived of the benefit which he reasonably expected;
- Extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
- Extent to which the party failing to perform or to offer to perform will suffer forfeiture;
- Likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
- Extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.
- [American Law Institute](#), Restatement (Second) of Contracts § 241 (1981)

# Major Breach = Excuse of Performance



- How to tell a major (i.e., material) breach from a minor breach, and why you should care.
- "When there is a breach of a material term of an agreement, the non-breaching party is relieved of its obligations under the agreement." [Nolan v. Lee Ho, 120 N.J. 465, 472, 577 A.2d 143 \(1990\)](#)

# Remedies for Major Breach



- A *material breach* is any failure to perform that permits the other party to the contract to either **compel performance**, or **collect damages** because of the breach, subject to certain exceptions
  - e.g., economic waste

# Remedies for Minor Breach



- In a "minor" breach (a partial breach or immaterial breach or where there has been substantial performance), the non-breaching party cannot sue for specific performance, and can only sue for actual damages.



# Examples in Leased Property



- Example: a **major** breach (such as drug manufacture in the apartment) will allow the landlord to exercise a right of re-entry in the lease and sue to evict, while a **minor** breach such as the payment of rent or any other financial obligation due under the lease after the due date but within the grace period permitted under State law\* constitutes a minor violation. KUZURI KIJJJI, Inc. v. Bryan, 852 A.2d 1136, 371 N.J. Super. 263 (N.J. Super., 2004).
  - \* five business days. NJSA 2A:42-6.1

# Acid Test



- What is the appropriate response?
  - Given the likelihood of recovery?
  - Given the likely cost of recovery?
  - Discount expectations to the weighted likelihood of recovery less cost to collect (not simply obtain judgment)

# How Did This Bar Bill Get So High?



- Making a mess of things with unclear signals
  - Misunderstandings (no meeting of the minds)
    - ✦ heighten risk of breach
    - ✦ cause perceived unfairness

# Clarity



- **Article 9**

REALTORS<sup>®</sup>, for the protection of all parties, shall assure whenever possible that **all agreements related to real estate transactions** including, but not limited to, listing and representation agreements, purchase contracts, and leases are **in writing in clear and understandable language** expressing the specific terms, conditions, obligations and commitments of the parties. A copy of each agreement shall be furnished to each party to such agreements upon their signing or initialing. (Amended 1/04)

Code of Ethics and Standards of Practice of the NATIONAL ASSOCIATION OF REALTORS<sup>®</sup>

*Effective January 1, 2012*

# Clarity



- **Standard of Practice 9-1**  
For the protection of all parties, REALTORS® shall use reasonable care to ensure that documents pertaining to the purchase, sale, or lease of real estate are kept current through the use of written extensions or amendments. (Amended 1/93)
- **Standard of Practice 9-2**  
When assisting or enabling a client or customer in establishing a contractual relationship (e.g., listing and representation agreements, purchase agreements, leases, etc.) electronically, REALTORS® shall make reasonable efforts to explain the nature and disclose the specific terms of the contractual relationship being established prior to it being agreed to by a contracting party. (Adopted 1/07)
- **Code of Ethics and Standards of Practice of the NATIONAL ASSOCIATION OF REALTORS®**  
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# Confirmation



- NJAC § 11:5-6.2 Contracts of sale, leases and listing agreements

(a) The following paragraphs specify licensees' obligations to obtain written confirmation of the intentions of, and to deliver copies of documents to, parties to a real estate transaction.

1. Where a licensee memorializes the terms of an offer or counter-offer on a writing which will itself become an "instrument" as defined in (a)3 below, the **licensee shall deliver to the maker of such an offer or counter-offer a clear copy of the executed offer or counter-offer immediately upon its being signed**, and initialed if necessary as provided in this section, by the maker of the offer or counter-offer. Any addition, deletion, or other change in any such offer or counter-offer shall be initialed by the party proposing such a revision and, if accepted, by the other party to the transaction.

