

LOUISIANA REAL ESTATE CONTRACTS
2013 Mandatory Topic

Featuring the New Residential Agreement to Buy or Sell

Prepared for the Louisiana Real Estate Commission by

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Course Outline

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LOUISIANA REAL ESTATE CONTRACTS

THE LOUISIANA SYSTEM

Louisiana is unique from other states because of the Civil Code. It is the primary authority governing obligations between persons in Louisiana. Although some states have codes relative to property, they are not like Louisiana's civilian law. All contracts are subject to the general contract rules of the Louisiana Civil Code, but some contracts, like the contract of sale, are subject to particular rules set forth in the Louisiana Civil Code pertinent to that type of nominate contract.

I. GENERAL CONTRACT LAW

A. WHAT CONSTITUTES A CONTRACT?

A contract is an agreement by two or more parties whereby obligations are created, modified, or extinguished. *La. C.C. art. 1906*

This definition begs the question, "What is an obligation?" An obligation is a legal relationship whereby a person, called the **obligor**, is bound to render a performance in favor of another, called the **obligee**. Performance may consist of giving, doing, or not doing something. *La. C.C. art. 1756*

It is important to remember that every contract involves an obligor and obligee. These terms will be used throughout this outline to describe the obligations undertaken by entering into a contract.

1. Types of contracts. The Louisiana Civil Code classifies contracts in two ways:

a. Nominate: is a contract with a specific "name" or designation; that is, sale, lease, loan or insurance. *La. C.C. art. 1914*. Nominate contracts are subject to special rules in the Louisiana Civil Code and the Civil Code ancillaries in addition to the general rules concerning contracts.

b. Innominate: a contract with no special designation. *La. C.C. art. 1914*. Innominate contracts are subject only to the general rules concerning conventional obligations in the Louisiana Civil Code.

c. Consideration: We do not have this concept in Louisiana law. This is probably the greatest difference in our contract law as compared to the common law status.

d. Cause: In essence, we classify contracts by the motive for making the contract. The motive is discovered by the expression of the parties in the contract (i.e., not "secret" or unexpressed motives). Once the motive (read "cause") is discerned, the contract is classified into an innominate or one of the nominate contracts. Once classified, the rules of that classification apply. (Ex. \$10.00 and OVC)

Example: JR, who is from Texas, wants to buy some prime swampland from your client, Troy. JR sends Troy a purchase agreement offering to purchase the property from Troy for "\$10.00 and other good and valuable consideration." JR tells Troy that he will actually pay him \$50,000 which is the appraised value of

the property. Even if Troy executes the purchase agreement, the contract will be invalid because the cause of the contract (Troy's desire to receive \$50,000) was not expressed in the contract.

2. Classification. Contracts are further classified by the type of performance incurred and advantages obtained by the parties:

- a. Unilateral:** a contract requiring the performance of only one party. *La. C.C. 1907.*
- b. Bilateral:** a contract in which parties obligate themselves reciprocally, thus requiring more than one performance (the more typical contract). *La. C.C. 1908.*
- c. Onerous:** one party obtains an advantage in exchange for his obligation. *La. C.C. art. 1909.*
- d. Gratuitous:** one party obligates himself to another without obtaining any advantage in return (e.g., a donation). *La. C.C. art. 1910.*

Example: An Agreement to Purchase and Sell (a "Purchase Agreement" is a contract between two parties wherein one person legally obligates himself to sell property, and the other legally obligates himself to purchase property. This contract is an example of a nominate, bilateral, onerous contract, which is named in the Louisiana Civil Code as a Contract to Sell and in which both parties are obligated reciprocally and both parties receive an advantage in exchange for the obligation. No deposit or payment (i.e. no "consideration") is required for this to be a binding contract. *La. C.C. art 2623.*

3. Is a contract required to be in writing?

a. Generally, contracts do not need to be in writing. However, the general rule for contracts that affect **title** (ownership) of immovables is that the contract must be in writing for it to be valid.

A sale or promise of sale of an immovable must be made by authentic act or by act under private signature, except as provided in Article 1839. *La. C.C. art. 2440.*

b. In the world of real estate, it is important to follow the general rule for immovables because of the public records doctrine, which states:

An instrument involving immovable property shall have effect against third persons only from the time it is filed for registry in the parish where the property is located. *La. C.C. art. 1839.*

c. Also, contracts where a component of ownership is transferred (for example, a servitude on immovable property) must be in writing. (contrast: a lease does not have to be in writing because it does not transfer ownership.)

4. Contracts may be implied by action or conduct, i.e., an oral transfer of an immovable is valid between the parties when the property has been actually delivered and the transferor recognizes the transfer when interrogated on oath. *La C. C. art. 1839.*

5. Forms of Writing. Form is important due to quality as evidence in court.

a. Authentic Acts. These are self-proving, i.e., no one needs to take the stand in court and identify their signature. (Authentic acts are highly recommended for any long term obligation, e.g., a lease because the persons who signed may not be around to verify that they signed it.)

(i) An authentic act is a writing executed before a notary public in the presence of two witnesses, and signed by each party executing the act, by each witness, and by each notary public before whom it was executed. *La. C.C. art. 1833.*

(ii) Any act to be recorded must include the typed, printed, or stamped name of the notary and the witnesses plus the notary identification or attorney bar roll number. The Clerk can refuse to accept the act if these are not included (unless it is something to be filed in the civil or criminal records).

(iii) An act that fails to be authentic may still be valid as an act under private signature. *La. C.C. art. 1834.*

b. Private Signature duly acknowledged (these are also self-proving). In this case, the person who signed an act (or a witness to the act) acknowledges that he or she signed the act before a notary or in court. *La. C.C. art. 1836.*

c. Private signature (these are not self-proving, i.e., must be identified in court) Simple signature (no witnesses, no notary). This is the form for most Purchase Agreements. *La. C.C. art. 1837.*

6. Interpretation of Contracts in Louisiana.

a. Contracts are interpreted based upon the common intent of the parties. *La. C.C. art. 2045.*

When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent. *La. C.C. art. 2046.*

b. Contracts are interpreted against the drafter if language in a contract can be interpreted in more than one way. If a court is called upon to determine the intent of the parties to a contract based upon the language in the contract, the court will interpret the contract in favor of the party that did not draft it. That is because typically the drafter will draft the contract in his favor.

In case of doubt that cannot be otherwise resolved, a provision in a contract must be interpreted against the party who furnished its text.

Query: What's the interpretation standard for a form contract like the LREC Purchase Agreement?

A contract executed in a standard form of one party must be interpreted, in case of doubt, in favor of the other party. *La. C.C. art. 2056.*

c. If a contract is negotiated by sending drafts of the contract back and forth between the parties then it cannot be said that only one party was the drafter. In that case parties are permitted to waive the rule in *La. C.C. art. 2056* by specifying in the contract that the text was furnished by and agreed upon by both parties.

B. ESSENTIAL ELEMENTS OF A VALID CONTRACT, *La. C.C. art. 1906 et seq.*

1. Capacity. All parties to a contract must be capable of entering into a contract. The general rule of capacity provides that “All persons have capacity to contract, except unemancipated minors, interdicts, and persons deprived of reason at the time of contracting.” *La. C.C. art. 1918*. This section will also deal with specific rules of capacity, which are particular to the alienation and encumbrance of immovable property.

A contract made by a person without legal capacity is relatively null and may be rescinded only at the request of that person or his legal representative. *La. C.C. art. 1919*.

a. Human Beings.

(i) Legal age in Louisiana. Majority is attained upon reaching the age of eighteen years. *La. C.C. art. 29*. A natural person (human being) obtains capacity and can make all sorts of juridical acts (e.g., contracts) upon reaching the age of majority.

(ii) Unemancipated Minors: A minor can become judicially (requires court proceedings) emancipated from his parents at the age of 16. Prior to being emancipated or reaching the age of majority, a minor does not have capacity to contract. Even an emancipated minor may have limited powers of administration, meaning the minor still cannot alienate or mortgage immovable property without judicial authority. *La. C.C. art. 373*.

(iii) Tutorship. In cases involving an unemancipated minor, a tutorship may be required. A tutorship is a formal legal proceeding in which a tutor (an adult, and most commonly a parent) is appointed by the Court to represent the interests of a minor child. A tutor may purchase, sell or mortgage immovable property on behalf of a minor child upon receipt of judicial authorization.

(iv) Emancipation by Marriage. Once married, minors are emancipated by right. *La. C.C. art. 379*.

(v) Interdicts are people, who due to an infirmity, are judicially determined to be unable to consistently make reasoned decisions regarding the care of their person and property, or to communicate those decisions. *La. C.C. art. 389*. An interdict’s property is administered by a curator. The curator is appointed in a formal legal proceeding of curatorship. Much like a tutorship, a curator may purchase, sell or mortgage immovable property on behalf of an interdict upon receipt of judicial authorization.

(vi) Persons Deprived of Reason. To affect a contract, these must exist at the time the contract is made (note – “lucid intervals”). Examples of lack of capacity based on deprivation of reason: maladies affecting intelligence (*Succession of Schmidt*, 219 *La. 675*, 53 *So.2d 834 (1951)*); habitual drunkenness (*Interdiction of Gasquet*, 136 *La. 957*, 68 *So. 89 (1915)*); drunkenness causing loss of reason (*Emerson v. Shirley*, 188 *La. 196*, 175 *So. 909 (1937)*); drug sedation (*Brumfield v. Paul*, 145 *So.2d 46 (La. App. 4th Cir. 1962)*); senility (*Smith v. Blum*, 143 *So. 2d 419 (La. App. 4th Cir. 1962)*).

b. Business Entities. A juridical person “is an entity to which the law attributes personality, such as a corporation or a partnership.” *La. C.C. art. 24*. Business entities, whether or not incorporated, are juridical persons. Just as natural persons must have capacity, so do juridical persons. While it is rare to see any limitations upon the capacity of a business entity, it is possible. Any limitations upon capacity should be contained within the Articles of Incorporation, Articles of

Organization or Partnership Agreement, as the case may be. It is good practice to review these documents to determine the extent of the entities' capacity.

2. Authority. This simply means the power to act. Juridical persons (those that are created under the law) cannot execute a contract as can a human being. Instead, juridical persons must authorize someone to perform the physical act of signing the contract that will obligate the entity. Therefore, when determining whether or not a contract is valid, it is important to determine whether or not the person signing the contract had the authority to do so. *See Exhibit A.*

a. Methods of Obtaining Authority:

(i) Corporation: by Resolution. There is no inherent authority for the president of a corporation to sign a Purchase Agreement or execute an act of sale. Any such authority must be contained in the corporate articles or permitted by resolution. *See, e.g., Tedesco v. Gentry Development, Inc., 540 So.2d 960 (La.1989)*

(ii) Limited liability company: Certificate of Authority or Unanimous Consent of the Members. The Articles of Organization of an LLC must state who may issue a certificate of authority.

(iii) Partnership: By Partnership Agreement

(iv) Mandate/Procurator (commonly referred to as Power of Attorney). A mandate is a contract by which a person, the principal, confers authority on another person, the mandatary, to transact one or more affairs for the principal. *La. C.C. art. 2989.* A contract of mandate is not required to be in any particular form, but when the law prescribes a certain form for an act, a mandate authorizing the act must be in that form. *La. C.C. art. 2993.* The authority to alienate, acquire, encumber, or lease a thing must be given expressly. *La. C.C. art. 2996.* Authority also must be given expressly to contract a loan. *La. C.C. art. 2997.*

Therefore, a Power of Attorney to buy, sell or mortgage immovable property must specifically authorize that act in writing. The preferred form is always an authentic act. For some acts, like mortgage, the power of attorney must be in authentic form.

Practice Tip: A basic power of attorney can be obtained from a lawyer or Notary Public. It should be executed in authentic form. A form power of attorney prepared by a Louisiana attorney can be a worthwhile investment for any real estate agent.

(v) Trust: By Trustee, acting in his capacity as Trustee, may buy, sell or mortgage immovable property on behalf of the Trust, so long as the trust document does not prohibit such action.

(vi) Succession:

(a) Immediately at the death of the decedent, the successors [typically heirs] acquire ownership of the estate and those named to receive specific items in a will, acquire ownership of the things bequeathed to them. *La. C.C. art. 935.*

(b) If ownership transfers at the moment of death, the question is, "who are the successors?" Ownership is determined by the will or by law in the absence of a will. The will of the decedent will indicate who inherits the property either

by designating a specific person for a specific piece of property or by designating one or more people to inherit a class of property. If there is no will (the decedent dies intestate), then the order of succession is designated by law. Typically, the decedent's children inherit all of his separate property in equal undivided shares and the decedent's one-half of his community property in equal shares and subject to a usufruct in favor of his surviving spouse. The surviving spouse retains her one-half interest in the community property.

(c) The succession proceeding judicially confirms the names of the successors. A Judgment of Possession is merely recognition of the parties that became owners and a declaration that the parties have been placed in possession.

(d) Prior to the rendering of a Judgment of Possession, the judicially appointed succession representative has authority to purchase, sell or encumber property of a decedent upon receipt of judicial authorization. An independent administrator has such authority without judicial authorization.

(e) If no representative is appointed then the heirs have the power to alienate prior to the rendering of the Judgment of Possession, but this is risky. Few title attorneys will want to pass the act of sale without the Judgment of Possession.

The judgment of possession rendered in a succession proceeding shall be prima facie evidence of the relationship to the deceased of the parties recognized therein, as heir, legatee, surviving spouse in community, or usufructuary, as the case may be, and of their right to the possession of the estate of the deceased. *La. C.C.P. 3062.*

3. Community Property Issues. The general rule in Louisiana is that all marriages are subject to the legal regime "of community of acquets and gains," in which the property owned by spouses can be classified as either community or separate. *La. C.C. art. 2334.* This fact is particularly important to remember in the case of the transfer of immovable property. This issue concerns who has the authority to transfer ownership of property.

a. Community property means that each spouse owns an undivided half interest.

b. All property is presumed to be community unless it can be shown by clear and convincing evidence that the property is separate.

c. "A spouse may not alienate [e.g., sell], encumber, or lease to a third person his undivided interest in the community or in particular things of the community prior to the termination of the regime." *La. C.C. art. 2337.*

d. Spouses may act alone with regard to most community property except for immovables. Concurrence of both spouses is required for the transfer of community immovables.

e. These rules mean that both spouses must execute an act of sale transferring community immovables unless a spouse has renounced the right to concur.

4. Object. The object of the contract must be lawful, possible and determined or determinable. *La. C.C. art. 1971*

a. The object of a Purchase Agreement is the transfer of real property. Therefore, the agreement must set forth a description of the property to be sold. It is always preferable to use the

legal description. The municipal address may or may not be a sufficient property description. The legal description can be acquired from the Seller's Act of Sale. In the case of a sale of rural acreage, it is acceptable to refer to a survey, so long as the survey referenced is actually attached.

b. In some places, particularly Parishes that have a subdivision ordinance, it is unlawful to contract to sell or sell a portion of a tract that is not legally subdivided and for which a subdivision map is not recorded. There is no lawful object if the property is not considered a legal lot.

Example. Developer buys a tract of land to be subdivided for homes. Buyer wants to buy a lot and use a custom builder. Buyer cannot purchase the lot from Developer until the tract is properly subdivided, approved by the appropriate governmental authority and recorded in the public records. Once it is legally subdivided Buyer can purchase "Lot 1 of Greenbrier Subdivision, as shown on the map recorded on _____ at Original ____, Bundle ____."

Issue: Can you sign an agreement preparatory to a sale; i.e., option or Purchase Agreement "subject to resubdivision?"

5. Consent. A contract is formed by the consent of the parties established through offer and acceptance. *La. C.C. art. 1927.*

a. Offer.

(i) An offer is a proposal that seeks acceptance. An offer must be complete, that is, sets out the terms of the contract fully so that acceptance is a simple "yes."

