REAL PROPERTY — BROKERAGE COMMISSION — THRESHOLD STANDARD FOR IMPOSING SELLER LIABLITY FOR A BROKERAGE COMMISSION IN A FAILED TRANSACTION IS A DETERMINATION THAT THE SELLER BREACHED THE SALES CONTRACT—*Van Winkle & Liggett v. G.B.R. Fabrics, Inc.*, 103 N.J. 335, 511 A.2d 124 (1986).

The truth is that real estate brokerage is a highly competitive, intensely jealous collage of profit-worshipping zealots . . . .[1]

Although this unflattering characterization of the brokerage industry may be applicable to any profession, it lends support to the fact that legal publications and courts are rife with actions regarding real estate brokers' commissions.[2] In fact, when compared with other occupational related litigation, broker commission cases command a quantum of American court time.[3] The bulk of litigation arises from disagreements between the broker and the seller as to when the broker is entitled to a commission.[4] Typically such disputes occur when, subsequent to a broker's procuring a buyer for the seller's property, the seller is unable to complete the

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[1] M. STEVENS, LAND RUSH 28 (1984).

[2] 1 A. CORBIN, CONTRACTS § 50 (1955); L. FRIEDMAN, CONTRACT LAW IN AMERICA 46-50 (1965); Note, *Let the Seller Beware—Unconscionability and the Real Estate Broker's Employment Contract*, 5 MEM. ST. U.L. REV. 59 (1974) [hereinafter Note, *Seller Beware*]; Note, *Ellsworth Dobbs, Inc. v. Johnson: A Reexamination of the Broker-Buyer-Seller Relationship in New Jersey*, 23 RUTGERS L. REV. 83 (1968) [hereinafter Note, *A Reexamination*]; Comment, *Colorado Real Estate Broker Listing Contracts*, 35 U. COLO. L. REV. 205 (1963) [hereinafter Comment, *Colorado Real Estate*]; Note, *Duties, Rights, and Remedies of Real Estate Brokers*, 8 U. FLA. L. REV. 513 (1955) [hereinafter Note, *Duties, Rights and Remedies*].

[3] L. FRIEDMAN, *supra* note 2, at 46. This phenomenon is easily understood in view of the American affinity for the investment appeal of real estate. *See generally* M. STEVENS, *supra* note 1. Franklin D. Roosevelt may have provided the best rationale for investing in real estate: "Real estate cannot be lost or stolen, nor can it be carried away. Managed with reasonable care, it is about the safest investment in the world." *Id.* at 90.

Among the leading causes for the disparity in the amount of litigation in broker commission cases is the rise in the number of land transactions, and the notion among buyers and sellers of realty that the commission charged is disproportionate to the services performed by the broker. *See* U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1986, at 498 (1986); A. CORBIN, *supra* note 2. *See also* L. FRIEDMAN, *supra* note 2, at 47; R. LIFTON, PRACTICAL REAL ESTATE: LEGAL, TAX AND BUSINESS STRATEGIES 88-89 (1979) ("[O]nce a desired service is rendered, many people, like the town fathers of Hamlin, dislike paying a very large fee for what appears to be very little work.").

[4] A. CASNER & W. LEACH, CASES AND TEXT ON PROPERTY 699 (3d ed. 1984); Note, *A Reexamination*, *supra* note 2, at 83. *See* Comment, *Colorado Real Estate*, *supra* note 2, at 205; Note, *Duties, Rights and Remedies*, *supra* note 2, at 513.

transaction.[5]

In most jurisdictions, the rule is that absent an express agreement, a broker earns his commission when he produces a buyer who is ready, willing, and able to purchase the property on the seller's terms.[6] In *Ellsworth Dobbs, Inc. v. Johnson*,[7] the Supreme Court of New Jersey rejected the majority rule and declared that, as a matter of law, in the absence of seller default, the broker's commission was contingent upon the buyer's performance of the contract.[8] Thus, in the absence of a closing and fault, a broker was not entitled to his commission.[9] Since *Ellsworth Dobbs* revolved around the issue of buyer default, the court failed to address the concept of seller default.[10] Recently, the court articulated a standard for imposing liability upon the seller in *Van Winkle & Liggett v. G.B.R. Fabrics, Inc.*[11]

A textile manufacturer, G.B.R. Fabrics, Inc. (GBR), owned a vacant lot in Rutherford, New Jersey.[12] In February 1979, a broker from Van Winkle & Liggett proposed that GBR list their property for sale.[13] One week later, GBR mortgaged the lot as part of a collateral package in order to obtain a $946,000 flood disaster loan from the Small Business Association (SBA).[14] In September 1979, GBR placed the property on the market by signing an open listing agreement with Van Winkle.[15]

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5 *See* D. BURKE, LAW OF REAL ESTATE BROKERS § 3.2, at 102 (1982).