# Confirmation



- NJAC § 11:5-6.2 Contracts of sale, leases and listing agreements
  - (a) ...
    1. ...
    2. Where a licensee records the terms of an offer or counter-offer on a writing which is not intended to be binding upon either party, and which so states on its face, in the event that the licensee secures the signature and/or initials of any party on such a writing, the **licensee shall provide to the signing and/or initialing party a clear copy of the writing** as signed and/or initialed by them.
    3. As used in this subsection, the term "instrument" means any complete and fully executed written contract of sale, lease, option agreement, or other writing affecting an interest in real estate, or any complete and fully executed addendum or amendment to any such contract, lease, option agreement or writing. The term instrument as used in this subsection does not include listing agreements and buyer brokerage agreements.

# Confirmation



- NJAC § 11:5-6.2 Contracts of sale, leases and listing agreements
  - (a) ...
    1. ...
    2. ...
    3. ...
    4. Licensees shall **immediately deliver to all parties to any fully executed instrument a clear copy with original signatures** of any such fully executed instrument. Licensees shall provide their clients with a fully executed copy of any sale or exclusive sale or rental listing contract at the time of execution thereof.
    5. Licensee-prepared revisions or additions reflected on the instrument itself shall be initialed by all parties to the transaction. Licensee-prepared revisions or additions to an instrument not memorialized by changes on the instrument itself shall be reflected on amendments or addenda to the instrument signed by all parties to the transaction.
      - i. Licensees **shall immediately deliver to the party proposing a revision or addition to an instrument a clear copy of any proposed revised instrument initialed by that party and a clear copy of any proposed amendment or addendum signed by that party.**
      - ii. All revisions, amendments and addenda to any fully executed instrument which are prepared by licensees must comply with New Jersey law as it pertains to the attorney review of contract and lease documents prepared by real estate licensees.
    6. This rule is to ensure prompt communication of the executed evidence of a transaction to all interested parties.



# Unrepresented Individuals



- Dealing directly
  - Ethical requirements (to treat fairly)
    - ✦ NJAC 11:5-6.4 “...(The) licensee (has) ... the obligation of dealing fairly with all parties to the transaction.”
    - ✦ And no regulatory ethical constraints on the other side
  - Meeting of minds harder to prove
  - Courts hate imbalance of power/knowledge
    - ✦ Contracts of adhesion

# Even a Man Who Is Pure in Heart



- A question of awareness
  - When the deal falls out of bed, don't let it fall on you
  - Why you are a target
    - ✦ Insurance, deep pockets, *respondeat superior*, other vicarious liability
    - ✦ You did something stupid
    - ✦ You didn't do anything stupid and it's just your turn
  - Your friend, record keeping

# In an Up Market, Sellers Want Out



- Case law interpreting “time of the essence”
- Where an agreement itself “provides a clear understanding that time is of the essence” it is settled that prompt performance is required “and the date contained in the contract for closing would be strictly enforced by a court of equity.” Marioni v. 94 Broadway, Inc., 374 N.J. Super. 588, 603 (App. Div.), certif. denied, 183 N.J. 591 (2005). However, a closing date in a contract is often viewed as “formal rather than essential.” Paradizo v. Mazejy, 3 N.J. 110, 115 (1949). It is also a well-settled rule in equity that time is ordinarily not of the essence of a contract for the sale of lands. Rosie v. Wisniewski, 112 N.J. Eg. 364, 366 (E. & A. 1933).

# In an Up Market, Sellers Want Out



- Refusal to extend, amend, or walk away
- “It is well-established that [i]n contracts for the sale or purchase of land, delay of one party must be greater in order to discharge the duty of the other than in mercantile contracts. Under [the] view [of Restatement, Contracts, § 276], how great a delay is permissible depends upon all the circumstances; it is a question for the trier of the facts. [[Hodes v. Dunskey, 5 N.J.Super. 333, 337-338](#) [69 A.2d 34] (App.Div.1949), quoting 1 Restatement, Contracts, § 276 at 407 (1932) ].
  - [Barlet v. Frazer, 526 A.2d 1141, 218 N.J.Super. 106, 111\(N.J. Super. A.D., 1987\)](#)

# In an Up Market, Sellers Want Out



- Repudiation

- “a positive statement indicating that the promisor will not or cannot substantially perform his contractual duties.”