(ii) In the case of real estate, the offer is usually made by the Buyer. The Seller makes it known that he wants to sell and invites persons to make an offer. The offer is made in writing, signed by the Buyer and submitted to the Seller.

The law requires that agreements to buy and sell immovable property be in writing, therefore, offer and acceptance must be in writing also. See *La. C.C. art. 2440.*

(iii) Under the real estate licensing law, a violation of law results if a licensee fails to reduce an offer to writing when a proposed Buyer requests that it be submitted. *LSA-R.S. 37:1455(26).*

6. Revocability. By default the offer to the Seller is irrevocable for a reasonable amount of time. Most Purchase Agreements include a time for when acceptance must be made, in which case the offer is irrevocable only until the stated time. While an offer may be revocable for a period of time, a revocable offer is rare.

Example. Buyer views Seller's property and is immediately interested. Buyer executes a Purchase Agreement and leaves it with Seller's agent. The Purchase Agreement states that the offer is irrevocable for 48 hours. Buyer cannot rescind the offer for 48 hours.

a. Irrevocable Offer.

(i) An offer that specifies a period of time for acceptance is irrevocable during that time. Also, if no time is specified, if the offeror manifests an intent to give the offeree a

delay within which to accept, the offer is irrevocable for a reasonable time. *La. C.C. art. 1928.*

(ii) An irrevocable offer expires if not accepted within the time prescribed. *La. C.C. art. 1929.*

Example. Buyer signs Purchase Agreement on April 5 and writes that the offer is irrevocable until April 7. If Seller does not accept the offer on or before the 7th then the offer expires and can no longer be accepted. Under Louisiana law, no formal act of rejection is required. However, the Louisiana real estate licensing law requires that all rejections be clearly marked as such and signed by the Buyer or Seller, as the case may be. If the Buyer/Seller refuse to indicate their rejection, the licensee may do it. *LREC §3907.*

b. Revocable Offer.

(i) An offer not irrevocable under Civil Code Article 1928 may be revoked before it is accepted. *La. C.C. art. 1930.*

(ii) A revocable offer expires if not accepted within a reasonable time. *La. C.C. art. 1931.*

(iii) There are very difficult to write and consultation with an attorney is advisable.

c. Acceptance.

(i) The contract is created when the offer is accepted and that fact is communicated and received. A simple “yes” is sufficient consent. In the case of real property, evidence of acceptance must be in writing.

(ii) Acceptance of an irrevocable offer is effective when received by the offeror. *La. C.C. art. 1934.* It is questionable whether or not presenting an accepted offer to a party’s real estate agent is “received.”

(iii) A revocable offer (rare) is accepted once the acceptance is transmitted (e.g., mailed, sent by courier, etc.). *La. C.C. art. 1935.*

(iv) The offer can specify the method of acceptance and the person who can receive the acceptance on behalf of the offeror.

Example. John offers to purchase Bob’s car. John’s offer says “acceptance may be made by depositing \$500.00 with my sister Mary before the 15th.” In this case the method of acceptance is making the deposit plus John is designating his sister as a person who can receive the acceptance. It is not this easy in the real estate business. If John is selling property to Bob and either John or Bob use the services of a real estate licensee then the licensee is obligated by the licensing law to document the entire transaction in writing (above and beyond the rules of the Civil Code).

(v) A written acceptance is received when it comes into the possession of the addressee or of a person authorized by him to receive it. *La. C. C. art. 1938*

(vi) Despite the seemingly simple rules regarding acceptance, the interplay of real estate licensees in the offer/acceptance mix often raises unique issues about the timing of an acceptance.

Example. Buyer makes an irrevocable offer to Seller, which notes that the offer is only good until 5:00 p.m. Seller accepts Buyer's offer and executes the Purchase Agreement at 3:00 p.m. Seller then gives the signed Purchase Agreement to his broker to give to Buyer's agent. However, Buyer's agent is held up by business in the office and does not transmit the accepted offer to Buyer until 6:00 p.m. Is Buyer bound by the contract? Probably not but there is no easy answer to this question. If the acceptance of an irrevocable offer is "effective" when the Purchase Agreement is received by the Buyer then the answer may be no, but what affect is there when the Buyer's agent accepts receipt of the signed Purchase Agreement?

d. Counteroffer.

(i) An acceptance not in accordance with the terms of the offer is deemed to be a counteroffer. *La. C.C. art. 1943*

(ii) Any variation from the offer is a counteroffer. Back and forth negotiations in real estate are common. Therefore, sometimes it's tricky to know which offer is still up in the air. That is because any deviation from the offer at hand becomes a counteroffer that can likewise be accepted or rejected by the offeree (in the back and forth game the "offeree" may be the Buyer or Seller at any time).

Example. The Purchase Agreement says "all equipment to remain" and signs the agreement, which is presented to Seller. Seller signs agreement, but only after adding "if lathe remains the Purchase Price to increase by \$5,000.00." Seller's actions constitute a rejection of the offer and the initiation of a counteroffer. Buyer now has the option to accept/reject before an enforceable contract is created.

(iii) A counteroffer ends the original offer. It acts as the rejection of the offer. The original offer ceases to exist at the moment the offeree initiates the counteroffer.

(iv) The person who receives the counteroffer may then accept/reject.

Example. Using the example above, if Buyer is not willing to pay more, then Seller cannot go back and try to accept the original offer. The Buyer's offer expired when Seller added the provision to increase the purchase price. There is no contract if Buyer rejects the new price. Any "acceptance" by Seller of Buyer's expired offer would be a new offer by Seller which would have to be accepted by Buyer in order to create a contract.

e. Verbal Negotiations.

(i) The Purchase Agreement, Act of Sale and most other agreements affecting immovable property must be in writing. Verbal communications cannot affect title to immovable property.

(ii) Generally verbal negotiations cannot be used to alter what is included in a written contract. The reason is evidence or "proof." A party that demands performance of an obligation must prove that the obligation exists. *La. C.C. art. 1831*. "When the law requires a contract to be in written form, the contract may not be proved by testimony or by presumption, unless the written instrument has been destroyed, lost or stolen." *La. C.C. art. 1832*. This is considered the "parole evidence rule." The contract supersedes all prior discussions and those discussions will not be admissible in court if a dispute should arise. Verbal negotiations may not be relied upon to determine the effect of

something in the contract. It is only when the intent of the parties cannot be determined from the contract, i.e., there is some ambiguity, that evidence from verbal negotiations may be permitted. For that reason, it is vital that parties put into writing, understand and agree upon all of the terms of their transaction.

7. **Nullity.** The failure to follow the rules for formation of a contract means no contract will come into existence. Even if it appears that a contract exists, it can have a defect that can affect the existence of what appears to be a contract (*La. C.C. art. 2020*) there are two types of nullity.

a. **Absolutely Null.** A contract that is absolutely null is deemed never to have existed. *La. C.C. art. 2033.* The contract is void and cannot be enforced against the parties. An absolute nullity arises when the contract “violates a rule of public order, as when the object of a contract is illicit or immoral.” *La. C.C. art. 2030.*

Example. While his mother is alive, John contracts with Bob to sell John’s mother’s house after she dies. The contract is absolutely null because it violates a rule of public order to act with regard to property that is part of a living person’s estate. Neither party is bound by the contract because it is treated as though it never existed.

b. **Relatively Null.** “A contract is relatively null when it violates a rule intended for the protection of private parties, as when a party lacked capacity or did not give free consent at the time the contract was made. A contract that is only relatively null may be confirmed.” *La. C.C. art. 2031.* A relatively null contract is enforceable if confirmed by the party whose interest the nullity is intended to protect. A relatively null contract that is deemed null by a court cannot be confirmed.

Example. John options property to his seventeen-year old friend Bob for three (3) years. The contract is relatively null because Bob does not have the capacity to contract. Bob can afford the property and will turn eighteen soon so Bob, the party to be protected, can ratify the option when he turns 18. John, however, cannot get out of the option since he is not the protected party under the law.

8. **Vices of Consent.** Consent may be vitiated by error, fraud, or duress. *La. C.C. art. 1948.*

a. **Error.**

(i) Error vitiates consent only when it concerns a cause without which the obligation would not have been incurred and that cause was known or should have been known to the other party. *La. C.C. art. 1949.* Error may concern a cause when it bears on the nature of the contract, or the thing that is the contractual object or a substantial quality of that thing, or the person or the qualities of the other party, or the law, or any other circumstance that the parties regarded, or should in good faith have regarded, as a cause of the obligation. *La. C. C. art. 1950*

(ii) Under these rules, relief for error may be granted only when the error concerned the cause of the contract and the error was known or should have been known to the other party.

(iii) If both parties are in error (“mutual error” by both Buyer and Seller) then courts are more likely to grant rescission of the contract. On the other hand, if only one party was in error then courts are more likely to permit the contract to be reformed (i.e., fixed).

Example: Buyer agrees to buy a lot in a subdivision based on dimensions shown on enlarged plat map provided to him by the listing agent. Listing agent is not informed that Seller redesigned the subdivision only the day before and

the lot sizes have been revised. Failing to realize that listing agent was not aware of the map revision, Seller signs the Purchase Agreement presented to him. Buyer and Seller later realize their “mutual error” and agree to rescind the Purchase Agreement based on the fact that Buyer’s house plans will not fit on the reconfigured lot.

Example: A listing agent incorrectly listed the total square footage of living area on the property. The Court found that the purchaser’s unilateral error as to the square footage did not vitiate their consent to the sale. The court concluded there was no evidence of intentional misrepresentation to constitute fraud; however, the court did state that an agent has a legal duty to communicate accurate information. If the court finds that a real estate agent breaches its legal duty and finds that the breach caused damages, the real estate agent could be held liable for negligence under La. C.C. art. 2315. *Smith vs. Remodeling Service, Inc.*, 648 So. 2d 995 (5th Cir. 12/14/94).

Note: A section “Limitation of Liability” on the Purchase Agreement is recommended to absolve agents, brokers and Sellers from liability for any such error.

b. Fraud. Fraud is a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other. Fraud may also result from silence or inaction. *La. C.C. art. 1953.*

Example: Consider the same example set forth above concerning Error. If the Seller knew the dimensions required for the Buyer’s home and intentionally showed him the wrong plat in order to induce him to buy the lot, this is fraud.

Note: A “Limitation of Liability” on Purchase Agreements will not absolve agents, brokers or Sellers from any liability associated with the intentional act of fraud.

c. Duress. Consent is vitiated when it has been obtained by duress of such a nature as to cause a reasonable fear of unjust and considerable injury to a party’s person, property or reputation. Age, health, disposition, and other personal circumstances of a party must be taken into account in determining reasonableness of the fear. *La. C.C. art. 1959.*

d. Lesion.

(i) A contract may be annulled on grounds of lesion. *La. C.C. art. 1965.* In the case of a sale of an immovable, lesion is when the price is less than one half of the fair market value of the immovable. *La. C.C. art. 2589.*

Example: Seller, who is unfamiliar with the property because he obtained it by inheritance, sells the property for \$100,000.00. Six (6) months later Seller finds out that Buyer sold only 3 months after their closing and Seller becomes curious. Seller finds out that the fair market value of the property at the time of the sale was \$250,000.00. Seller may rescind the sale on the grounds of lesion because the price was less than one half of the fair market value. Seller has a claim against the original Buyer.

(ii) An action for lesion must be brought within one year from the time of the sale. *La. C.C. art. 2595.*

(iii) If the immovable is sold by the Buyer then the Seller only has an action for damages against the Buyer in the amount of the profit received by the Buyer in the sale to

a third party. The original Seller does not have an action against the third party. Recovery by the Seller cannot exceed what the Seller would have gotten had the Buyer retained the immovable. *La. C.C. art. 2594.*

(iv) Only a Seller has an action in Lesion.

Example: If JR and Troy close on the Purchase Agreement with insufficient cause and execute an act of sale transferring the swampland for \$10.00 and other good and valuable consideration, then Troy could sue to rescind the sale on the grounds of lesion. Remember, outside evidence is not allowed to prove the meaning of a contract. Even if Troy does not sue, JR has created a title problem for himself should he desire to sell or lease the property within the one year period.

9. Methods of Extinction of Obligations.

a. Performance. The primary manner of extinguishing any obligation is performance. *La. C.C. art. 1854.* The Closing entails performance by the Seller who transfers the property and the Buyer who transfers the money. The time for performance is stipulated in the contract, otherwise all contracts must be performed within a “reasonable time.”

b. Impossibility of Performance. The obligor is not liable for the failure to perform when performance is impossible because of a fortuitous event. *La. C.C. art. 1873.* Liability may depend upon the obligor’s assumption of the risk that such an event will occur and whether or not the obligor is already in default.

Example. Seller enters into agreement to sell a warehouse to Buyer on December 5th. On December 3rd, Seller’s warehouse is destroyed by fire. Seller is not liable to Buyer because he cannot close on a warehouse that no longer exists. On the other hand, if Seller fails to close on December 5th because he changes his mind, he is liable to Buyer for breach of contract even if his warehouse is destroyed by fire on December 6th.

c. Confusion. An obligation is extinguished if the obligor and obligee become one and the same. *La. C.C. art. 1903.*

Example. A sells off the front part of a large tract and keeps a servitude of passage so that he can reach the highway. Later, A re-acquires the front tract. Then he resells the front tract and fails to retain a servitude of passage because he thinks it’s still there. It is not. The servitude was extinguished by confusion.

10. Assignment. An assignment does not extinguish an obligation, but instead, changes the obligated parties. A contract may be performed by another party (a third party) unless the obligee has an interest in performance only by the obligor. *La. C.C. art. 1855.* (For example, in an architectural contract there is “an interest in performance only by the obligor” because the owner seeks certain talents of the architect.) Most real estate is assignable unless they say otherwise. (Issue: If a Purchase Agreement calls for owner financing, is it assignable?)

Example. Seller enters into Purchase Agreement with Buyer. Buyer cannot secure financing so Buyer assigns his rights in the Purchase Agreement to Third Party. Third Party closes on the sale with Seller. Third Party performs Buyer’s obligation. Once the assignment was made, Buyer was relieved from his obligation. On the other hand, Seller was not. Seller is still obligated to sell his property.

11. Breach of Contract. Just as obligations are extinguished by performance, they are breached by a party's failure to perform.

a. Default. A party to a contract is considered "in default" when the party fails to carry out the obligations undertaken by the contract. The party who is not in default may demand specific performance of the obligation or damages for the failure to perform. *La. C.C. art. 1986.*

b. Default by Seller. The most obvious way that the Seller defaults in the performance of a Purchase Agreement is to refuse to close on the sale with the Buyer. Less obvious ways are refusing to permit an inspection or refusing to fix agreed upon repairs. If Buyer seeks specific performance of these obligations, Buyer is seeking the right to inspect the property, force Seller to make necessary repairs and close on the property at the agreed upon time.

c. Default by Buyer. The Buyer is likewise in default if he fails to close on the property. As in the example above, Seller can seek specific performance, i.e., that Buyer close on the sale, or damages.

d. Damages. The right to specific performance and other remedies may be controlled by the contract. The parties are free to modify the provisions of law in a manner that can be agreed upon.

(i) Damages may be stipulated in the contract by setting a specific amount (i.e. forfeiture of deposit). These are enforceable unless they are manifestly unreasonable.

(ii) If set by a court, damages are typically based upon losses suffered by the non-defaulting party.

(iii) Delay damages may be sought if the defaulting party performs, but does so after the time stated in the contract.

Example. Closing is set for March 10. Seller tells Buyer that he cannot close until March 15. Buyer is entitled to damages for failure to close on time. The court may take into account such things as Buyer paying for a hotel and storage space during the delay to decide the amount of damages. The same right to delay damages is true if Buyer fails to close on time because his financing is delayed.