6 10 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1287 (3d ed. 1967); Note, *Seller Beware*, *supra* note 2, at 59-60. *See* D. BURKE, *supra* note 5, at §§ 3.2-3.5 (reviewing the majority rule in detail). A broker has been characterized as

> an agent employed by a seller or buyer to negotiate the sale, purchase, or exchange of real estate on a commission contingent on success . . . . His primary function is to act as an intermediary between the buyer and the seller, and to aid in the negotiations leading up to the sale, purchase, or exchange of real estate.

H. LUSK & W. FRENCH, LAW OF THE REAL ESTATE BUSINESS 274 (1975).

7 50 N.J. 528, 236 A.2d 843 (1967). *See infra* notes 100-23 (discussing *Ellsworth Dobbs*).

8 *Ellsworth Dobbs*, 50 N.J. at 555, 236 A.2d at 857. The *Ellsworth Dobbs* court maintained that "[t]he present New Jersey rule . . . is deficient as an instrument of justice." *Id.* at 547, 236 A.2d at 853.

9 *See* D. BURKE, *supra* note 5, at § 3.6.

10 *See Ellsworth Dobbs*, 50 N.J. at 555, 236 A.2d at 857; Note, *A Reexamination*, *supra* note 2, at 87.

11 103 N.J. 335, 511 A.2d 124 (1986).

12 *Id.* at 337, 511 A.2d at 125.

13 Van Winkle & Liggett v. G.B.R. Fabrics, No. L-68453-78, at 4 (N.J. Super. Ct. Law Div. Sept. 16, 1983) (transcript of oral decision), *aff'd*, No. A-768-83T3, A-1239-83T3 (N.J. Super. Ct. App. Div. Nov. 19, 1984), *rev'd* 103 N.J. 335, 511 A.2d 124 (1986).

14 *Id.*

15 Petition for Certification and Appendix of Defendant-Appellant-Petitioner at

In May 1980, Latorraca Realty Corporation informed Van Winkle that a potential buyer, Columns Enterprises (Columns), was interested in purchasing the property.[16] Subsequent to negotiations, Van Winkle delivered a contract proposal to GBR.[17] Van Winkle was then informed of the SBA lien.[18] At GBR's request, GBR and Columns renegotiated for an all-cash transaction.[19] Van Winkle confirmed the offer and acceptance subject to the terms of the contracts drawn by both parties' attorneys.[20]

Columns' and GBR's attorneys revised the contract with the proviso that its terms were "expressly conditioned" upon the release of the mortgage by SBA.[21] In the interim, GBR contacted the SBA to effectuate the release of the mortgage and submitted a proposal for a collateral substitution.[22] GBR's proposal suggested that the proceeds of the sale be applied toward the purchase of tax free municipal bonds.[23] All trading activities and liquidations in the portfolio would be subject to SBA approval.[24] The SBA, however, rejected GBR's proposal as inconsistent with the original purpose of

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2, Van Winkle & Liggett v. G.B.R. Fabrics, Inc., N.J. Super. Ct. App. Div. Nov. 19, 1984 (No. A-768-83T3); *Van Winkle*, 103 N.J. at 337, 511 A.2d at 126. In an open listing agreement, the seller employs a broker to produce a buyer ready, willing and able to buy on the seller's terms. *See* R. LIFTON, *supra* note 3, at 94. In return, the seller promises to pay the broker the stipulated commission for his services. *Id.* The seller may also opt for: (a) an exclusive agency agreement by promising that for the duration of the contract period he will not sell the property to a buyer procured by another broker; or (b) an exclusive right of sale agreement (also known as an exclusive sale listing) by giving the broker the exclusive right to sell the property, thus entitling him to a commission, regardless of who arranges the sale during the listing period. *Id.* at 94-96.

The GBR agreement provided for the payment of 6% commission based on the sale price, when title passed, if Van Winkle was "instrumental in effecting a sale or lease" of the property. *Van Winkle*, 103 N.J. at 337, 511 A.2d at 126.