Restatement (Second) Contracts §318(a)

# In an Up Market, Sellers Want Out



- “Pre-approval” and the Mortgage Contingency
  - A pre-approved mortgage is different than loan pre-qualification.
  - Prequalification is a non-binding estimate
  - The next step, pre-approval, is a binding agreement to make the loan

# In a Down Market, Buyers Want Out



- **Anticipatory Breach**
  - By words (repudiation) or conduct
- **Breach by voluntary disablement**
  - Failure to make good faith application
  - Failure to provide proof of funds
  - “Forgetting” to sign necessary submission

# In a Down Market, Buyers Want Out



- Duty to cover and mitigate
- Injured parties have a duty to take reasonable steps to mitigate damages.
  - Ingraham v. Trowbridge Builders, 297 N.J.Super. 72, 82, 687 A.2d 785, 790 (App.Div.1997); Grubbs v. Knoll, 376 N.J.Super. 420, 870 A.2d 713 (N.J. Super., 2005)



# In a Down Market, Buyers Want Out



- Duty to cover and mitigate
- There is no dispute that a landlord must make "reasonable" efforts to mitigate its damages after a tenant breaches the lease.
  - In Sommer v. Kridel, 74 N.J. 446 (1977), the New Jersey Supreme Court held that a residential landlord must mitigate damages arising from the breach of the lease by reasonable attempts to relet the premises. The same now applies to commercial landlords, per McGuire v. City of Jersey City, 125 N.J. 310, 320-21 (1991).

# In a Down Market, Buyers Want Out



- **Bad faith tactics**
  - disputed repair items
  - disputed “expert” status
- **Final walk through and items for repair**

# Trouble at the Closing



- Common problems and spot solutions
- Advance preparation
- Formalities of extension and rescheduling
- The dry closing

# Trouble at the Closing



- Lenders
  - Unready
  - Nonconforming paperwork
  - Additional requirements
- Unacceptable checks
- Last minute amendment
  - Stickups and sweeteners

# Break - Ten Minutes



# Caught in the Middle



- Agency in the failed transaction

- Standard of Practice 3-5

It is the obligation of subagents to promptly disclose all pertinent facts to the principal's agent prior to as well as after a purchase or lease agreement is executed. (Amended 1/93)

- Code of Ethics and Standards of Practice of the NATIONAL ASSOCIATION OF REALTORS<sup>®</sup>  
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- The earnest money in escrow

- “The Law abhors a forfeiture.”

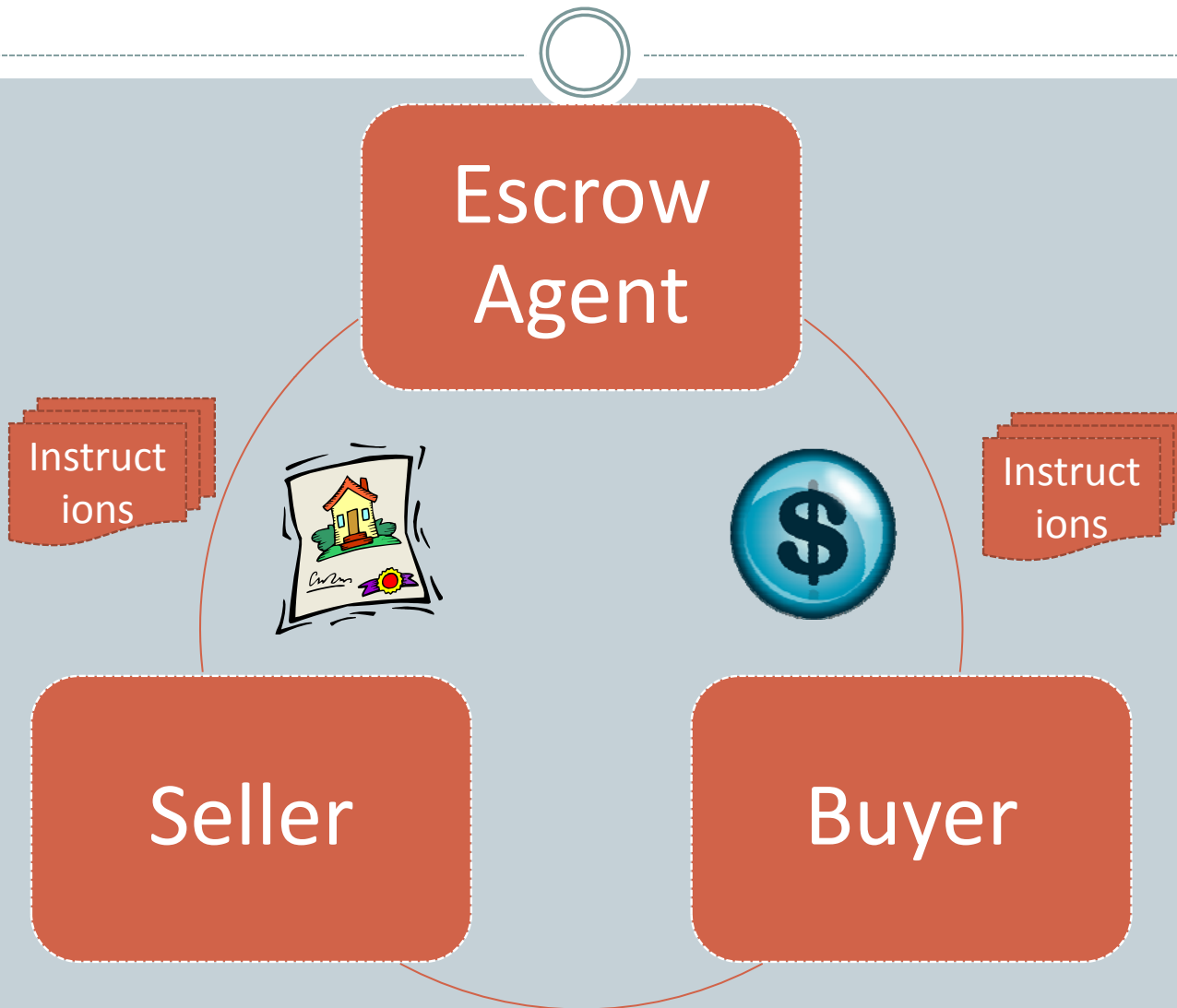
- ✦ Oldfield v. Stoeco Homes, Inc., 26 N.J. 246, 139 A.2d 291 (N.J., 1958)