12. Term of Performance. The obligor is not in default until the term for performance arrives. If the term is fixed or clearly determinable by the circumstances then the obligor is in default upon the arrival of the term. *La. C.C. art. 1990.* In other cases the obligor must be put in default by a demand for performance made by the obligee either oral (when made in front of two witnesses) or in writing. *La. C.C. art. 1991.*

Example. Seller and Buyer execute a Purchase Agreement that says the act of sale will be executed on April 15. The term for performance is set for April 15 and either party's failure to perform will automatically put that party "in default" upon the mere arrival of April 15th. If the act of sale is to be executed within 30 days of the date Buyer obtains approval of financing and approval is obtained on April 1, then the term for performance is clearly determinable.

II. CONTRACTS USED IN REAL ESTATE PRACTICE

A. WRITTEN AGREEMENTS MOST COMMONLY USED:

1. Listing Agreements and Buyer Agency Agreements

a. Listing Agreement. (Agreement between broker and Seller.) This is an employment contract; a contract in which the Seller agrees to pay a commission to broker and in exchange broker agrees to attempt to find someone to purchase owner's property upon the Seller's terms. The Agreement typically contains the amount of the commission, the term of the contract and the terms of the sale.

b. Buyer Agency Agreements. (Agreement between broker and Buyer.) Buyer contracts with broker for broker to seek to find property for Buyer to buy. Whether or not a commission will be paid depends on the agreement, as there is no general practice.

2. Relationship Between the Broker and Principal/Mandate.

a. Agent or Mandatary? An agent is commonly understood as someone who represents another. However, the legal ramifications of the term are far more complicated. It is erroneous to think that a real estate agent legally represents another. A true representative is someone who can act for someone in legal relations. *La. C.C. art. 2985*. It is an issue of authority just as discussed above for entities.

(i) Real estate agent. A real estate "agent" as that term is used in real estate law, particularly the Louisiana Licensing Law is "a licensee acting under the provisions of this Chapter in a real estate transaction," meaning someone licensed to conduct real estate activity in Louisiana. *La. R.S. 37:1431*.

In the case of a listing agreement, the broker can be compared to an employee. The broker accepts the "job" of selling his employer's (the owner's) property, but the broker has no legal authority to bind the owner. His true "job" is to find someone to buy, not to act for the owner and actually transfer the property by signing the act of sale.

b. Mandate (Power of Attorney). Unlike an agent who receives compensation for his services, a mandatary may or may not receive anything of value for his services. That is to be determined solely by the contract.

A mandate is a contract by which a person, the principal, confers authority on another person, the mandatary, to transact one or more affairs for the principal. *La. C.C. art. 2989*.

(i) If the broker in the discussion above were to enter into a contract of mandate with the owner (in this case the principal), then the broker would become the owner's mandatary and would have the legal authority to act in place of the owner to sign the act of sale transferring the property. In this case the broker's action could bind the owner.

(ii) The authority of a mandatary to act for his principal with regard to immovable property must be evidenced in writing. *La. C.C. art. 2993*. In cases where the act to be executed by the mandatary requires a certain form, the mandate must be in that form. For example, a mortgage must be in authentic form, therefore the mandate must be in authentic form (rule of "Equal Dignity").

B. AGREEMENTS PREPARATORY TO SALE/LEASE:

1. Letters of Intent (LOI).

a. LOIs are not intended to be binding contracts. These letters are most often used in the negotiation stage as an expression of interest. In fact, if written correctly, the point is to prevent a letter of intent from becoming enforceable.

b. Letters of intent are not specifically recognized in Louisiana and there is little case law concerning their use. However, case law from other states suggest that LOIs will be deemed binding if all of the requirements of a contract are found. Factors that courts look at in finding an enforceable contract include:

(i) LOI contains all material terms (i.e. price, property description, closing date).

(ii) LOI obligates parties to execute a subsequent agreement.

(iii) LOI includes references from which a court can determine the material terms.

(iv) Part performance evidences the parties' agreement to be bound by the terms of the LOI.

(v) LOI contains terms that prove intent of parties to be bound. (David C. Camp et al., *Letters of Intent in Sale Transactions and Loan Commitments*, Practising Law Institute, Real Estate Law and Practice Course Handbook Series, 468 PLI/Real 627.)

c. Factors often used by courts to indicate the intent not to be bound:

(i) Nature of the LOI itself makes letter non-binding.

(ii) LOI is not sufficiently specific to be binding (e.g., essential terms not included).

(iii) Specific language disavowing enforceability.

(iv) Conduct of the parties after signing the LOI reflect no intent to be bound. (*Id.*)

2. Purchase Agreements.

a. Placed in context, the Purchase Agreement (or Agreement to Purchase and Sell) is an agreement between the Buyer the Seller to sell and buy. While there are many rules in the Civil Code specific to Sales, the general rules regarding contracts also apply.

b. The Code Definition is:

“An agreement whereby one party promises to sell and the other promises to buy a thing at a later time, or upon the happening of a condition, or upon performance of some obligation by either party, is a bilateral promise of sale or contract to sell. Such an agreement gives either party the right to demand specific performance.

A contract to sell must set forth the thing and the price, and meet the formal requirements of the sale it contemplates.” *La. C.C. art. 2623.*

3. **Elements to be Included or Considered in a Purchase Agreement.**

- a. Actions necessary to satisfy the condition. (Example – property must be rezoned from residential to commercial.)
- b. Time frame within which to perform. (Example – before the expiration of the Inspection period.)
- c. Any costs involved, who is responsible for payment. (Example – Buyer shall be responsible for all cost involved in rezoning the property. Seller shall cooperate by signing any required applications; however, Seller shall not be obligated to expend any money in connection with rezoning.)
- d. Other typical conditions:
 - (i) Prior years taxes must be paid.
 - (ii) Prior mortgages must be cancelled.
 - (iii) Satisfaction of inspections.
 - (iv) Other “escape” clauses.

4. **Environmental and Wetlands Disclosure and Warranty Issues.**

- a. Unlike the sale of residential property, Sellers of commercial property are not legally obligated to make any disclosures. Not even the state mandated Property Disclosure Document is required in commercial transactions. For that reason, most Purchase Agreements and leases require the Seller to make certain disclosures during what is termed the “Inspection Period.”
- b. Disclosures are usually obtained in the form of studies and reports that the Seller is obligated to provide (usually only if these are already in the possession of Seller). The problem with representations and warranties by the Seller is that the Seller can only pass on any studies or reports obtained from qualified professionals. The Seller can only attest to what he knows.
- c. Buyer should also take responsibility for using the Inspection Period to cause additional inspections to be made by professionals for the purpose of mitigating potential environmental and wetlands issues. Failure of the Buyer to investigate these issues may subject the Buyer to liability for cleanup. Proper investigation might otherwise provide Buyer with “innocent landowner” status in the event of any future problems.

5. **Inspection and Due Diligence Period.** Every Purchase Agreement should have a time frame for permitting inspections of the property. The LREC Purchase Agreement addresses this at Lines 158 – 188 and will be addressed later.

The list of “inspections” does not need to be limited to physical characteristics. The Inspection Period can be used to afford the opportunity to the Buyer to seek financing or look into other relevant matters. The important thing is for the agreement to cover everything. The Inspection Period is typically the Buyer’s only chance to terminate the agreement and still receive a refund of the deposit, if one is made. There is no such chance if the agreement fails to cover the reason for withdrawal.

6. **Title.**

a. The Seller warrants the Buyer against eviction, which is the Buyer's loss of, or danger of losing, the whole or part of the thing sold because of a third person's right that existed at the time of the sale. The warranty also covers encumbrances on the thing that were not declared at the time of the sale [e.g., mortgage], with the exception of apparent servitudes and natural and legal nonapparent servitudes, which need not be declared.

If the right of the third person is perfected only after the sale through the negligence of the Buyer, though it arises from facts that took place before, the Buyer has no claim in warranty. *La. C.C. art. 2500.*

The Buyer may waive the warranty of title; however, there are statutory limits to such a waiver. The parties may contractually agree upon the extent of the warranty (*La. C.C. art. 2503*). The three most used clauses are:

(i) **Full warranty.** Eviction permits the Buyer to sue for return of the purchase price and damages.

(ii) **No warranty.** Eviction permits the Buyer to sue for only the return of the purchase price. No damages.

(iii) **"Peril & Risk."** The Seller is not liable for anything, except for his own acts. The Seller is always responsible for his own acts.

A better way to say this is "no warranty even for return of purchase price." However, you can design your own warranty.

b. **Quitclaim Deed.** This term is more often used in common law states. However, it is recognized in Louisiana. In this case there is no specific transfer of an immovable. Instead, the Seller is only transferring whatever **right** he may or may not have in the thing. Such a transfer does not give rise to a presumption of bad faith. Eviction would not permit any claim for recovery nor is there a claim for lesion. *La. C.C. art. 2502.*

7. **Title Clause.**

Example title clause. Title shall, as of the date of Closing, be valid and merchantable and not reflect any condition, restriction or servitude which, in the opinion of Buyer or Buyer's lender would impair Buyer's use of or the value of the Property ("Title Conditions"). If title is not valid or merchantable, or such Title Conditions exist, Buyer may extend the time for Closing by thirty (30) days. In the event title is not valid or merchantable and cannot be made valid or merchantable or such Title Conditions exist, which cannot be removed at a reasonable expense, prior to the Closing date set forth herein, as it may be extended hereunder, this Agreement shall be null and void at the option of the Buyer.

a. **Merchantability.** A title examination is usually performed by the Buyer's attorney to determine merchantability. The common definition of merchantability is "not suggestive of serious and substantial litigation." Malcolm A. Meyer, *Meyer's Manual on Louisiana Real Estate* (1992). Consequently, merchantable title does not mean perfect title.

b. **Conditions affecting use.** While the title examiner may determine that title is merchantable, the title exam may still reflect issues that could hamper the Buyer's plans. Such issues concern restrictions or servitudes that may restrict the Buyer's intended use for the property,

e.g., Buyer intends to build a grocery store on the property, but a title exam reflects deed restrictions prohibiting grocery stores. These issues are just as important to the Buyer as merchantability and should be seriously considered.

8. Rezoning / Resubdivision / Regulation. Oftentimes the Buyer may want to have the property rezoned or resubdivided prior to purchase. These are typically drafted as conditions to closing with a specified time frame that is distinct from the time frame set for inspections. The problem is that the Seller (owner) is the party who must sign documents required to rezone or resubdivide and the Seller is not always available, despite the inclusion of typical language indicating that the Seller will cooperate. For that matter the Buyer may require the Seller to grant the Buyer the right to sign such documents on the Seller's behalf.

9. Example Regulatory Approval Period Clause. Buyer shall have until _____ (the "Regulatory Approval Period"), to seek or obtain approval from the necessary governmental authorities to rezone and re-subdivide the Property for Buyer's intended use.

Seller agrees to cooperate with the Buyer in connection with any necessary rezoning, resubdivision or other regulatory approvals. Buyer shall be responsible for submitting all necessary documentation to the appropriate governmental authorities for said rezoning and resubdivision and shall bear all costs associated therewith. Seller grants to Buyer the power and authority to sign and execute, in Seller's name and on Seller's behalf, any rezoning or resubdivision application, request or related document as well as any other application and related documents for any other regulatory approval.

In the event that Buyer is unable to acquire all necessary approvals within the Regulatory Approval Period, as it may be extended, Buyer shall be permitted to cancel this Agreement by providing written notice of said cancellation to Seller during this period, in which case this Agreement shall become null and void. If Buyer so elects to cancel this Agreement, Seller agrees to instruct Escrow Agent in writing to promptly return the Deposit to the Buyer.

10. Miscellaneous Purchase Agreement Clauses.

a. Ratchet clause. In a Purchase Agreement conditioned upon various activities being conducted in different time periods (e.g., inspections, title search, financing), it is advisable to include language that reflects that these may be linked.

Example "ratchet" clause. In the event that any time period set forth in this Agreement is extended for any reason, the time period(s) set for all other matters herein shall likewise be extended by an equivalent amount of time. By way of example, and not of limitation, if the Inspection Period is extended by thirty (30) days, the date of Closing shall be extended by thirty (30) days.

b. Holiday clause. Because so many conditions in a Purchase Agreement are time sensitive it is important to state whether weekends and holidays should not be considered when calculating any performance date.

Example holiday clause. When any day for notice or performance falls on Saturday, Sunday or a legal holiday, as that term is defined under Louisiana law, then such time for notice or performance shall be extended to the close of the next ensuing business day. (Hurricane clause – when a hurricane occurs during hurricane season it is not "force majeure" and failure to perform because of the hurricane results in breach of the contract. Parties may want to consider adding language that extends time frames additionally for weather related problems.)

c. All owners clause. Without performing a title search in advance of signing a Purchase Agreement, a Buyer may not always be sure of the identity of every owner (e.g., when purchasing

from heirs). The agreement should indicate the consequences of failure of all owners to sign the agreement. Example:

Example all owners clause. In the event the Property is owned by more than one owner, and all owners are not signatories herein (whether they are or are not reflected herein as Sellers) Buyer may (a) cancel this Agreement in its entirety or (b) proceed to Purchase the Property from those Sellers that are signatories hereto, in which case the Purchase Price will be reduced in proportion to the ownership interests purchased.

11. Telephone/Fax Negotiations and E-Mail. As indicated above for verbal negotiations, telephone and fax negotiations also create the same “proof” issues. Because of the increasing use of technology in negotiations, parties should indicate whether or not fax and telephone negotiations are acceptable. For example, if Buyer agrees that acceptance may be evidenced by receipt of a signed Purchase Agreement from Seller by fax then that should be indicated in the agreement.

a. Louisiana Law Regarding Electronic Transactions. Applicability of the *Louisiana Uniform Electronic Transactions Act* to Real Estate Transactions.

History of E-Sign.

(i) The first attempt to synchronize the use of technology in business and commerce came with the adoption of the Uniform Electronic Transactions Act (“UETA”), a model act promulgated by the National Conference of Commissions of Uniform State Laws (“NCCUSL”). UETA was used widely, but with many amendment in various states.

(ii) Next, Congress adopted the Electronic Signatures in Global and National Commerce Act (“E-Sign” – 15 U.S.C. §§ 7001 *et seq.*) to harmonize the provisions of the various rules on the subject. States could opt out of E-Sign by adopting UETA entirely.

(iii) Louisiana adopted UETA, with few modifications, in 2001 by Act 244 (“LUETA”). This adoption of UETA, with modest differences consistent with E-Sign, prevents federal law from superseding state law on this subject.

b. What does LUETA do?

(i) It provides for the validity and enforceability of transactions executed by electronic means. This covers all forms of electronic means.

(ii) The effect of LUETA is legal recognition of contracts that are electronically recorded and electronically signed. Laws requiring a record to be in writing or to be signed will be satisfied by an electronic record or electronic signature respectively. *La. R.S. 9:2607*

(iii) Consent is a major issue. The parties involved in the transaction (Buyer and Seller for our purposes) must agree to use electronic means to negotiate and finalize the contract.

c. The rules regarding LUETA do not affect the rules regarding contracts. They simply provide rules for how the contract may be formed and signed.

(i) Parties are free to choose to use LUETA or not. It is notable that so far it is rare to see contracts formed using the provisions of LUETA. While most parties are comfortable using email to negotiate the agreement, most will still choose to physically sign the document rather than electronically.

(ii) LUETA also covers how electronically created documents can be used to satisfy recordation requirements.

(iii) The LREC requires licensees to keep certain documents in their original form. This provision can be satisfied if the parties conduct their entire transaction by electronic means. In that event the electronic record is the “original” record. A record retained electronically will satisfy the records retention requirement. The LREC has the authority to adopt rules for records retention to comply with LUETA.