16 *Van Winkle*, 103 N.J. at 338, 511 A.2d at 126.

17 *Id.*

18 *Id.* Although Van Winkle "vigorously contested" knowledge of the SBA loan, the trial court determined that such knowledge existed no earlier than June 3, 1980. *Id.* The appellate division later affirmed that determination, but held that the non-disclosure was immaterial since Van Winkle did not void the listing agreement at that point, but rather proceeded to procure a buyer. Van Winkle & Liggett and Latoracco [sic] Realty Corp. v. G.B.R. Francis [sic], Inc., A-768-83T3, A-1239-83T3, slip op. at 1-2 (N.J. Super. App. Div. Nov. 19, 1984).

19 *Van Winkle*, 103 N.J. at 338, 511 A.2d at 126.

20 *Id.* In a letter to GBR, Van Winkle also reiterated the commission clause of the listing agreement. *Id.*

21 *Id.* at 338-39, 511 A.2d at 126.

22 *Id.* at 339, 511 A.2d at 127.

23 *Id.*

24 *Id.* In a letter to the SBA, GBR assured them that "the sale of the real property would benefit both the S.B.A. and the borrowers. The borrowers would be free of some of the ownership costs and the S.B.A. would have a more liquid secur-

the loan.[25] GBR consequently terminated its contract with Columns pursuant to the contingency clause.[26]

Van Winkle and Latorraca filed suit against GBR to recover the broker's commission in the amount of $18,900.[27] In a counterclaim, GBR alleged breach of fiduciary duty, malicious prosecution, and fraud.[28] The trial court awarded Van Winkle the commission because as a matter of law, the seller owed a duty to the broker to refrain from unreasonably preventing the consummation of the sale.[29] The lower court held that GBR prevented the consummation of the transaction by offering "unreasonable conditions for release of the SBA mortgage."[30] Additionally, the court concluded that although GBR had a duty to disclose the SBA mortgage at the signing of the listing agreement, Van Winkle had waived its rights resulting from GBR's non-disclosure by using their best efforts to consummate the sale.[31]

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ity." *Id.* at 340, 511 A.2d at 127 (quoting Letter from Samuel Bornstein, counsel for GBR, to Howard Epstein, of the SBA (June 20, 1980)).

25 *Id.* The SBA asserted that, "[t]he purpose of this reduced rate loan was to fulfill a need resulting from a natural disaster and the real estate collateral was required as the business collateral was inadequate to secure the loan." *Id.* (citation omitted). The SBA consistently refused to approve GBR's and Columns' proposal to release the mortgage in exchange for substitute collateral.

26 *Id.* at 340-41, 511 A.2d at 128.

27 *Id.* at 341, 511 A.2d at 128. In a letter to GBR's attorney, the SBA expressed a willingness to release the mortgage in return for the proceeds of the sale of the property "unless there [was] a compelling business reason." *Id.* at 340, 511 A.2d at 127. Apparently, GBR chose not to exercise this option, and instead proffered their opinion that the collateral substitution was "undoubtedly more marketable" than the property itself. *Id.*, 511 A.2d at 128 (quoting Letter from Samuel Bornstein, counsel for GBR, to Ronald Langell, acting chief portfolio manager of the SBA (July 16, 1980)).

28 *Id.* at 341, 511 A.2d at 128. During the negotiations for the contract of sale, Van Winkle informed GBR that the principal shareholder of Columns was also a licensed real estate broker with Latorraca Realty who would be sharing in the commission. Van Winkle & Liggett v. G.B.R. Fabrics, No. L-68453-78, at 11-12 (N.J. Super. Ct. Law Div. Sept. 18, 1983) (transcript of oral decision). The trial court held that since GBR subsequently attempted to obtain the SBA release, they waived any rights flowing from Van Winkle's failure to disclose the buyer's dual status in a timely manner. *Id.* at 17-19.