# Caught in the Middle



- The deposit and other escrow matters
- Article 8  
REALTORS<sup>®</sup> shall keep in a special account in an appropriate financial institution, separated from their own funds, monies coming into their possession in trust for other persons, such as escrows, trust funds, clients' monies, and other like items.
  - Code of Ethics and Standards of Practice of the NATIONAL ASSOCIATION OF REALTORS<sup>®</sup>  
*Effective January 1, 2012*

# Caught in the Middle





# Interpleader



- **RULE 4:31. Interpleader**
- Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff denies liability in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counter-claim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted by R. 4:29.
- **Note: Source-R.R. 4:35; amended July 13, 1994 to be effective September 1, 1994.**

# Caught in the Middle



- Contested brokerage fees
  - Under existing law, upon performance of the contract by the buyer, the owner/seller becomes liable for the payment of the real estate commission. Ellsworth Dobbs, Inc. v. Johnson, 50 N.J. 528, 551 (1967).

# Caught in the Middle



- Ellsworth Dobbs, Inc. v. Johnson, 50 N.J. 528, 551 (1967) was a landmark case in which our Supreme Court undertook a comprehensive review concerning the nature of the relationship between real estate brokers and sellers. The Court rejected the notion that a broker became legally entitled to a commission upon the signing of a contract between buyer and seller but ruled instead, that it was earned only when the buyer consummated the contract.

# Broker Liens on Proceeds



- No statutory lien in NJ
- “An equitable lien is ‘a right of special nature in a fund and constitutes a charge or encumbrance upon the fund.’” VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 546 (1994) (quoting In re Hoffman, 63 N.J. 69, 77 (1973)).

# Broker Liens on Proceeds



- “The issue involved is rather simple, occurs commonly, but, so far as research has been able to determine, has not been ruled on, definitively, in New Jersey. It is this. Does the broker whose efforts lead to the signing of a contract for the sale of real estate have a lien for his commission on the proceeds of sale due to the seller at closing? The answer is, yes.”
- Cohen v. Estate of Sheridan, 218 N.J. Super. 565, 566-67 (Ch. Div. 1987)[218 NJSuper Page 567]

# The Resulting Lawsuit



- The set-up: remaining ready to perform
  - Deny the defendant counterclaims and affirmative defenses
  - Wearing the good-guy “plaintiff” hat

# Joinder of Parties



- RULE 4:28. Joinder Of Parties

- **4:28-1. Joinder of Persons Needed for Just Adjudication**

- **(a) Persons to Be Joined if Feasible.** A person who is subject to service of process shall be joined as a party to the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest in the subject of the action and is so situated that the disposition of the action in the person's absence may either (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or other inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant.