12. Deposit vs. Earnest Money. *La. C.C. art. 2624.* Neither is required by law in connection with a Purchase Agreement or Option.

a. Deposit. The default rule is that an amount given by the Buyer to the Seller in connection with the Purchase Agreement is a deposit towards the amount of the Purchase Price. It is important to note that in Louisiana a Buyer is not required by law to provide a deposit. On the other hand, it is common practice.

b. Earnest Money. This is a specific legal term in Louisiana. If the amount given is deemed earnest money then either party may recede from the contract. If the Buyer recedes then the Buyer forfeits the earnest money. If the Seller recedes then the Seller must return the earnest money to the Buyer plus an equivalent amount.

(i) The use of earnest money is not the norm in Louisiana. This is confusing for people from out of state who use the term earnest money synonymously with deposit.

(ii) It is key to note that the consequences are not “damages” in an earnest money contract. Instead, it is an “alternative” performance and neither party is considered in default.

13. Escrow Agreements

a. Escrow is when a third party holds something, e.g., money, until the fulfillment of a condition. When something is held “in escrow” the thing is deposited with the escrow agent for safekeeping. In Louisiana, the escrow is a contract that may be gratuitous (no compensation) or onerous (typically compensated).

The most typical use of escrow in the case of real estate is the holding of a deposit. The third party in this case is often a broker or a title company. While a broker is not a true escrow agent, they are acting, in this situation, as a depository and the contract is gratuitous.

(i) Brokers who accept money must open and maintain a “Sales Escrow Account.” LREC §2701. The accounts are non-interest bearing, which is why most deposits made in Purchase Agreements are deemed “non-interest bearing.”

(ii) Whether or not the escrow agent is a broker or another party, the agreement should state whether or not the funds will bear interest while being held by the escrow agent.

b. The deposit is held until the terms of the Purchase Agreement are satisfied and the transaction closes. In that case the deposit is usually released to the Seller as a portion of the purchase price. If the transaction fails, the deposit is usually returned to the Buyer.

c. Escrow is also used often in closings when the parties do not intend to meet to close the transaction or if something remains to be done after closing.

Example. Seller lives in California and cannot be available to close on the scheduled date. Seller signs all of the closing documents and sends them to the title company to be held “in escrow.” If Buyer satisfies all of the closing requirements then the documents will be released for Buyer to sign and complete the transaction at Closing.

Example. Builder and Buyer agree to close on March 1. The closing date arrives but Builder has not completed the landscaping agreed upon in the Purchase Agreement. Builder and Buyer agree to close, but put \$5,000.00 of the Builder’s proceeds from the sale “in escrow”, to be held by the title company. The funds will not be released to Builder until the landscaping is complete. The parties agree that if the landscaping is not complete by a certain date that the funds may be released to Buyer as compensation for Builder’s failure to complete the landscaping.

d. Deposit Disputes. If a dispute occurs regarding ownership or entitlement to the deposit then the broker is obligated, within 90 days of the scheduled closing date, or determination or knowledge that such a dispute exists, whichever shall first occur, to do one of the following (LREC §2901). This will be discussed in detail later.

e. Disburse the funds upon the order of a court of competent jurisdiction.

14. Liquidated Damages.

a. Parties may stipulate the damages to be recovered in case of nonperformance, defective performance, or delay in performance of an obligation. *La. C.C. art. 2005.*

b. The benefit to a liquidated damages clause is that the obligee does not have to prove actual damages resulting from the obligor’s nonperformance, defective performance, or delay in performance. *La. C.C. art. 2009.*

Example. Builder and Buyer enter into a contract to build an office. Builder is obligated to complete the office on or before June 1 or pay liquidated damages in the amount of \$100.00 per day. Builder does not complete the office until June 5. Buyer does not have to prove that the 4-day delay caused him any actual damages. Builder owes Buyer \$400.00 in liquidated damages.

c. The issue of liquidated damages is wholly separate from the deposit. A Purchase Agreement may provide for liquidated damages and return of the deposit/retention of the deposit in the case of breach by the Seller or Buyer respectively.

15. Contingencies. Most Purchase Agreements include contingencies or “conditions” that must be satisfied before the Purchase Agreement is enforceable. There may be other contingencies that must be satisfied after the sale.

A conditional obligation is one dependent on an uncertain event.

If the obligation may not be enforced until the uncertain event occurs, the condition is suspensive.

If the obligation may be immediately enforced but will come to an end when the uncertain event occurs, the condition is resolutive. *La. C.C. art. 1767* (emphasis added).

a. Suspensive Condition. If a condition is suspensive then the performance of obligation is not enforceable until the condition is satisfied.

(i) The most often used suspensive condition in a sales contract involves financing. Buyers typically indicate that the sale cannot take place if the Buyer is unable to obtain financing. The uncertain event is the financing and the Purchase Agreement is not enforceable until the financing is obtained. For this reason, most Purchase Agreements include a time frame for when this condition must be satisfied so that it won't hold up every other provision in the contract.

(ii) If the condition is not satisfied then the contract is not enforceable and it is as if there never was a contract. However, there must be a good faith effort made to satisfy the condition.

Example. Buyer offers to purchase Seller's property. Buyer's offer includes a condition that Buyer must obtain a Purchase Agreement on his own property in order to buy Seller's property. This condition is suspensive. If Buyer cannot sell his property after a good faith effort then he is not obligated to purchase Seller's property. Any deposit must be returned because the contract is unenforceable.

Example. *Garsee v. Bowie*, 37,444 (La.App. 2 Cir. 8/20/03), 852 So.2d 1156. Garsee agreed to sell Bowie eight multi-family residential properties with the suspensive condition that Bowie obtain a 30-year first mortgage with a 25 percent down payment at a rate not to exceed 6 7/8 percent interest. Bowie applied to Hibernia National Bank for the agreed upon financing for the properties. Hibernia rejected Bowie's loan application. After the rejection, Bowie declared the Purchase Agreement null and void for failure to fulfill the suspensive condition. Garsee subsequently filed suit to enforce the agreement. Garsee asserted that Bowie did not comply in good faith with the Purchase Agreement because he only made an application to one lending institution. The court held that the condition was suspensive, thus, once the agreed upon financing could not be obtained the Purchase Agreement was null. Secondly, one attempt to obtain financing was enough to constitute a good faith effort by Bowie to satisfy the terms of the Purchase Agreement.

b. Resolutive Condition.

(i) If a condition is resolutive then performance of the obligation is immediately enforceable, but may come to an end if the uncertain event arises. In the case of a sale, the Buyer's obligation is to pay the purchase price. If the Buyer fails to pay the price then the uncertain event has occurred and the obligation comes to an end.

Example. Buyer purchases a property from Seller and the parties agree upon owner-financing and execute a credit sale. Buyer makes all of his payments to Seller during the first year, but fails to make any payments in the second year. Seller is now entitled to "unwind" the sale and take back the property. (This is a

simple example and does not take into account other issues when this situation arises.)

(ii) Waiver. The nature of a resolutive condition requires that its terms be carried into the Act of Sale. Once the sale is recorded the resolutive condition outranks everything that comes next, most importantly, mortgages. For that reason, most parties will waive the effect (dissolution of the sale) of any resolutive conditions in the Act of Sale.

Example. Seller subdivides his lot into two parts and sells the back part to Buyer. In the Purchase Agreement Seller agrees to construct a road along a servitude of passage on his property to permit Buyer to reach the frontage road. Later, the Act of Sale indicates that Seller will build the road; however, Buyer waives the resolutive condition and indicates that failure of Seller to build the road shall not dissolve the sale, but permit Buyer only a claim for damages or specific performance.

c. Conditions Generally.

(i) Nullity. Once the condition is fulfilled, depending on the type, the contract is automatically enforceable or automatically null and void. It is not an option of the parties. In the case of resolutive condition contained in an Act of Sale, the result is dissolution of the sale.

Example. Parties enter into Purchase Agreement which contains special provisions clause that states: “any single mechanical item repair that exceeds \$2,000.00 the Seller has the option to repair or the contract will be null and void.” Inspector found over \$25,000.00 in required repairs. Seller refused to make repairs. Parties argued over who had the option to terminate the contract. The court said neither party had that right because the clause contained a condition, not an option, and once the condition was fulfilled (repair over \$2,000.00 that Seller would not fix) the contract automatically became null. *Campbell v. Melton*, 2001-2578 (La. 5/14/02), 817 So.2d 69.

(ii) Whim or Will. “A suspensive condition that depends solely on the whim of the obligor makes the obligation null. A resolutive condition that depends solely on the will of the obligor must be fulfilled in good faith.” La. C.C. art. 1770. The former statement was historically referred to as a “potestative” condition, but that term is no longer used in the Civil Code. The idea is that fulfillment of the condition should not be based on an arbitrary decision by the obligor, but rather one of judgment.

Example. Buyer offers to buy Seller’s property with the condition that “financing must be obtained at an interest rate that is acceptable to me.” This suspensive condition is based upon the whim of the obligor because the obligor can decide that any interest rate is unacceptable. The contract is likely null.

(iii) Waiver. Generally, a condition may be waived by the party in whose favor it is written.

16. Covenants, Conditions, Restrictions and Servitudes. Ownership is composed of three basic rights; to use, to receive income and to dispose (usus, fructus, abusus). Servitudes are considered a “dismemberment of ownership” because they permit others to use the thing. Covenants, conditions and restrictions also affect use by limiting what the owner can do with the thing.

a. Servitudes.

(i) There are 2 kinds of servitudes: (1) personal (e.g., usufruct, habitation, right of use), and (2) predial. *La. C.C. art. 533, 534.* The type to be discussed here are predial.

(ii) Predial servitude = a charge on a servient estate for the benefit of a dominant estate. The two estates must belong to different owners. *La. C.C. art. 646.* There must be a benefit to the dominant estate for there to be a predial servitude (e.g., right of passage). *La. C.C. art. 647.*

(iii) A predial servitude is inseparable from the dominant estate and passes with it. It cannot be alienated, leased or encumbered separately from the dominant estate. The charge upon the servient estate continues even if ownership changes. *La. C.C. art. 650.*

Example. John owns a tract of land adjacent to Bob's tract. John wants access to the public lake located on the other side of Bob's tract from his land. John and Bob enter into a contract in which a servitude of passage is created on Bob's land for the benefit of John's land. Bob's land is the servient estate and John's land is the dominant estate. The benefit to the dominant estate is passage to the lake. The contract creating the servitude is recorded in the public record. Bob sells his land to Jim. Later John sells his land to Charles. Charles may use the servitude of passage on Jim's land because the servitude is predial, i.e., runs with the land, rather than personal to either John or Bob.

(iv) Predial servitudes may be natural, legal, and voluntary or conventional. Natural servitudes arise from the natural situation of estates (e.g., drainage); legal servitudes are imposed by law (e.g., passage); and voluntary or conventional servitudes are established by juridical act (e.g., contract), prescription, or destination of owner (e.g., developer creates a servitude of passage over his land because he intends to subdivide and sell the land). *La. C.C. art. 654.*

(v) A predial servitude may be established by an owner on his estate or acquired for his benefit by conventional act (e.g., contract). *La. C.C. art. 697.* When the parties fail to establish rules for the servitude in the act creating the servitude then the Civil Code rules apply.

(vii) A developer may create servitudes for various uses upon an entire tract of land prior to subdividing the land into lots for sale. The servitudes should be noted on the approved subdivision map, which is then recorded. Such servitudes may be for passage, drainage, utilities, etc.

(viii) Servitudes established by title are governed by same laws governing alienation of immovables. *La. C.C. art. 708.*

b. Covenants, Conditions, Restrictions. These are lumped together because they are typically used to mean the same thing in this context. The Civil Code defines "building restrictions" as:

... charges imposed by the owner of an immovable in pursuance of a general plan governing building standards, specified uses, and improvements. The plan must be feasible and capable of being preserved. *La. C.C. art. 775.*

(i) The most common restrictions are the type a developer imposes upon a new subdivision these are properly called Building Restrictions. At the time lots are subdivided, the developer records a set of "covenants" concerning how the subdivision

will look; how lots can be used, the things that cannot be done upon a lot, how common areas will be used and maintained, etc.

(ii) Deed restrictions are usually contained within the act of sale.

(iii) Restrictions are established by a written act, preferably an authentic act, executed by the owner or by all owners affected and recorded in the public record. Subsequent owners are not affected by the restrictions if they are not recorded. Otherwise owners are bound by them even if they are not mentioned in a Purchase Agreement (note – good reason for researching title).

(iv) Amendment or Termination.

Building restrictions may be amended, whether such amendment lessens or increases a restriction, or may terminate or be terminated, as provided in the act that establishes them. In the absence of such provision, building restrictions may be amended or terminated for the whole or a part of the restricted area by agreement of owners representing more than one-half of the land area affected by the restrictions, excluding streets and street rights-of-way, if the restrictions have been in effect for at least fifteen years, or by agreement of both owners representing two-thirds of the land area affected and two-thirds of the owners of the land affected by the restrictions, excluding streets and street rights-of-way, if the restrictions have been in effect for more than ten years. *La. C.C. art. 780.*

(v) Building restrictions may be enforced by mandatory and prohibitory injunctions. *La. C.C. art. 778.*

No action for injunction or for damages on account of the violation of a building restriction may be brought after two years from the commencement of a noticeable violation. After the lapse of this period, the immovable on which the violation occurred is freed of the restriction that has been violated. *La. C.C. art. 781.*

(vi) Zoning ordinances neither terminate nor supersede existing building restrictions. *La. C.C. art. 782, comment (c).*

17. Purchase Price and Financing.

a. “Real” price. There is no sale unless the parties intended that a price be paid. The price must be in proportion to the thing sold (think – lesion). “Thus, the sale of a plantation for a dollar is not a sale, though it may be a donation in disguise.” *La. C.C. art. 2464.* If a proper price is not paid and the “sale” is viewed as a “donation” then issues regarding form arise. (Note – the term “other valuable consideration” is not acceptable in Louisiana, although it is often used in common law states to maintain privacy if the parties to the sale do not want the purchase price to become a part of the public record.)

b. Determination by third party. The price may be left to the determination of a third party, e.g., an appraiser. If a third person is not named or the named person fails to or is unable to determine a price, then it may be set by the court. *La. C.C. art. 2465.*

c. Financing. In most cases the Act of Sale does not reference financing. Typically, if the Buyer obtains a loan from a third party then the lender provides cash for closing and financing

conditions are contained in separate documents (e.g., mortgage and/or loan agreement). Financing terms should be included in the Act of Sale if the sale is to be owner-financed.

18. Warranties and/or “As Is” Clauses. The Seller generally warrants three things to the Buyer; condition, use and title.

a. Redhibition (hidden).

The Code provides that the Seller warrants the Buyer against redhibitory defects, or vices, in the thing sold. This automatically applies unless the contract alters it.

A defect is redhibitory when it renders the thing useless, or its use so inconvenient that it must be presumed that a Buyer would not have bought the thing had he known of the defect. The existence of such a defect gives a Buyer the right to obtain rescission of the sale.

A defect is redhibitory also when, without rendering the thing totally useless, it diminishes its usefulness or its value so that it must be presumed that a Buyer would still have bought it but for a lesser price. The existence of such a defect limits the right of a Buyer to a reduction of the price. *La. C.C. art. 2520.*

(i) Redhibition concerns the condition of the property. The Seller does not owe any warranty for defects that were known to the Buyer or “for defects that should have been discovered by a reasonably prudent Buyer of such things.” *La. C.C. art. 2521.* This is exactly why an inspection is so important.

(ii) The Seller must be notified of any defects in the thing sold in order to give the Seller an opportunity to make repairs. Failure to give notice may reduce the Seller’s liability unless the Seller has actual knowledge of the redhibitory defect. *La. C.C. art. 2522.*

(iii) “As is” and Waiver. This term is somewhat of a misnomer. Including this, by itself, in a Purchase Agreement or Act of Sale is insufficient as a waiver of the warranty of condition and fitness for use (discussed below), despite the intentions of the parties. Essentially every sale is “as is.” The Seller sells what he has. If the intent is for the Buyer to waive the Seller’s liability, then the waiver must be explicit. The following is an example of a sufficient waiver.

