Contracts and Leases

Lesson 1

General Contract Law (Louisiana)

45 Hour Louisiana Post-Licensing

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 states.

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.*

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*.

5. **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 the drafter will typically 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, 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. Evan 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. A minor is fully emancipated by marriage. Termination of the marriage does not affect emancipation by marriage. Emancipation by marriage may not be modified or terminated. *La. C.C. art. 367.*

(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 too 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/Procuration (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, as 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, 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, as 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, 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, 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, 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 the 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, 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), 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 an 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 seller'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, 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 the Buyer close on the sale or pay 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, 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 oblige, 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.