- (b) ...
- (c)...

# Joinder of Parties - 2



- **RULE 4:28. Joinder Of Parties**
- **4:28-2. Claims by or Against Fiduciaries**
- Claims by or against any fiduciary, as such, may be joined without leave of court with claims by or against the fiduciary personally in respect of or arising out of the fiduciaryship, and may, with leave of court, be joined with any other claims by or against the fiduciary personally.
- Note: Source-R.R. 4:32-6; amended July 13, 1994 to be effective September 1, 1994.



# Tendering the E&O Claim



- How and when
- Following through
- Covered vs. uncovered claims
  - Independent counsel on uncovered claims
  - Contesting denial of coverage

# Tendering the E&O Claim



- An insurance policy provision that requires an insured to cooperate is a condition precedent to recovery of policy benefits.
  - See Griggs v. Bertram, 88 N.J. 347, 359-60, 443 A.2d 163 (1982)
- However, an insurer must show that it was appreciably prejudiced by its insured's failure to cooperate in order to disclaim coverage based on that failure.
  - Cooper v. Government Employees Insurance Company, 51 N.J.86, 237 A.2d 870 (1968); Hager v. Gonsalves, 942 A.2d 160, 398 N.J. Super. 529 (N.J. Super., 2008)

# The Resulting Lawsuit



- Remedies for Breach
  - For the Buyer: Specific Performance or Money Damages
  - For the Seller: Money Damages
  - For Either Side: Rescission and Restitution
  - For Either side: Other equitable remedies such as Reformation, Equitable Lien, etc.

# Specific Performance



- Seller able but unwilling to perform
- Buyer wants to proceed with deal
- Buyer sues for an injunctive relief – a court order that the Seller carry through with sale

# Specific Performance



- To obtain specific performance, the buyer must prove that he was ready and able to perform his obligations at the closing, and must remain ready to perform under the contract while the lawsuit is pending.

# Specific Performance



- Specific performance, like any injunctive remedy, ordinarily reserved for the extraordinary case in which there is no monetary remedy.
- However, parties may contract for specific performance as the remedy of choice.
  - ✦ Caveat: may thereby lose access to money damages for breach. *The Bluffs at Ballyowen, LLC v. Toll Bros., Inc.*, 2010 N.J. Super. (App. Div. Nov. 4, 2010) (appeal dismissed by settlement).

# Measure of Money Damages 1



- Expectation damages measured by the difference between the contract price and market value (of the consideration).
  - Goal is to place the plaintiff in as good a position as if the defendant fully performed.
  - May be measured in one of two ways:
    - ✦ the cost of repair, or
    - ✦ the diminution in value
  - Delay damages measured by the value of loss of use (imputed rental value or imputed interest on the market value, or interest on the sum due).

# Measure of Money Damages 2



- Damages Suffered Due to Detrimental Reliance
- Available when expectation damages are uncertain or unforeseeable.
- Goal is to put the plaintiff in as good a position as if the contract had not been made, by compensating for losses caused by plaintiff's detrimental reliance on the contract.
- Expectation and reliance damages not available if the recovery would put the plaintiff in better position than if the contract had been performed.



# Measure of Money Damages 3



- Restitution
  - Recovery based on the reasonable value of the plaintiff's performance, under the contract, i./e., the benefit conferred, rather than the loss suffered as a result of the defendant's breach.