The property is sold “as-is, where is” without any warranties whatsoever as to fitness or condition, whether expressed or implied, and Buyer expressly waives the warranty of fitness and the guarantee against hidden or latent vices (defects in the property sold which render it useless or render its use so inconvenient or imperfect that Buyer would not have purchased it had he known of the vice or defect) provided by law in Louisiana, more specifically, that warranty imposed by Louisiana Civil Code art. 2520 et seq. with respect to Seller’s warranty against latent or hidden defects of the property sold, or any other applicable law, not even for a return of the purchase price. Buyer forfeits the right to avoid the sale or reduce the purchase price on account of some hidden or latent vice or defect in the property sold. Seller expressly subrogates Buyer to all rights, claims and causes of action Seller may have arising from or relating to any hidden or latent defects in the property. This provision has been called to the attention of the Buyer and fully explained to the Buyer, and the Buyer acknowledges that he has read and understands this waiver of all express or implied warranties and accepts the property without any express or implied warranties.

b. Fitness for Use. Anything sold must be fit for its “ordinary use.” This warranty is wholly different from redhibition.

The thing sold must be reasonably fit for its ordinary use.

When the Seller has reason to know the particular use the Buyer intends for the thing, or the Buyer's particular purpose for buying the thing, and that the Buyer is relying on the Seller's skill or judgment in selecting it, the thing sold must be fit for the Buyer's intended use or for his particular purpose.

If the thing is not so fit, the Buyer's rights are governed by the general rules of contracts. *La. C.C. art. 2524.*

19. Prorations. Typically the Buyer and Seller agree to prorate the cost of any expenses related to the property that may be due in the year of the sale, e.g., taxes, homeowner's association dues and condominium association dues, rent, utilities.

20. Date and Signature – Authentic Form. The Act of Sale must be dated and signed by the Buyer and Seller. Authentic Form was previously discussed at Section I.A.6.

21. Recordation. The sale of an immovable does not affect third parties until the Act of Sale is recorded in the public records of the parish in which the immovable is located. *La. C.C. art. 1839.* The Act of Sale should be recorded as soon as possible after the transaction is complete.

22. Certified Funds Requirement at Closing. The following requirements are necessary if title insurance is involved.

Settlement agents may not accept personal or commercial checks in excess of \$2,500.00, in which case the funds must be by certified check. *La. R.S. 22:532(B)(3)(h).*

a. Checks that may be drawn on the trust account or sales account of a licensed real estate broker are limited to less than \$20,000.00. Otherwise they must be certified funds. *La. R.S. 22:532(B)(3)(g).*

23. Options/Rights of First Refusal Agreements/Right of First Offer. Options and Rights of First Refusal are considered “agreements preparatory to the sale” by the Louisiana Civil Code.

a. Option Contract. An option is a contract that gives a party the right to accept an offer to sell or buy a thing within a stipulated time. *La. C.C. art. 2620.* An option must set forth the thing and the price, and meet the formal requirements of the sale it contemplates. *La. C.C. art. 2620.*

An option is a contract whereby the parties agree that the offeror is bound by his offer for a specified period of time and that the offeree may accept within that time. *La. C.C. art. 1933*

The rights granted by an option include; the right to accept the option, thus turning the agreement into an agreement to purchase. *La. C.C. art. 2620, comment (e).*

Acceptance (usually called “election”) or rejection is effective when received by the grantor.

The parties to an option should realize that acceptance of the Option automatically turns the option contract into a Purchase Agreement. The option must be complete enough so that if accepted, the document will stand as a fully completed Purchase Agreement.

The option agreement contains the terms of a true Purchase Agreement with a provision that if the Buyer elects to exercise his option to buy the property that the terms of the Purchase Agreement “take over.”

In the real estate business, an option contract usually involves the payment of money for the benefit of obtaining such a period of time within which to accept. However, unlike in many common law states, no price is required in Louisiana.

b. Right of First Refusal.

(i) A Right of First Refusal is an agreement in which a party promises not to sell a thing without first offering it to a certain person. La. C.C. art. 2625. The right given is the right of first refusal, which may be enforced by specific performance.

(ii) The grantor of the right cannot sell the property unless and until it has been offered for sale to the party who holds the right.

(iii) Unless otherwise stipulated, the time for acceptance of a right of first refusal is thirty (30) days. La. C.C. art. 2627. If the property is not sold within six (6) months then the right subsists in favor of the grantee who failed to exercise it when the offer was made to him.

(iv) Enforcement of Right of First Refusal. The Civil Code Right of First Refusal may be enforced by specific performance. La. C.C. art. 2625.

(v) Issues.

(a) The Civil Code leaves many areas unanswered so it is important that parties cover these in the agreement.

(b) The right of first refusal becomes operative only if the owner has an offer he desires to accept. Usually, the holder of the right of first refusal must exactly match all terms of the offer the Seller wishes to accept.

(c) Unanswered questions.

(1) What if the Seller gets an offer for part of the Property?

(2) If part is sold, does the right of first refusal continue to apply to the remainder of the property?

(3) Can the right of first refusal have its own terms, i.e., will meet offered price, but will be owner financed if holder of right of first refusal elects to buy.

c. Term. Options and Rights of First Refusal may not be granted for a term longer than ten (10) years, unless the right is granted “in connection with a contract that gives rise to obligations of continuous or periodic performance” (e.g., lease) in which case the Option or Right of First Refusal may be granted for as long a period as required for the performance of the obligations (e.g., a lease with an option provides for a twenty-year term. The right to the option lasts for

twenty (20) years because the lease term is 20 years). If a longer time is stipulated in the contract, then it is reduced to ten years.

d. Effect against Third Persons. These rights, if they affect immovables, affect third persons only from the time of recording notice of the right in the public record. *La. C.C. art. 2629*.

e. Distinction. An Option is the right to accept an offer, whereas, a Right of First Refusal is to right to receive an offer. In the case of an Option, the grantor must give the grantee a stipulated time to accept or reject an offer. On the other hand, the grantor of a Right of First Refusal only has to give the grantee the offer before giving it to another party or before accepting an offer from another party.

III. LOUISIANA RESIDENTIAL AGREEMENT TO BUY OR SELL – PART I

A. DUTY OF REAL ESTATE LICENSEES TO USE PURCHASE AGREEMENT FORMS (R.S. 37:1449.1)

(RULES LAC 46:LXVII. CHAPTER 39).

Rule LAC46:LXVII. Chapter 39 requires any Licensee representing either the Buyer or Seller of residential real property to complete the Purchase Agreement Form prescribed by the Louisiana Real Estate Commission in making an offer to purchase or to sell residential real property. That person shall not alter the Purchase Agreement Form; however, addendums or amendments to the Purchase Agreement Form may be utilized.

The “Purchase Agreement Form” means a document in a form prescribed by the Louisiana Real Estate Commission. “Residential Real Property” means real property consisting of one or not more than four residential dwelling units which are buildings or structures each of which are occupied or intended for occupancy as a single family residence.

These sections taken together simply mean that as a licensee you must use the form prescribed by the Louisiana Real Estate Commission and found on their web site. Second, it is clear that, other than filling in blanks, no strike-outs or modifications of any kind can be made to the printed form. Any matters that need to be covered that are not a part of the printed form can be done in the section entitled “Additional Terms and Conditions” found at lines 284-292 of the Louisiana Residential Agreement to Buy or Sell (the “Purchase Agreement”). Any modifications to the printed form should be done by an attached addendum which references the lines that are to be changed and the changes that you are making to them.

B. HYPOTHET FOR REFERENCE.

Sue and Bob Smith (Sellers) decided to put their home up for sale. They contact their longtime friend Ann Lister (Lister) to market their home and sign a listing agreement. The property is Lot 85, The Oaks Subdivision.

Line 6-7

The Sellers have a few items in the home and on the lawn that they want to keep, namely a swing and playground set that Sellers made for their children and an heirloom camellia bush that they moved from Bob’s mom’s house after her death.

Line 9-19

The list price is \$325,000.00. The Sellers tell Lister they the are wary of contingencies since they want to move the property quickly.

Meanwhile, John Agent (Agent) has been working with Ed and Katie Buyer (Buyer) who are shopping for a home. Agent spots the Seller home in the MLS and arranges a visit with Buyer at the home. Buyer decides this home is what they want and ask Agent to write an offer. Buyer must obtain financing for the purchase. Agent, after checking with several local lenders and making a market study, advises Buyer to make an offer for \$305,000.00. For financing, he advises that 30 year 80% loans are their best route with interest not to exceed 4-1/2%. Agent also advises that they should ask for a long period within which to close due to long loan approval time he has experienced.

Line 38-39

Agent recommends sixty (60) days. Agent then discusses the mineral rights option and Buyer decides that with a surface waiver they are not important. Agent then discusses the inspection and due diligence contingency.
Line 157

Buyer intends to do extensive remodeling and wants to use the inspection period to also get estimates from contractors. They decide thirty (30) days would be appropriate. The warranty options are carefully discussed with Buyer. Buyer is concerned that in the remodeling process they may discover defects. Since they cannot do “destructive” inspections, Buyer is concerned about what may be hidden behind the walls so buyer opts for a sale with warranties.
Line 210

As for time to cure defects to title, Agent recommends that this time be short. If there is a major issue that will take time to cure, they should cancel the agreement and look for another home.
Line 228

Agent fills out the approved Louisiana Residential Agreement to Buy or Sell accordingly. Buyer signs and sets the Expiration time of the offer for Thursday, February 10 at 5:00 P.M. giving Seller four days to respond. Agent delivers the Agreement to Lister.
Line 351

Lister presents the offer. She explains that they can (1) reject the offer by noting on the Agreement that it is rejected or by simply letting the time for acceptance expire; or (2) make a counter offer by noting items they want changed using the approved counter offer attachment; or (3) accept the offer as written in which case the Buyer (not Buyer’s agent) must receive a written notice of acceptance within the deadline.

After consideration, they counter the offer by raising the price from \$305,000.00 to \$315,000.00 and change the deadline to obtain financing from sixty (60) days to forty-five (45) days and reserve from items sold the swing and playground set and the heirloom camellia bush. Lister explains that by making a counter offer they are rejecting the original offer and making a new offer; in other words the original offer cannot be accepted if the counter offer is rejected. Lister recommends that Buyer be given three (3) days to accept. Lister presents the counter to Agent who presents it to Buyer. Buyer accepts and notice of acceptance is sent to Lister and Lister presents it to Seller within the three (3) day deadline.

Buyer makes their loan application the next day. Preliminary Loan approval is made thirty (30) days later and Seller is advised of this.
Line 73-78

Meantime, Buyer has ordered an inspection. Three recommendations are made by the inspector: (1) repair roof area over the garage; (2) replace damaged outside window sill in the office; and (3) repair chipped tile in kitchen. Within 72 hours as required, Seller agrees to times (1) and (2), but not item (3). Within 72 hours, Buyer decides to accept the Seller response.
Line 158-183

Title work is done, final loan approval is made and the matter set for closing. Within five (5) days of closing, Buyer makes its final walk through and finds all items have been repaired satisfactorily. At closing, Buyer agrees, by written documentation, that Seller will have five (5) days to remove the swing and playground set and Camellia bush, in default of which they become the property of Buyer.
Line 228 and Line 239-242

C. THE INFORMATION AREA AND IMPORTANCE OF THE OFFER AND ACCEPTANCE CONTEXT.

This information area should be filled in as carefully and accurately as you can. It provides all the necessary contact information and persons to be contacted. It also has the information on delivery to the designated Agent and a note of when it was received by the designated listing Agent. There is also a line for comments to make any notes that need to be made concerning delivery of the agreement. Since this section deals with the initial delivery of the offer it has an important role in the context of offer and acceptance and the timing thereof. Offer and acceptance will be discussed in detail previously and below.

D. THE CONTRACT.

1. **Line 3 – Date.** This is critical information since it will set the beginning for all subsequent time lines in the Purchase Agreement whether to accept the offer or any other matters which would run from that date. It should coincide with the date on Line 369, which is the date that either the Buyer or the Seller is making the offer.

2. **Lines 5 - 10 – Property Description.** Earlier we talked about the “Object of the Contract.” It is possible for a property description to be so vague that no “object” is provided in the contract and therefore the contract would be unenforceable. Specificity is required. A lot number and subdivision name are always very clear. Unsubdivided parcels provide more of a headache. It is critical that the listing agent establish an appropriate property description. These can often be found from the documents whereby the Seller acquired the property or other documentation in the Seller’s possession. It is never a good idea to simply use the municipal address of the property since the municipal address performs a function other than a property description.

3. **Lines 10 - 18 –** deal with what is “real estate” (immovable property in Louisiana) and what is not. The critical inquiry here is that if it is real estate, it will be sold as part of your Purchase Agreement. If it is not real estate under the definition of Louisiana law, it will not be sold with your real estate unless, as the Purchase Agreement does, items are specifically listed to define what is being sold whether it is real estate or not.

4. **Lines 20 - 28 -** form a savings clause for removable items that are not listed in lines 10-18. Coming to an agreement on this is a critical part of the function of both the listing agent and the Buyer’s agent. The listing agent should carefully inquire in the listing if there are any items that are not to be sold along with the property. The Buyer’s agent must make similar inquiries of his clients as to any expectations they have as to ++property that may be movable they desire to purchase along with the home.

Louisiana law defines immovable property (real estate) as tracts of land. Also, buildings or other constructions attached to the ground (which are called component parts of the land when they belong to the owner of the land) are real estate.

Real estate also includes things incorporated into a tract of land, a building or “other construction” so as to become an integral part of it, such as building materials. These are all pretty clear. The problem in Louisiana law (and most other states) is the next category. Real estate also includes component parts of a building or other construction and that are attached to a building and that according to “prevailing usages” serve to complete a building of the same general type without regard to its specific use. These include

doors, shutters, gutters, cabinetry as well as plumbing, heating, cooling, electrical and similar systems. Other things are component parts of the building are those that are attached to such a degree that they could not be removed without substantial damage to themselves or to the building or other construction that they are attached to.

Within the context of these definitions there is much room for confusion as to some particular items. Therefore, care must be taken as noted above by both the listing agent and the Buyers agent to insure that Buyer and Seller have a complete written understanding of any items that may cause doubt as to whether they are part of the real estate.

Example: The house being sold has custom drapery, a sub-zero refrigerator disguised to be part of the kitchen cabinetry, a secondary refrigerator in the outdoor kitchen and a brand new washer/dryer set. Buyer's and Seller's expectations as to these items should be discussed. Seller may intend to take the drapery to his new home, but draperies are clearly "window coverings" and included in "real estate" per lines 13-14. The sub-zero refrigerator would likely be considered "built-in appliances" per line 12. The secondary refrigerator and washer/dryer set likely do not fall within the definition of "real estate." Depending on the circumstances, these items should be listed on lines 20-22 (if no value and being transferred to Buyer), lines 27-28 (if being excluded from the transfer), or lines 284-292 (if being transferred to Buyer, but part of the consideration for the purchase price).

5. **Lines 30 - 32 – Mineral Rights.** There are two components of mineral rights that we need to be aware of. First, who in fact owns the minerals under the ground. Mineral rights can be owned separately from the real estate. If the mineral rights are owned by the landowner they are able to be transferred in whole or in part and reserved in whole or in part. The transfer or reservation of mineral rights in residential context is often overlooked unless the property is in a known "hot" area of mineral activity. However, often times mineral activity will occur years after the sale and then the parties go back to re-visit their documents. These usually produce a couple of law suits.

Example: Vendors of property brought action against the attorney who handled the closing to challenge failure to reserve mineral rights in the act of sale. The buyer and seller executed a purchase agreement that contained the terms and conditions of the proposed sale and a description of the property. The purchase agreement contained an express stipulation that the seller was to retain all mineral rights on the property. The act of sale was prepared by the closing attorney but it made no mention of mineral rights on the property. It was not discovered until later that the reservation was not included until the seller tried to lease the mineral rights. *Varnado v. Insurance Corporation of America*, 484 So.2d 813 (La.App. 1 Cir.,1986).