29 103 N.J. at 341, 511 A.2d at 128. Although the trial court acknowledged that GBR had "full discretion" to set the terms of the sales contract, it found that their terms were unreasonable. *See Van Winkle*, No. L-68453-78, at 10-11 (N.J. Super. Ct. Law Div. Sept. 18, 1983) (transcript of oral decision). The trial court also dismissed Latorraca's claim. *Van Winkle*, 103 N.J. at 341 n.3, 511 A.2d at 128 n.3. The dismissal of the claim was not raised on appeal. *Id.*

30 *Van Winkle*, 103 N.J. at 341, 511 A.2d at 128. The trial court held that the SBA properly rejected the proposed collateral substitution by GBR as a condition for the mortgage's release. *Id.*

31 *Id. See* Van Winkle & Liggett v. G.B.R. Francis, [sic], Inc., Nos. A-768-83T3, A-1239-83T3, slip op. at 2 (N.J. Super. Ct. App. Div. Nov. 19, 1984).

The appellate division affirmed the trial court's decision.[32] The Supreme Court of New Jersey granted certification.[33] In reversing the appellate division's decision, the court held that "absent bad faith or special circumstances, the threshold standard for imposing liability on a seller for a brokerage commission in an aborted real estate transaction is a finding that the seller committed a breach of the sales contract."[34]

To the extent that the majority rule afforded a broker protection for bringing buyer and seller together, the harsh reality was that it placed the seller in a no-win situation, especially where the transaction was abandoned due to circumstances beyond the seller's control.[35] Many sellers attempted to avoid the inevitable by inserting commission clauses in brokerage agreements and contracts of sale, or conditioning payment of commission upon a certain date or event.[36] New Jersey courts, vexed by the interpretation of the ambiguous terms of these provisions, opted to construe these terms as "time" or "contingency" clauses.[37] When an agreement involved a "time" provision, the broker earned his commission when the buyer and seller signed the contract of sale.[38] In such instances, courts deferred payment until the closing date, regardless of the transaction's failure to materialize.[39] If an agreement contained a "contingency" clause, however, the broker's right to a commission fixed upon the happening of a specified event.[40]

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32 *Id.* at 3.

33 *Van Winkle*, 102 N.J. 333, 508 A.2d 210 (1985).

34 *Van Winkle*, 103 N.J. at 349, 511 A.2d at 132.

35 *See generally* Note, *Seller Beware*, *supra* note 2; Note, *A Reexamination*, *supra* note 2.

36 *See* Hinds v. Henry, 36 N.J.L. 328 (1873). *See infra* notes 41-54 and accompanying text for a discussion of *Hinds*.

37 Note, *A Reexamination*, *supra* note 2, at 87.

38 *See, e.g.*, Steinberg v. Mindlin, 96 N.J.L. 206, 114 A. 451 (1921); Courter v. Lydecker, 71 N.J.L. 511, 58 A. 1093 (Sup. Ct. 1904).

39 *See, e.g.*, Mercner v. Fay, 71 N.J. Super. 519, 522, 177 A.2d 481, 482 (App. Div. 1962) ("on date set for closing of title"); Winter v. Toldt, 32 N.J. Super. 443, 445, 108 A.2d 648, 649 (App. Div. 1954) ("upon the execution of the deed and the closing of title"); J.R. Tucker, Inc. v. Mahaffey, 6 N.J. Misc. 17, 18 (Sup. Ct. 1928) ("due and payable at time of final settlement").

40 *See, e.g.*, Richard v. Falleti, 13 N.J. Super. 534, 536, 81 A.2d 17, 17 (App. Div. 1951) ("one-half on signing agreement for sale of property and the balance on delivery of deed"); Leschziner v. Bauman, 83 N.J.L. 743, 743, 85 A. 205, 205 (1912) ("on the day of passing title or July 15th"); Dresser v. Gilbert, 81 N.J.L. 358, 359, 79 A. 1043, 1043 (Sup. Ct. 1911) ("for selling said property"); Hinds v. Henry, 36 N.J.L. 328, 329 (1873) ("the first half thereof . . . at the time that the purchasers of the property hereinbefore mentioned shall pay over the first half of the purchase money, and the balance at the expiration of one year from the date of the deed").

In 1873, in *Hinds v. Henry*,[41] a New Jersey appellate court[42] established the general rule governing brokers' commissions in sales contracts involving contingency clauses. On December 6, 1866, Benjamin Hinds and Eugene Henry entered into an agreement by which Hinds would have received a real estate commission if he effectuated the sale of Henry's property before January 15, 1867.[43] On January 9, the parties agreed to extend the terms of the sale to March 15.[44] On March 28, 1867, Hinds drafted a contract of sale between Henry and the prospective purchasers of the property.[45] The following day, Hinds and Henry re-executed the December 6, 1866 agreement.[46] At the closing, the purchasers discovered a cloud on the title to a portion of the land and withdrew from the deal.[47] Hinds brought an action against Henry to recover his broker's commission.[48] The trial court held in favor of Henry.[49]

In affirming the lower court's decision, the supreme court ruled that a broker, as an agent, was entitled to recover for commissions only in the presence of an employment contract and retainer by his principal.[50] The court asserted that generally, a broker earned a right to a commission when he procured a purchaser who was "able

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41 36 N.J.L. 328 (Sup. Ct. 1873).