# Rescission and Restitution



- By the terms of the contract
- Where there is no valid contract
- As an equitable remedy in court



# Rescission and Restitution



- Terminate the contract
- Take steps to restore the parties to their original positions
  - Return the deposit, plus or minus payment of reasonable expenses to either side
  - Incidental expenses may include the cost of the survey, title examination, and attorney's fees

# Rescission and Restitution



- Rescission is an available remedy in an action for equitable fraud. Bonnco Petrol, Inc. v. Epstein, 115 N.J. 599, 611, 560 A.2d 655 (1989). A rescission of a transaction is "the undoing of it; it returns the parties ... to the very ground upon which they originally stood." Driscoll v. Burlington-Bristol Bridge Co., 28 N.J.Super. 1, 4, 99 A.2d 829 (App.Div.1953). Its object "is to restore the parties to the status quo ante and prevent the party who is responsible for the misrepresentation from gaining a benefit." Bonnco Petrol, Inc., 115 N.J. at 612, 560 A.2d 655.

# The Resulting Lawsuit



- Complaint, Case Information Statement, Track Assignment Notice, Summons
- Lis pendens
- Answer
  - ✦ Counterclaim
  - ✦ Third party complaint,
  - ✦ And so on...

# Respondeat Superior



- Respondeat Superior
- NJAC 11:5-4.2 Broker supervision and oversight of individual licensees, office operations and escrowed monies
- (a) The following apply to individual broker licensees operating as sole proprietors (employing brokers) or as the authorized broker (broker of record) of a corporation or other entity licensed as a New Jersey real estate broker. As used in this section, the term "individual broker" shall refer to employing brokers and brokers of record and the term "broker licensee" shall refer to sole proprietors and corporations or other entities licensed as brokers.
  - **1. The Commission will hold responsible individual brokers for any actions of the broker licensee or any person employed by or licensed through the broker licensee taken in the pursuit of its real estate brokerage business which violate any of the provisions of the real estate license law, N.J.S.A. 45:15-1 et seq., or the regulations promulgated thereunder.**
  - i. This responsibility shall apply regardless of where the persons licensed through the broker licensee engage in actions in pursuit of the broker licensee's real estate brokerage business.
    - ...

# The Resulting Lawsuit



## ○ Discovery

- ✦ Depositions, interrogatories, requests for inspection, requests for production, requests for admissions, demand for papers and pleadings

## ○ Motion Practice

## ○ Trial

## ○ Appeal

# Remember You Were Warned



- What not to expect from the lawsuit
  - Vindication
  - Closure
  - Everything you feel is due
  - Speedy resolution
  - Happy feelings
  - A picture of a chicken



# ADR



- **Article 17**

In the event of contractual disputes or specific non-contractual disputes as defined in Standard of Practice 17-4 between REALTORS® (principals) associated with different firms, arising out of their relationship as REALTORS®, the REALTORS® shall mediate the dispute if the Board requires its members to mediate. If the dispute is not resolved through mediation, or if mediation is not required, REALTORS® shall submit the dispute to arbitration in accordance with the policies of their Board rather than litigate the matter.

**In the event clients of REALTORS® wish to mediate or arbitrate contractual disputes arising out of real estate transactions, REALTORS® shall mediate or arbitrate those disputes in accordance with the policies of the Board, provided the clients agree to be bound by any resulting agreement or award.**

The obligation to participate in mediation or arbitration contemplated by this Article includes the obligation of REALTORS® (principals) to cause their firms to mediate or arbitrate and be bound by any resulting agreement or award. (Amended 1/12)

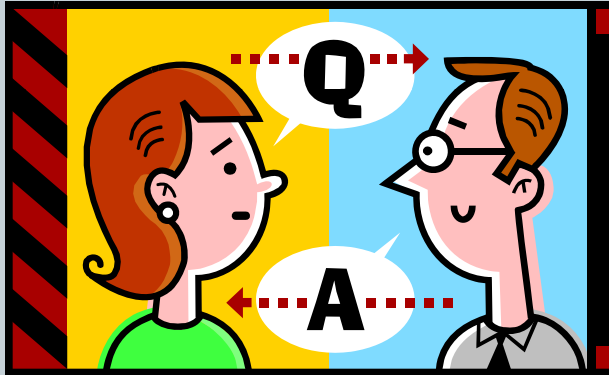
- 2012 Code of Ethics and Standards of Practice of the National Association of REALTORS®

# Conclusion



- How to work with lawyers
  - The role of appointed defense counsel
  - When independent counsel is indicated
    - ✦ Uncovered claims
    - ✦ Conflicts of interest
  - Contingency fee representation

# Open Q&A



*Don't Forget to Sign Out.*



# Unsettled: The Legal Aftermath of Failure to Close



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