Example: Lot purchasers did not have knowledge that a prior owner had retained mineral rights, even though the prior deeds of transfer contained mineral rights reservations and were duly and properly recorded prior to their purchase. The vendor had furnished the agent/attorney for lot purchasers to verify clear title existed, and agent/attorney verified checking the public records and found the title to be good, even though he had knowledge of the mineral reservations. *Coleman v. Burgundy Oaks, L.L.C.*, 71 So.3d 352 (La.App. 2d Cir., 2011).

Second, and most importantly, the owner of the mineral rights has the absolute right to go on the surface of the property for any purpose of developing the mineral rights. This includes drilling, pipelines, storage tanks, seismic work and all the other activities intended to explore for minerals. It is NOT acceptable in the residential context for the surface rights to be separately owned from the owner of the property. That is why the waiver of the surface rights is automatic and part of the standard form Purchase Agreement.

6. **Lines 34 - 36 - Price.** To have a valid sale, and therefore a valid Purchase Agreement, under Louisiana law only three things are necessary: First the thing, which is the Property being sold; second, consent which is self defining; and third the price. For a sale to occur the price has to be expressed in money. There are ways to transfer property for something besides money (for example, an exchange) but the standard form Purchase Agreement contemplates a sale. The price should be stated in the written words and in numerals. Please check to be sure that they reconcile as a disparity between the two occurs more often than one would think. If property is to be transferred for something other than a dollar amount, then your clients should seek outside legal help as that documentation is beyond the scope of the standard form Purchase Agreement.

7. **Lines 38 - 42 - Act of Sale.** It is traditional in Louisiana for the sale to be closed by the Buyer's representative. It is not necessary that it be so, and if it is to be closed by the Seller's representative or someone not chosen by either Buyer or Seller then that should be expressed in an addendum. The date for closing is critical as it is the "term" (as discussed above) for performance. If the parties have not performed by that date, that is close the sale, the term for performance ends. If it is ended because someone has breached the contract (discussed below) then there are consequences. If it is not closed due to a failure of condition, like obtaining financing, that has implications which are also discussed below. The time for performance can certainly be extended if it is done so in writing. It must be done by an addendum and not by marking out of the standard form Purchase Agreement. Any extension should be signed by Buyer and Seller prior to or on the closing date. The term "good funds" is defined in La. R.S. 22:512 (10), formerly cited as La. R.S. 22:2092.2, as money or "items" as that term is defined in R.S. 10:4-104(a)(9) meaning an instrument or a promise or order to pay money handled by a bank for collection or payment. The term does not include a payment order governed by Chapter 4A or a credit or debit card slip; and "checks" as that term is defined in La. R.S. 10:3-104 (f) "Check" means (i) a draft, other than a documentary draft, payable on demand and drawn on a bank or (ii) a cashier's check or teller's check. An instrument may be a check even though it is described on its face by another term, such as "money order".

8. **Lines 44 - 45 - Occupancy.** The change of occupancy from Seller to Buyer normally occurs at the act of sale or, as the Purchase Agreement states "unless mutually agreed upon in writing." Many closing attorneys have on hand separate occupancy agreements in the event this is to occur. It is very important that if occupancy is to be maintained by the Seller after the sale that it be documented properly. What occurs if occupancy continues in the Seller after the sale is a lease, and lease law in Louisiana is very complex in many ways especially as to liability and insurance coverage. Therefore, post closing occupancy must be documented properly and separately as it is beyond the scope of the Purchase Agreement itself. Note that most residential mortgages include a representation that the mortgagor will use the property as his or her "primary residence," which would not be the case if there is extended post-closing occupancy by the Seller.

9. The "**initialing lines**" at the bottom of all pages of the Purchase Agreement. The importance of having Buyer and Seller initial each page cannot be overstated. In a multi-page document, especially one as readily available as ours is on a web site, a person could do what is called "slip page." This simply means inserting a page into the context of the document that may have different terms on it then as originally signed. Initialing of each page prevents this from being easily done.

10. **Lines 47 - 51 - Contingency for Sale of Buyer's Other Property.** As discussed earlier under Conditions, this would fall under the category of a "suspensive condition." To restate the material above, there is a valid and binding contract, however, the performance is suspended until the condition happens. Please note that if the sale is contingent on sale of another home that the specific addendum referenced in the Purchase Agreement should be used. In all cases one of the two boxes should be checked and not left blank.

11. **Line 53 - All Cash Sale.** This simply means what it says, that the Buyer has or will have at closing, cash to close the sale. This cash must be delivered to the closing attorney as "good funds" as discussed above. The Buyer should be advised of the requirement of "good funds" at closing.

12. **Lines 55 - 71 - Financed Sale.** Referencing the materials above on Conditions, the conditioning of a sale on the ability of the Buyer to borrow the money is a suspensive condition. As noted in the material above, the Buyer must make a “good faith” effort to obtain financing. If the sale is to be financed, the licensee should work very hard to make sure that this section is filled out accurately and completely. You will note that the Condition allows the Buyer to set a flat sum of money in terms of dollars or express the amount to be borrowed as a percentage of the sale. Next, the Buyer is setting an outside limit on the amount of interest that they will pay. If they are unable to obtain a loan at an interest rate at that number or below, then the financing contingency will not be met. The same is true for the number of years of the financing. The Purchase Agreement then addresses seven methods of financing and one box for other. One of these boxes should be checked. Next, the Seller limits the amount of fees that he will pay for the lender (noting that different types of financing mechanisms require Seller to pay some fees). Next Buyer sets an outside limit on the amount of discount points that he is willing to pay. As discount points are related to the interest rate it is very important for the Buyer to set this outside limit in the context of the maximum interest rate that the Buyer has expressed that he is willing to pay. The box designated “other financing conditions” this requires a thorough inquiry by the licensee of the Buyer as to any other matters that may need to occur in the obtaining of financing and, if there are any, they should be clearly expressed in writing in this portion of the Purchase Agreement. Before we leave this section it is again important to note that all items must be filled in to obtain a complete picture of the contingency so that both Buyer and Seller will know if it is been met or if it has failed.

13. **Lines 73 - 83 – Deals with Process of Loan Application.** First, the Buyer warrants that he has available the funds which are required to complete the sale of the property including but not limited to the deposit, down payment, closing costs, prepaid items and other expenses. Buyer further agrees to make a good faith application within a certain number of calendar days after acceptance of this offer or any counter offer. It is important that the Buyer representative discuss with the Buyer their understanding of the mechanics of getting their loan so that adequate time can be allowed to make the application. Often times Buyers are unfamiliar with the current loan application process and assistance is also warranted here. Next, the Buyer must obtain written proof from the lender that the application has been made and this written proof shall be supplied to the Seller. The 2012 Purchase Agreement has added to and changed some items in this section. The primary difference is to require “Preliminary Loan Approval” be obtained as opposed to “Final Loan Approval.” In an attempt to define what a basic Preliminary Loan Approval is, the required information is (1) that a loan application has been made; (2) a credit report has been obtained and reviewed by the lender; (3) a preliminary loan commitment has been secured from the same lender; and (4) financing equal to the loan amount provided is available to complete the transaction. Care must be taken in deciding how long this process will take and what the particular lenders mechanics are for distributing this Preliminary Loan Approval. The next line explains why. It says any extension of this date shall be in writing and shall be signed by all parties. The meaning of this is very clear: if these items are not obtained within the time allowed there is a failure of the suspensive condition and the Purchase Agreement fails. Lines 76-77 simply authorizes and instructs the lender to release to Seller or Seller’s broker or designated agent written verification of a loan application and final loan approval. This is necessary due to current privacy laws.

14. **Lines 85 - 88 –** This sentence reserves the rights of the Seller to provide financing to the Buyer on the same terms as expressed in lines 54-65, if the Buyer is unable to secure financing.

15. **Lines 90 - 98 –** deal with who pays the costs of the transaction and how they are to be paid. The primary items for proration are real estate taxes, flood insurance premium if assumed, rents, assessments, condominium dues, assessment and/or other dues to homeowner’s association and the “like” for the current year to be pro-rated to the act of sale. Proration can sometimes be a little tricky. For example, taxes are easy to prorate because they are due in Louisiana on December 31st. Therefore, if you are closing on January 30th the Seller will hand over to the Buyer 30 days worth of taxes so that at the end of the year, the next following December 31st the Buyer will have 1/12th of the years taxes and he is liable for the balance. Other prorations have a different start date. For example, if condominium dues are due on July 1st and were paid and the closing is on January 30th and they were paid in advance then the Buyer must reimburse the Seller for five (5) months of condominium dues. While the actual prorations are usually

handled by the closing attorney the method of proration should be carefully explained to Buyer and Seller alike so that there are no surprises at closing.

It is traditional in Louisiana that the Buyer pay for all cost obtaining financing (except those specifically disallowed by a lender), title insurance and documentation. This is not a legal requirement, it is simply a practice. The Seller normally pays for all release certificates and cancellations and closing fees which are specifically allocated to the Seller, for example, any documentation necessary to clear the title. The last lines of that clause simply point out that the Seller is responsible for all prior assessments and taxes up to the date of sale.

16. **Lines 100 - 107** – deal with appraisal of the property. First, one of two boxes must be checked. Either the sale is not conditioned on appraisal or it is. If the sale is conditioned on the appraisal, then the Purchase Agreement is conditioned upon the appraisal not being less than the sales price. The next few lines deal with the valuation in the appraisal. If the appraised value is equal to or greater than the sales price, the Buyer pays the sales price agreed upon in the Purchase Agreement. If not, the Buyer must immediately provide written notification to Seller of the appraised value and Buyer's request for Seller to reduce the sales price. They provide that within a certain number of calendar days after Seller's receipt of the written notification of the appraised value, Buyer has the option to pay the sales price agreed upon prior to the appraisal or void the agreement unless the Seller agrees in writing to reduce the sales price to the appraised value or all parties agree to a new sales prices.

Example: Buyer's obligation to purchase is conditioned upon appraisal. Buyer receives an appraisal for \$1,000 less than the purchase price. Buyer does not want to cancel the Purchase Agreement or demand reduction of the purchase price for a relatively small amount. Buyer should send Seller written notification of the appraised value and notice that Buyer will pay the purchase price previously agreed upon. If Buyer neglects to send the appraisal notice at all, is Buyer in default under the Purchase Agreement? Probably not. The appraisal condition favors Buyer and thus can be waived by Buyer at anytime (recall II.B15(c)(iii)). Thus, Buyer will likely be deemed to have waived the condition.

17. **Lines 109 - 115 – Deposit.** First it is to be noted that a deposit is not required under Louisiana law to have a valid Purchase Agreement. It is a practice and seems to be expected by Sellers and Buyers alike. However, to repeat, it is not necessary to have a deposit to have a valid Purchase Agreement. Therefore, this clause could be deleted by addendum. However, if not deleted there is a requirement for immediate delivery of the deposit in the amount set forth in the blank. Please note that the deposit can be a particular dollar amount or a percentage of the sales price. The deposit can be made under the form either in cash, check or a promissory note. LREC §2717 titled "Deposits" states that funds received in a real estate sales, lease or management transaction shall be deposited in the appropriate sales escrow checking account, rental trust checking account or security deposit trust checking account of the listing or managing broker unless all parties having an interest in the funds have agreed otherwise in writing.

Promissory notes as deposits need to be carefully thought through. You should try to put the due date of the promissory note as close to the closing date as possible, unless special circumstances exist. For example, if there is a sixty (60) day gap between the Purchase Agreement and the date of closing, and Buyer expects funds from some source within thirty (30) days in which case he will redeem the promissory note with cash. In that case, the date can be adjusted. When a Seller gets a promissory note it is nothing more than that, a promise to pay. Therefore, if the Seller tries to collect on the deposit for some reason, for example, in the event of a breach, the Seller must go to court to obtain a judgment on the promissory note and then collect it using legal means. This is an added expense and should be considered when a promissory note is taken or given. Most promissory notes provide that in the case of legal collection process that the maker of the note, in our case, the Buyer, will be liable for all fees, expenses and attorney fees.

18. **Lines 117 - 122 – Failure to Deliver the Deposit.** Failure to deliver the deposit is an act of default under the agreement. The result of the default will be discussed later as to the Buyer. (Lines 228

-232) You will note that line 112 of the Purchase Agreement sets forth that a particular person must be named to hold the deposit. If the deposit is held by a broker must be held in the broker's authorized trust account. Thereafter, if there is any dispute as to the disposition of the deposit the broker must abide by the rules and regulations set forth by the Louisiana Real Estate Commission. Those rules provide that when a dispute exists in a real estate transaction regarding the ownership or entitlement to funds held in a sales escrow checking account, the broker holding the funds shall send written notice to all parties and licensees involved in the transaction. Within 90 days of the scheduled closing date or knowledge that a dispute exists, whichever occurs first, the broker shall do one of the following:

1. disburse the funds upon the written and mutual consent of all of the parties involved;
2. disburse the funds upon a reasonable interpretation of the contract that authorizes the broker to hold the funds. Disbursement may not occur until 10 days after the broker has sent written notice to all parties and licensees;
3. place the funds into the registry of any court of competent jurisdiction and proper venue through a concursus proceeding;
4. disburse the funds upon the order of a court of competent jurisdiction. LREC §2901.

19. **Lines 124 – 141 – Return of Deposit.** This section declares two things. First, under the circumstances listed in numbers 1 thru 5 below the deposit shall be returned to the Buyer. The operative word here is shall, that is, the broker must return the deposit if the conditions are met. Second, the agreement is declared null and void without demand if the conditions are met. The term “without demand” is an important item under Louisiana law. We have elaborate rules about putting someone in “default.” However, the Purchase Agreement waives the demand requirements. All of the conditions set forth in lines 124 thru 138 are specific and obvious. The conditions for return of the deposit are:

1. If the Buyer declares the agreement null and void during the inspection period.
2. If the Buyer had conditioned the agreement on getting a loan and cannot get the loan
AND
 - (a) The Seller has not offered to finance the property; AND
 - (b) The Buyer has complied with the conditions of making timely application and making a good faith effort to obtain the loan;
3. If the Purchase Agreement conditions the sales price on the appraisal and (i) the appraisal is less than the sales price; (ii) the Seller will not reduce the sales price as set forth in the agreement; and (iii) Buyer will not pay the price set forth in the Purchase Agreement, then the agreement is null and void and the deposit is returned;
4. The Buyer exercises his right to terminate the agreement after reviewing the leases or assessments as set forth in lines 140-144;
5. The Seller is unable to deliver to Buyer an approved sewerage and/or water inspection report as required under the agreement.

20. **Lines 143 - 147 – Leases/Special Assessments.** Real estate leases in Louisiana pose some special problems. If they are recorded then the Buyer will take the property subject to the lease, that is the Buyer must honor the lease as to the tenant. If a lease is unrecorded, then the Buyer takes the property free and clear of the lease. However, there is a real danger here for the Seller. Even though the Seller has sold the property, the Seller will remain liable to the tenant because under the lease the Seller is still the landlord. As such if the Buyer under an unrecorded lease evicts the tenant, the tenant can turn

around and sue the landlord for breach of the lease and damages. Therefore, to protect themselves, Sellers will require that the Buyers assume the lease. To assume the lease the Buyer simply takes over as the landlord and must honor all the provisions of the lease.

This section requires the Seller to deliver to the Buyer within five (5) calendar days of acceptance of the Purchase Agreement copies of all Leases and unpaid special assessments (mineral leases are excluded because they are not possessory in nature.) Buyer then has five (5) calendar days after receipt of the aforementioned documents to notify Seller, in writing, of Buyers intent to terminate the agreement. This gives the Buyer an opportunity to review the terms and conditions of the lease or assessments to make sure they are acceptable to the Buyer. The lease will provide both the term of the lease, that is, how long it will run, and other items such as rent, insurance and liability issues.