42 In 1844, the New Jersey Constitution provided that "the court of last resort" would be named the Court of Errors and Appeals. PAUL AXEL-LUTE, NEW JERSEY LEGAL RESEARCH HANDBOOK 59 (1984). In 1873, the New Jersey Supreme Court was an intermediary court which exercised both original and appellate jurisdiction. *Id.* Under the 1947 constitution, the Court of Errors and Appeals became the New Jersey Supreme Court. *Id.*

43 *Hinds*, 36 N.J.L. at 328. Henry owned approximately thirteen hundred acres of land in Pennsylvania. *Id.* Henry's father acquired a portion of the land referred to as the Paschal tract at a tax sale. *Id.* at 328-29.

44 *Id.* The original agreement stipulated that Hinds was entitled to a commission for any amount received for the property over $12,000. *Id.* at 328. The subsequent time extension did not affect the terms of the commission. *See id.* at 328-29.

45 *Id.* at 329. On February 18, 1867, Henry gave Hinds power of attorney to make all the necessary agreements for the sale of the property. *Id.* The contract of sale conveyed the property "in fee simple, clear of all encumbrances, for the sum of $15,000." *Id.*

46 *Id.* The new agreement stipulated that Hinds was entitled to a $3,000 commission payable to him, "the first half thereof (say $1500), at the time that the purchasers of the property hereinbefore mentioned shall pay over the first half of the purchase money, and the balance at the expiration of one year from the date of the deed for said property . . . ." *Id.*

47 *Id.* at 329-30. The encumbrance was a tax title on the Paschal tract. *Id.* at 329. The tax title was later determined to be worthless. *Id.* at 334.

48 *Id.* at 330. Hinds sued on the contract of March 29, 1867 for services rendered in negotiating the sale. *Id.*

49 *Id.* The trial court heard the case without a jury. *Id.*

50 *Id.* The court added that "[s]ervices rendered as a mere volunteer, without any employment, express or implied" gave no right to a brokerage commission. *Id.*

and willing" to comply with the terms of the sale.[51] Additionally, the court acknowledged that a broker was entitled to contract with the seller by conditioning his commission upon the occurrence of a specified event.[52] Furthermore, the court indicated that where a broker's commission was contingent upon a certain event, regardless of whether the event was within his control, the terms of the contract determined the rights and liabilities of the parties.[53] The court noted that due to the defect in title, none of the contingencies occurred.[54] The court concluded that a commission is recoverable, despite the absence of the specified event, where the sale was prevented by the seller's willful or fraudulent conduct.[55]

In *Murray Apfelbaum, Inc. v. Topf*,[56] the court considered the seller's conduct in relation to an agreement's contingency clause.[57] In *Apfelbaum*, the seller and broker entered into an agreement which provided that the seller would pay a commission when the broker effectuated the sale pursuant to the contract terms.[58] The agreement further stipulated that the seller was under no obligation to pay the broker if the title failed to pass, unless such failure resulted from the seller's "default."[59] The broker produced a buyer, and the

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51 *Id.* at 332. The court observed that this premise "rests upon the general usage of the business, and is liable to be modified or superseded by a special usage in relation to the particular transaction, in connection with which the broker was employed, or by special agreement between the parties." *Id.*

52 *Id.* Although a broker was free to condition his commission upon a contingency, the court indicated that he might be bound by "a contingency which his efforts cannot control, even though it relate[s] to the acts of his principal." *Id.*

53 *See id.* at 330.

54 *Id.* at 333. The *Hinds* court determined that Hinds' employment contract expired on March 15, 1867. *Id.* at 331. The court opined that services performed thereafter were voluntary and therefore merited no compensation. *Id.* As to the March 29, 1867 agreement, the court asserted that the broker's commission was contingent upon the purchaser's payment of one-half of the purchase price and a one year passage of time from the date of the deed's delivery. *Id.* at 333.