Special assessments are defined in the Purchase Agreement as an assessment levied on property to pay the costs of local improvements. While these are now rare, they do still exist. Special assessments usually come about in older parts of a town or in rural areas. They are commonly used to pay for improvements such as road improvements, drainage or road lighting. The way they usually come about is that local governments issue bonds and use the money to make capital improvements. Therefore the governmental agency issuing the bonds will assess property. Assessments can be based on front footage, square footage or any other method determined by the agency issuing the bonds. The assessments are normally paid annually and are collected by the same governmental agency that collects property taxes. Again, the Buyer has five (5) calendar days after receipt of this information to decide whether they are acceptable or to cancel the Purchase Agreement.

IV. LOUISIANA RESIDENTIAL AGREEMENT TO BUY OR SELL – PART II

A. THE CONTRACT CONTINUED:

1. **Lines 149 - 152 – New Home Construction.** This section requires the licensee to make an election. If the property to be sold is completed new construction, under construction or to be constructed you must check one of the two boxes. First, the election notes that a new home construction addendum with additional terms and conditions is attached. The new construction addendum is an approved document and is available at the LREC web site. It requires further elections. It requires the parties to elect that the construction is completed, under construction or new construction or to be constructed options. If the home is under construction the addendum requires the parties to make a list of items to be completed and changes for selections allowed by the builder for Buyer's selection, all of which shall be attached to the addendum. If the home is new constructed or to be constructed there is a requirement to note whether the floor plan is attached and whether specifications are attached. Further, there is a date of completion clause which must be established in the addendum. The addendum then provides for inspection and final walk through of new construction. This should be carefully reviewed with the Buyer. Anyone in the real estate business will tell you that construction is the highest risk in real estate contracting. Therefore, careful review with your client is important. It would not be inappropriate to encourage outside consultation by your client with an attorney knowledgeable in the construction field.

2. **Lines 154 - 191 – Inspection and Due Diligence Period.** The terms in lines 151-156 do a couple of things. First, the Buyer acknowledges that the sales price has been negotiated on the current condition of the property. This is to establish by contract that the Seller is not obligated to make any repairs unless there is further agreement to do so. Second, it requires the Seller to maintain the property in substantially the same or better condition as it was when the agreement was fully executed. This clause is essentially establishing a base line for the condition of the property.

3. **Lines 174 - 191 – Inspection Process.** In this portion of the agreement the Buyer is given a time period which must be elected to make inspections. It is to be noted that this time period is in calendar days, that is, it includes, weekends, holidays, etc. The time period elected will be controlled by the extent to which a Buyer may want to make inspections. You will note that the inspections include just about anything that the Buyer may want to research or have researched on their behalf. It includes not only the property condition, but also items such as school districts, flood zone classifications and zoning and subdivision restrictive covenants as well as any items addressed in the Seller's property disclosure document. Testing shall be non-destructive. While there is no precise science to the definition "non-destructive," it is a common sense definition. There may be occasions when an inspector will recommend an invasive procedure, for example, removal of a portion of sheet rock or brick work and, if this is the case it is recommended that advance clearance be obtained from the Seller.

If the Buyer is not satisfied with the condition of the property then they have two options. Under our law, whenever the word "satisfaction" is used, in this case to the Buyer's satisfaction, it means just that. That the Buyer can be dissatisfied with that item for any reason. It does not have to be reasonable or accurate. The Buyer can just merely be dissatisfied. In the event the Buyer is dissatisfied with any item, the Buyer: under option 1 may elect to terminate the agreement and declare it null and void; or under option 2, the Buyer may indicate in writing the deficiencies and desired remedies. Seller will then have seventy-two (72) hours to respond in writing as to Seller's willingness to remedy those deficiencies. This time period is defined in the agreement as "Sellers response."

If the Seller in the Seller's response refuses to remedy any or all of the deficiencies listed by Buyer, it is now the Buyer's turn to make an election. The Buyer has seventy-two (72) hours from:

1. The date of Seller's response; or
2. Seventy-two (72) hours from the date that Seller's response was due, whichever is earlier to (a) accept the Seller's response; or (b) accept the property in its current condition; or (c) elect to

terminate the agreement. Buyer's response must be in writing. Upon Buyer's failure to respond to the Seller's response within the time specified or, Buyer electing in writing to terminate the agreement, the agreement shall automatically with no further action required by either party be null and void except for return of the deposit.

Example: Parties enter into Purchase Agreement which contains special provisions clause that states: "any single mechanical item repair that exceeds \$2,000.00 the Seller has the option to repair or the contract will be null and void." Inspector found over \$25,000.00 in required repairs. Seller refused to make repairs. Parties argued over who had the option to terminate the contract. The court said neither party had that right because the clause contained a condition, not an option, and once the condition was fulfilled (repair over \$2,000.00 that Seller would not fix) the contract automatically became null. *Campbell v. Melton*, 2001-2578 (La. 5/14/02), 817 So.2d 69.

If the Buyer fails to make any inspections or fails to give written notice of deficiencies and desired remedies to Seller (or Seller's designated agent) within the inspection period, it should be deemed as acceptance by the Buyer of the property's current condition.

4. **Lines 193 - 200 – Private Water/Sewerage.** This section of the Purchase Agreement puts the burden on the Seller to do a number of things. If either a private water and/or sewerage systems services a home site, the Seller must provide at Seller's expense evidence of approval of either of these systems by the appropriate governmental entity. The governmental entity could be any number of governmental agencies that would have jurisdiction over these systems. Further, an approved sewerage and/or water inspection report must be issued within thirty (30) days prior to the act of sale by the appropriate governmental agency. Last, the Seller must provide an approved inspection and test on the water and/or sewerage system. Any repairs necessary to obtain the approved inspection certificate are to be paid for by the Seller.

5. **Lines 202 - 211 – Home Service/Warranty.** This section of the Purchase Agreement requires an election of whether a home service warranty plan will be purchased or not purchased at the closing of the sale. This section also provides a price that is a not to exceed price. The home service warranty plan can be paid by the Buyer, the Seller or neither (these are often paid for by the broker or licensee). In any event an election must be made as to who is paying for it. Last, it must be clearly stated who is ordering the home service warranty plan. Beginning at line 203 the parties are advised that the warranty plan does not cover pre-existing defects and does not supersede any other inspection clause or responsibilities. This is to alert the parties to the contract that the home service warranty plan should not be viewed as a substitute for appropriate inspections. Lines 203 thru 208 are for the licensee/broker protection. First, the parties acknowledge that the agent/broker may receive compensation from the home warranty company for actual services performed. The clause further requires the parties to acknowledge that if a plan is not chosen that they have been aware of it and further, hold the broker and agents harmless from responsibility or liability due to their rejection to such a plan.

6. **Lines 212 – 229 - Warranty or As Is Clause with Waiver of Right of Redhibition** (Check one only). This portion requires an election to be made. To understand these clauses there must first be a discussion of what Louisiana law is as to warranty in a sale. These general rules have an exception, that is the new home warranties, and that will be discussed below.

In every sale in Louisiana, including sale of real estate, the Seller by default, and unless changed by contract, warrants two things regarding condition of the Property:

1. That the thing sold is free from redhibitory defects; and
2. That the thing is fit for its intended use.

Redhibitory defects are defects are those that are (a) not apparent or visible or (b) cannot be discovered with simple inspections. Stated another way, Louisiana law is to the effect that if a defect is observable or could have been discovered upon simple inspection, it is not a redhibitory defect and the Buyer buys the property with those defects and they are the Buyer's problem. (If the Seller knows of the defects and conceals them other problems arise which are beyond the scope of this course.) So the law on redhibitory defects assumes that there is a defect that cannot be discovered easily or is not readily observable so that neither the Buyer nor the Seller knows about them. If such defects are discovered after the sale within the time period set by law then the Buyer has recourse against the Seller for a reduction in the purchase price (generally the amount to cure the defect), or, if the defects are monumental, then Buyer may in fact be entitled to rescind the sale, that is, transfer the property back in return for a full refund of the full purchase price. Instances of the latter are very rare, but the right does exist. The warranty of fitness for intended use does not arise very often in the residential real estate context since the intended use is "residential" and whether the property is fit for that use is generally readily apparent. With that background in mind, a review of the choices are in order.

Election (A) Sale with Warranties: If this election is made the Seller is selling the property with all the warranties discussed above. To restate, there is no warranty by the Seller as to apparent or easily discoverable defects. The warranty applies only to those that are hidden or, as the law calls them, redhibitory defects.

Election (B) Sale "As Is" Without Warranties. Electing this clause will relieve the Seller of the warranty against redhibitory defects. If this election is made, the Buyer's inspections now become much more important and Buyers should be alerted that if this election is made that the Seller will not be liable for any hidden or redhibitory defects.

Election (C) New Home Warranties. The New Home Warranty Act supersedes the general rules of warranty that apply to elections A and B. The New Home Warranty Act sets forth in very specific detail what warranties are made, the time periods for liability of the Seller and the time period that those warranties last. This course will not go into the details and nuances of the New Home Warranty Act as that is a seminar in itself. However, there are some basic rules that need to be understood to see if this election applies.

The three important definitions are that of "Builder," "Home," and "Initial Purchaser." Under the statute a Builder is a person or business organization which constructs a home or an addition thereto including a home occupied initially by the builder as his residence. A person is a Builder under the statute whether they build the home on the property owned by the builder or build it on property owned by another. For example, a lot owner who contracts for construction on their own lot will be contracting with a "Builder" under the statute.

Second, the definition of "Home" means any new structure designed and used only for residential use together with all attached and unattached structures constructed by the Builder. This definition includes condominiums and other multiple dwelling regimes.

Last, "Initial Purchaser" means any person for whom the home is built or the first person to whom the home is sold upon the completion of construction.

Therefore, if the property being sold meets this definition, then election (C) is the only one available.

7. **Lines 231 - 240 – Merchantable Title/Curative Work.** "Merchantable Title" under Louisiana law is a legal definition that title is not suggestive of serious litigation. This definition is somewhat elusive since a determination needs to be made as to whether the potential for litigation is "serious" or not. Under Louisiana law, the Seller always warrants that they are delivering merchantable title unless the parties agree to a waiver of some or all of this responsibility. The Purchase Agreement does not contain any deviation from this general standard, however, all licensees should be aware that there are

other title standards, both higher and lower than merchantable title. In the event that a request is made by either Seller or Buyer for a different standard than merchantable title an addendum must be used to reflect that standard. It is also to be remembered that the lender is not bound by the merchantability standard. If the title work is being handled by an attorney for the lender, the lender may have in place higher standards than simple merchantability. The lender may turn down the title, not because it is not “merchantable” but because it does not meet the lender’s standards for title.

Not surprisingly the rest of the clause deals with Sellers responsibility if the title defect that makes the title not merchantable is discovered. The Purchase Agreement states that in the event curative work is required under the agreement OR as a requirement for obtaining the loan upon which the agreement is conditioned the parties agree to extend the date for closing of the sale. There is a blank here which must be filled in and at the time the Purchase Agreement is entered into to establish a time period to cure defects. At the time the Purchase Agreement is entered into, this has to be a guess. Some defects are easily cured and others are more difficult and take more time. From the Seller’s standpoint the Seller wants as much time as possible to cure any defects and have the sale go through. From the Buyer’s standpoint they want to know that if the matter is going to drag out they want to be able to cancel the agreement and move on to another property. The agreement further provides that all costs and fees required to make the title merchantable are paid by Seller and it further requires the Seller to make a good faith effort to deliver merchantable title. Last, the agreement provides that if merchantable title cannot be delivered within the time as extended then the Purchase Agreement automatically becomes null and void. The Buyer does reserve the right to demand return of the deposit and recover from the Seller actual costs incurred in processing of the sale as well as legal fees incurred by the Buyer.

8. **Lines 242 - 245 - Final Walk Through.** Within five (5) days prior to the act of sale or occupancy whichever is first to occur, the Buyer reserves the right to re-inspect the property. This inspection is made for two reasons: first, the Buyer is making sure that the property is in the same condition as when it was first inspected and, second the Buyer gets to make sure that the items that the Seller agreed to repair (see Inspection and Due Diligence clause) have been made. The Seller also obligates himself to provide utilities for the final walk thru and access to the property.

9. **Lines 247 - 256 – Default of Agreement by Seller.** This portion of the Purchase Agreement deals with the consequences to the Seller of the Seller’s default. Lines 244-245 note that the Seller is not liable for default if the agreement is cancelled for the reasons set forth in Lines 121 - 138 – Return of the Deposit, or Lines 232-234 Failure of Merchantable Title. Except for those exclusions, if the Seller defaults the Buyer has a number of options. First the Buyer can declare the agreement null and void with no further demand. Next the Buyer reserves the right to demand and/or sue for any of the following:

1. Termination of the Agreement;
2. Specific Performance;
3. Termination of the Agreement in an amount equal to ten (10%) percent of the sales price as stipulated damages.

Number 1 above, “Termination of the Agreement,” needs no further discussion. In number 2 above, “Specific Performance,” references the right for the Buyer to require the Seller to sell the property under the terms and conditions of the Purchase Agreement. This election is rarely made and the Buyer should make it only with competent legal advice. In number 3 above, as to “stipulated damages,” as discussed above, Louisiana law allows the parties, with very little limitation to set an amount in advance as damages in the event there is a breach. This allows the Buyer to make the demand and, if necessary, sue and not have to prove up any actual damages because the parties have agreed to the amount for damages.

In all circumstances the Buyer is entitled to return of the deposit. Further, in an important clause, the prevailing party to any litigation brought to enforce the agreement shall be awarded attorney fees and costs. The agreement last declares that the Seller may also be liable for broker fees.

10. **Lines 258 - 262 – Default of Agreement by Buyer.** This portion of the Purchase Agreement is really a mirror image of the rights granted to the Buyer if the Seller defaults. The only difference is, of course, there is no exclusion for the Buyer in the event of failure of merchantable title because the Buyer is not delivering title in any event.

11. **Lines 268 - 271 – Mold Related Hazards Notice.** In this clause the Buyer acknowledges receipt of the information of access to EPA web site in regard to mold related hazards. This is a Louisiana Real Estate Commission regulation and is found at LREC §3801 in accordance with La. R.S. 37:1470.A(1).

12. **Lines 273 - 278 – Offender Notification.** This again calls the Buyer’s attention to resources including that of the Louisiana Bureau of Criminal Identification and Information and local law enforcement as to the location of registered sex offenders as that is defined under Louisiana law. This is found at La. R.S. 37:1469.

13. **Lines 280 - 281 – Choice of Law.** The parties choose in this clause to have Louisiana law apply to any interpretation of agreement or any dispute. The importance of this clause cannot be over emphasized. The rules on conflicts of law, that is, what states’ laws apply to disputes, are very complicated. Just because the property is in Louisiana does not mean that Louisiana law would apply except that this clause requires that Louisiana law to be applied.

14. **Lines 283 - 285 – Deadlines.** The term “Time is of the Essence” is a legal term that simply means when a clear deadline, for example, a certain number of days or certain date, is agreed to in a contract, the term for performance, the deadlines, are final. The Purchase Agreement does note that any modifications, changes and extensions must be made in writing. Any change in any deadline to be effective under Louisiana law must be made in writing and signed by the parties. This section further notes that “calendar days” shall end at 12:00 midnight in Louisiana. According to Black’s law dictionary (9th Ed. 2009) a calendar day is a consecutive 24 hour day running from midnight to midnight. “If the last day for passing the act of sale falls on a weekend or a **holiday** on which business is not conducted, the last day for passing the act of sale is automatically extended to the next working day.” Transcontinental Development Corp. v. Bruning, 195 So. 2d 430 (La. Ct. App. 4th Cir. 1967).