55 *Id.* at 333-34. The court found that the "defendant made no fraudulent concealment of the defect in his title, and that [Hinds] acted with full knowledge that his efforts might be made abortive by the defendant's inability to convey . . . ." *Id.* at 335.

56 104 N.J.L. 343, 140 A. 295 (1928).

57 *Id.*

58 *Id.* at 344, 140 A. at 296. The Topfs agreed to pay "three and one-half per cent. [sic] on the first $20,000 of the purchase price and two and one-half per cent. [sic] on the balance thereof." *Id.* Apfelbaum sought to recover a total commission of $3,575. *Id.*

59 *Id.* In the agreement between Apfelbaum and the Topfs, the Topfs stated that they would be liable "only in the event of passing of title or in the event of failure to pass title, through our default." *Id.*

parties entered into a contract of sale.[60] After a title search revealed that the property was subject to restrictions contained in an earlier deed in the chain of title, the prospective buyers withdrew from the sale.[61] In an action to recover damages, the broker alleged that under the contract the seller's failure to convey clear title constituted default, and thus rendered the seller liable for the commission.[62]

The *Apfelbaum* court acknowledged the vendee's right to legitimately refuse a defective title.[63] The court stated that unless the seller fraudulently concealed the defect or prevented the passage of title by some other willful act, the seller would not be obligated to pay the broker's commission.[64] The court also construed the word "default" as it appeared in the agreement to mean "some willful act done . . . to defeat the passing of the title, and the consummation of the sale."[65]

Eleven years later, in *Lippincott v. Content*,[66] New Jersey's highest court interpreted a commission clause where the seller and the proposed buyer modified their original contract to allow the filing of a

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60 *Id.* at 345, 140 A. at 296. The contract of sale called for a purchase price of $135,000. *Id.*

61 *Id.* The earlier deed in the chain of title contained a covenant which restricted the use of the property for

> any brewery, slaughter house, glue or chemical factory of any kind, any beer saloon, beer cellar or any place in which beer, wines or liquors shall be sold, or any building in which shall be carried on any business offensive, noxious or detrimental to the use of said land or the adjoining or contiguous land or any part of the same for private residence, nor shall said land be used for any purpose which would create a nuisance.

Id.

62 *Id.* at 344, 140 A. at 296.

63 *Id.* at 346, 140 A. at 296.

64 *Id.* at 346-47, 140 A. at 296-97. Regarding the restrictive covenants which were held not to have been released or canceled by the trial court, the *Apfelbaum* court found it unnecessary to consider

> whether or not they had ceased to be of any legal force, since the adoption of the eighteenth constitutional amendment, the Volstead [a]ct, and the statutes of this state, and under the ordinances of the municipality, in which the premises are situated, by reason of the legislation referred to, and whereby the restrictions had become mere personal covenants to be entered into by a purchaser to refrain from committing violations of law, and, hence, now relate to personal conduct of the owner of land, and not to the use of the land for any and all lawful purpose or purposes.

Id. at 346, 140 A.2d at 296. The court instead focused on the issue of whether "the failure to pass title" resulted from the seller's default. *Id.*

65 *Id.* at 347, 140 A. at 297. The *Apfelbaum* court found that the case was "utterly barren" of any willful misconduct on the part of the Topfs or any evidence indicating that they knew of any restrictions on the use of the land. *Id.*

66 123 N.J.L. 277, 8 A.2d 362 (1939).

suit by the owner to quiet title.[67] When the seller's action to quiet title was unsuccessful, the purchaser terminated the contract.[68] Although the sale was never consummated, the broker sued on the contract which provided for the "commission to be paid in consideration of services rendered in consummating this sale . . . to become due and payable upon [the] closing [of] title."[69] The court held in favor of the seller.[70]

In reaffirming the legality of commission clauses, the *Lippincott* court noted that the parties were bound by the terms of those clauses if they incorporated them in the contract of sale.[71] The court maintained that although the contract clauses were specific, the agreement did not clearly indicate that the broker's commission was contingent upon the passage of title.[72] The parties' conduct, as well as the wording of the agreement, indicated to the court that the passage of title was "requisite performance" to the broker's right to a commission.[73]

In *Alexander Summer Co. v. Weil*,[74] the appellate division undertook a further analysis of the seller's conduct in a title-defect case.[75] The broker and the seller entered into a listing agreement, which they subsequently modified.[76] The modified agreement stipulated that the broker was entitled to a commission "payable if, as, and

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67 *Id.* at 278, 8 A.2d at 362. The buyer and seller subsequently postponed the closing date. *Id.* at 278-79, 8 A.2d at 362.