Example: If Closing is to occur by December 28, 2012, then it must occur by 12:00 a.m. (Midnight) December 28, 2012. This really means that closing must occur no later than December 27, 2012. If one Agreement said 11:59 a.m. on December 28, then you can close on the 28th.

If a deadline is not a “calendar day,” and the Purchase Agreement does not provide for “calendar days” then, for example, “fifteen (15) days” means fifteen (15) days. If the fifteenth day falls on a Saturday, Sunday or legal holiday the contract must be performed on that day. In the Purchase Agreement lines 74, 75, preliminary loan approval only says “days.” Line 193, Water Inspection Report, says thirty days; line 239 Final Walk-Through, only says five days

15. **Lines 287 - 295 – Additional Terms and Conditions.** This area is reserved for any special considerations or conditions that the parties have agreed to. The objective here is that if the parties desire it to be done then it must be written down. Licensees are sometimes concerned as to whether they are expressing this in appropriate “legal” language. The best rule is to simply write it as clearly as you can. Try to express your thoughts fully. If you run out of room on this form you may use an addendum to finish expressing the agreement between the parties. Do be careful to use the proper defined terms.

Example: Remember our example regarding the new washer/dryer set to be transferred to Buyer. The requirement that the washer/dryer set is to be transferred to the Buyer should be included here. The following would likely be sufficient: The Kenmore

washing machine and Kenmore dryer located in the laundry room of the property as of November 30, 2012 shall be transferred to Buyer as part of the Sale Price.

16. **Lines 297 - 314 – Roles of Brokers and Designated Agents.** To understand what this clause is really all about we need to understand what brokers and designated agents are not. Brokers and designated agents are not parties to the agreement. They cannot perform for the Seller nor the Buyer. The Purchase Agreement makes that clear. The brokers and designated agents are not title attorneys or surveyors and therefore make no warranties as to items that would be determined by those persons. Brokers and designated agents are normally not experts in mechanical systems as a home inspector would and therefore no warranty is made as to those items. Brokers and designated agents are normally not lawyers and should not be required to investigate or understand the status of permits, zoning, code compliance, restrictive covenants or insurability. Broker and designated agents are not experts as to flood plains or wetlands nor are they entomologists to determine the presence of wood destroying insects or damage. Last a designated agent shall be an independent contractor for the broker if the conditions set forth in La R.S. 37:1446(H) are met: (1) The real estate salesperson or associate broker is a licensee. (2) Substantially all of the real estate salesperson's or associate broker's remuneration for the services performed is directly related to sales or other output rather than the number of hours worked. (3) There is a written agreement between the real estate salesperson or associate broker and the broker that specifies that the real estate salesperson or associate broker will not be treated as an employee.

In sum, the Purchase Agreement is trying to establish, in writing their role. Brokers and designated agents represent owners of property and potential purchasers.

17. **Lines 316 - 324 – List Addenda to be Attached and made a part of this Agreement.** There are four printed choices and four blanks for other addenda. Do not hesitate to make your own box, with an additional addendum.

This list should completely incorporate all addenda attached to the contract. The reason for the list is the same as the reason for initialing each page. This is to insure that all addenda used are captured in the body of the contract to avoid any issues.

The balance of the Section addresses the relationship between the preprinted portions of the agreement and any additional or modified terms and blanks or any addendum. It provides that the additional or modified terms in blanks and on addenda control over the preprinted portions of the agreement as discussed above. This is the law in Louisiana on interpretation of contracts and the Purchase Agreement simply makes it clear to the parties that that is the result.

Last, be careful to ensure that there are no unintended consequences in use of addenda. For example, an addendum may change a time for performance that is not reconciled with other time periods in the Purchase Agreement.

18. **Lines 326 – 328 - Singular-Plural Use.** This is a traditional contract clause.

19. **Lines 330 – 334 -** Going back to the earlier discussion, acceptance occurs when two things happen: first, the party accepting signs the contract and second, that fact is communicated to the person making the offer. All of this you will probably remember must be done within the time given for acceptance, that is it must be signed and that fact communicated within the time set forth in the offer. The Purchase Agreement does allow the parties to contract that notice of the acceptance may be communicated by fax or electronic signature. The Purchase Agreement then provides that the agreement and any supplemental addenda, modifications, including any photocopy, fax or electronic transmission may be executed in two or more counterparts all of which shall constitute one and the same agreement. This simply means that the Seller and the Buyer can sign separate copies of the agreement or any modifications or addenda and that even though those are signed on different pieces of paper when taken together they will constitute one whole contract.

20. **Lines 336 – 340 – Notices and Other Communication.** This section sets for the the manner in which notice, such as the notice of deficiencies found during the Inspection and Due diligence Period, must be given. Buyer and/or Seller may elect to receive notice by electronic mail. This is an attempt to comply with the Louisiana Uniform Electronic Transactions Act and actual practice. (See II.B.11 for discussion of LUETA). Since it is common practice to deliver notices to the licensees first, it would be best to include both the licensee’s email address and the Buyer/Seller’s email address, as applicable. This will help establish the time notice as given and conform with actual practice.

21. **Lines 348 – 350 - Contract.** This is simply a statement to the parties to the contract that it is legally binding and has very important consequences. It further states if they do not understand any portion of the contract that they should seek legal advice and that they should certainly seek legal advice before attempting to enforce any part of the contract.

22. **Lines 352 – 353 - Entire Agreement.** This is a statement of Louisiana law. Once the parties sign the contract anything that is not incorporated in it will be ignored by any court. Any modifications not in writing will be ignored by a court.

23. **Lines 354 – 355 - Expiration of Offer.** From the discussion above, you will recall that if an offer is made and it has a time within which it should be accepted, it is “irrevocable” within that time. The Purchase Agreement restates that fact. In choosing the time within which the offer must be accepted practical consideration should control. Are the Seller and Buyer in close geographical proximity to each other or are they in a remote location? Has one of the parties advised you that they will be out of town for a few days? Stated again, choosing the time period within which the offer must be accepted is a practical consideration.

24. **Lines 357 – 391 - The “Signature Lines”.** In addition to being there for the signature ask that very important information be filled out. This is of great assistance to many people including the other licensees you are working with and those trying to close the transaction. Lenders, title attorneys, appraisers and surveyors all, to some degree, rely on the information contained in this Purchase Agreement Section.

25. **Line 374 - The Acceptance, Rejection.** Handling of the Purchase Agreement is governed not only by the tenets of Louisiana law but by the Louisiana Real Estate Commission Rules **LREC §3900 et seq.** Line 371 contains three choices. First, the agreement is accepted. Second, it is rejected without counter. Third, it is rejected and countered. On this last choice it is a good time to remember from our discussion above what a counter offer really is. A counter offer is first, a rejection and second, a new offer. The new offer contained in the counter offer must meet all the tests and criteria of an original offer to be valid.

Exhibit A

EXHIBIT "A"
ENTITY AUTHORITY IN REAL ESTATE TRANSACTIONS

II. ENTITY TYPE	III. DESCRIPTION	IV. AUTHORITY TO ACT	V. FORM REQUIREMENTS
Corporation	<p>A corporation is an entity created by law and given rights, including the authority to act as a person distinct from the shareholders who own it.</p> <p>There are 2 types of corporation: business and non-profit</p> <p>A non-profit corporation is a corporation that is organized for any purpose other than a purpose that involves pecuniary profit or gain to its members or which pays dividends or other monetary remuneration.</p>	<p>A corporation is a legal fiction and can only act through the acts of its agents.</p> <p>Generally, all corporate powers are vested in the Board of Directors (La. R.S. 12:81(A))</p> <p>Officers and Agents have only the powers that are conferred by the bylaws or by resolutions of the Board.</p> <p>The Board may grant authority to officers or agents only by statutorily prescribed methods. (La. R.S. 12:81 & 82)</p>	<p>Unless otherwise provided in the Articles of Incorporation or Bylaws, the Board of Directors may grant authority to an agent by a formal meeting or by unanimous written consent of all directors filed in the minutes book of the corporation.</p> <p>If the Board confers authority by a meeting, the meeting must be properly called, proper notice must be sent, a quorum of directors must be present, and a majority of directors present at the meeting must vote in favor of the proposed action. (You should obtain an extract, certified by the corporate secretary, of a resolution of the Board conferring authority.)</p> <p>If the Board confers authority by means of unanimous consent, the consent must be written, unanimous, and filed in the minutes book of the corporation.</p>
Partnership	<p>A partnership is a juridical person distinct from its partners, created by contract between two or more persons to combine their efforts and resources in determined proportions and to collaborate at mutual risk for their common profit and commercial benefit.</p>	<p>A partner is a mandatary of the partnership for all matters in the ordinary course of its business other than the alienation, lease, or encumbrance of partnership immovables. (La. C.C. art. 2814).</p> <p>The partnership agreement may give one or more partners the authority to alienate or encumber immovable property of the partnership.</p> <p>If the alienation, lease, or encumbrance of immovables of the partnership is involved in a transaction, the third person must inquire into and establish the authority of the partner who attempts to act as a mandatary of the partnership. (La. C.C. art. 2814, Comment (b)).</p>	<p>In order for immovable property to be owned by the partnership, the contract of partnership must be in writing at the time of acquisition. (La. C.C. art. 2806)</p> <p>If the contract of partnership is not in writing at the time of acquisition, the immovable is owned by the partners. (La. C.C. art. 2806).</p> <p>As to third parties, the individual partners are deemed to own immovable property acquired in the name of the partnership until the contract of partnership is filed for registry with the Secretary of State as required by law. (La. C.C. art. 2806).</p>
Limited Partnership or	A limited partnership consists of	A registered limited liability partnership	The same rules that apply to partnerships in real estate

II. ENTITY TYPE	III. DESCRIPTION	IV. AUTHORITY TO ACT	V. FORM REQUIREMENTS
Partnership In Commendam	one or more general partners who have the powers, rights and obligations of partners and one or more partners in commendam or limited partners with limited liability and management rights. The contract of partnership in commendam must be in writing and filed for registry with the Secretary of State.	is a partnership and not a separate form of legal entity. (La. R.S. 9:3435)	transactions apply to registered limited liability partnerships.
Foreign Partnership	A foreign partnership is a partnership that is formed under the laws of any jurisdiction other than the State of Louisiana.	A foreign partnership must file a statement of foreign partnership in order to enjoy the rights, privileges and juridical status of a Louisiana partnership. (La. R.S. 9:3421 & 22).	In order to own immovable property in Louisiana, a foreign partnership must be registered in Louisiana with the Secretary of State. (La. R.S. 9:3423)
Limited Liability Company	A limited liability company is an entity that provides the owners with limited liability (like a corporation) and can also provide the flexibility of a partnership.	<p>Managed by Members- Unless otherwise provided in the articles of organization or in a written operating agreement, a majority vote of the members is required to approve the alienation, lease, or encumbrance of any immovables of the LLC. (La. R.S. 12:1318)</p> <p>Managed by Managers- If the articles of organization provide that the business of the company is to be managed by one or more managers, the managers may not alienate, lease, or encumber immovables of the LLC unless they are authorized to do so by the articles of organization. (La. R.S. 12:1312 & 1318)</p>	<p>The operating agreement must be in writing if it restricts or enlarges the management rights and duties of any member or class of members or if it alters the requirement of a majority vote of members in decisions involving the alienation, lease, or encumbrance of immovable property.</p> <p>Persons dealing with an LLC may rely upon a certificate of any person named in a statement (described under La. R.S. 12:1305(C)(5)) in the articles of organization, or if no such person is named, upon a certificate of one or more managers or members, to establish the authority of any person to act on behalf of the LLC, including the alienation, lease, or encumbrance of any immovable property of the LLC. (La. R.S. 12:1317(C))</p>
Louisiana Trust	<p>A trust is a property interest held by one person (the trustee) at the request of another (the settler) for the benefit of a third party (the beneficiary).</p> <p>Louisiana Trusts are created</p>	A trustee has the right to alienate, lease, or encumber the trust property, unless the alienation or encumbrance is specifically forbidden in the trust instrument or unless it appears from the trust instrument that the property is to be retained in kind. (La. R.S. 9:2118, 2119,	<p>If at any time the trust property includes immovables or other property the title to which must be recorded in order to affect third parties, the trustee shall file the trust instrument, or an extract thereof, for record in each parish in which the property is located. (La. R.S. 9:2092(A))</p> <p>For purposes of recording an extract of a trust instrument,</p>

II. ENTITY TYPE	III. DESCRIPTION	IV. AUTHORITY TO ACT	V. FORM REQUIREMENTS
	pursuant to the Louisiana Trust Code (La. R.S. 9:1721 et seq.)	& 2120)	such an extract shall include all of the following: (a) name of the trust; (b) a statement as to whether the trust is revocable or irrevocable; (c) the name of each settlor and signature of each settlor of an inter vivos trust; (d) the name of each trustee and name or description of the beneficiary or beneficiaries; (e) the date of execution of the trust; and (f) a brief description of the immovable property or other property subject to the trust, the title to which must be recorded in order to affect third parties. (La. R.S. 9:2092(B))
Foreign Trust	A foreign trust is a trust created pursuant to the laws of any other jurisdiction other than the state of Louisiana.	The authority of a trustee of a foreign trust or his representative to execute and deliver a conveyance of immovable property situated in Louisiana may be evidenced in any manner that is lawful under the law which the parties have expressly chosen to govern the trust. (La. R.S. 9:2262.3)	If at any time the trust property of a foreign trust includes an immovable or other property in Louisiana the title to which must be recorded in order to affect third parties, a trustee shall file the trust instrument, or an extract thereof, for record in each parish in which the property is located. (La. R.S. 9:2262.2) A trust instrument executed outside Louisiana in the manner prescribed by, and in conformity with, the law of the place of its execution, or the law of the settlor's domicile, at the time of its execution shall be deemed to be legally executed and shall have the same force and effect in this state as if executed in the manner prescribed by the laws of this state, provided the trust instrument is in writing and subscribed by the settlor. (La. R.S. 9:2262.4)
Unincorporated Associations	An unincorporated association is an unincorporated organization, other than one created by trust, consisting of two or more members joined by mutual consent for a common, nonprofit purpose. However, co-ownership does not by itself establish an unincorporated association, even if the co-owners share use of the property for a nonprofit purpose. (La. R.S. 12:501) An unincorporated association is a	An unincorporated nonprofit corporation may acquire, hold, mortgage, donate or otherwise transfer an interest in immovable property in the name of the unincorporated association (La. R.S. 9:504) A transaction involving immovable property must be authorized by a resolution adopted by a majority of the members of the association who vote on the resolution at a special meeting called and held for that purpose. The resolution may designate a person or persons to act	An interest in immovable property held in the name of an unincorporated association may be mortgaged, encumbered or otherwise transferred by a person so authorized in a statement of authority filed in the conveyance records in the parish in which the immovable property is located. (La. R.S. 12:505) An unincorporated association authorizes the sale, encumbrance or transfer of immovable property by resolution adopted by a majority of the members of the association who vote on the resolution at a special meeting called and held for that purpose. (La. R.S. 12:1051). Notice of the special meeting, including the date, time, and

II. ENTITY TYPE	III. DESCRIPTION	IV. AUTHORITY TO ACT	V. FORM REQUIREMENTS
	<p>legal entity separate from its members for purposes of acquiring, holding, encumbering, donating and otherwise transferring immovable and movable property. (La. R.S. 12:504)</p>	<p>an agent for the purpose of effectuating the transaction. (La. R.S. 9:1051)</p>	<p>place of the meeting and the substance of the of the contemplated resolution, shall be published on two separate days at least fifteen days prior to the date of the meeting, in the official journal of the parish in which a majority of the residents reside or, if none, in a newspaper of general circulation in the parish. A copy of the resolution and proof of publication as required (see above) shall be attached to each act effectuating the transaction. (La. R.S. 9:1051)</p>