68 *Id.* at 279, 8 A.2d at 362. In the trial court, the seller claimed ownership by adverse possession. Content v. Dalton, 122 N.J. Eq. 425, 426-27, 194 A. 286, 287 (1937). The New Jersey Court of Errors and Appeals affirmed the trial court's decision. *Id.* at 440, 194 A. at 294.

69 *Lippincott* at 279, 8 A.2d at 362.

70 *Id.* at 280, 8 A.2d at 363. In affirming the trial court's decision, the Court of Errors and Appeals held that: "Since the actual passing of title to the property was a necessary condition to fulfillment of the right to the commission, omission of that element left the claim of the agent incomplete. Direction of a verdict in favor of the defendant owner was therefore appropriate." *Id.*

71 *Id.* at 279, 8 A.2d at 363. The *Lippincott* court declared that the parties' freedom to contract was "subject only to legality of the purpose, and the consideration of public policy." *Id.*

72 *Id.* at 279-80, 8 A.2d at 363. The *Lippincott* court indicated that the agreement in question was the result of poor draftsmanship. *See id.* at 280, 8 A.2d at 363. The court opined that language of the agreement "in consummating this sale" and "upon closing title" was sufficient to show that the closing was more than a "chronological marking." *Id.* at 280, 8 A.2d at 363.

73 *Id.* at 280, 8 A.2d at 363.

74 16 N.J. Super. 94, 83 A.2d 787 (App. Div. 1951).

75 *Id.*

76 *Id.* at 96, 83 A.2d at 787. The modification was in response to an option agreement between the buyer and seller. *Id.* at 96-97, 83 A.2d at 788. It stipulated that if the seller was unable to convey clear title, she would have the option to rectify the situation within thirty days. *Id.* at 96, 83 A.2d at 788. Additionally, the

when title closes, and not otherwise."[77] The purchaser conducted a title search which revealed that the property was subject to a reservation within an earlier deed.[78] The seller failed to locate any heirs or descendants of the original grantor, and the purchasers refused to proceed with the transaction.[79] In his action to recover the commission, the broker alleged that the seller's failure to disclose and remove the defect in title prevented the actual passage of title.[80]

The trial court granted the seller's motion for summary judgment.[81] In affirming the lower court's decision, the appellate court construed the commission clause as making the passage of title a condition precedent to the seller's liability for payment.[82] Citing the *Apfelbaum* holding,[83] the court stated that the condition precedent would not be excused unless the seller fraudulently concealed the defect or prevented the passage of title by some other willful act.[84]

The supreme court similarly imposed a good faith standard as a defense to a contingency clause in a seller-broker agreement in *Blau v. Friedman*.[85] In 1947, Morris Friedman and his mother Sarah Friedman, co-owners of an apartment building, created a trust which named Morris as a trustee for his mother's half of the prop-

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agreement provided that if the seller failed to remove the defect, she would return any money which she had received from the buyer. *Id.*

77 *Id.* at 97, 83 A.2d at 788.

78 *Id.* In 1848, the grantor reserved a portion of the land to be used as a "burying ground." *Id.*

79 *Id.* at 98, 83 A.2d at 789. In her attempt to locate the heirs of the original grantor, the seller examined genealogy records, cemetery records and even tombstones. *Id.*

80 *Id.* at 97, 83 A.2d at 788. The seller's father acquired the property approximately 30 years before the case came to court. *Id.* at 98, 83 A.2d at 788-89. The seller's attorney proffered a warranty deed with affidavits attesting to "open, continued, adverse and notorious possession of the [land] for more than 29 years . . . ." *Id.*, 83 A.2d at 789. The purchasers refused to accept the deed. *Id.*

81 *Id.* at 96, 83 A.2d at 787.

82 *Id.* at 99, 83 A.2d at 789 (citing Lippincott v. Content, 123 N.J.L. 277, 8 A.2d 362 (1939); Murray Apfelbaum, Inc. v. Topf, 104 N.J.L. 343, 140 A. 295 (1928)).

83 *Id.* at 100-01, 83 A.2d at 790. *See supra* note 64 and accompanying text.

84 *Summer*, 16 N.J. Super. at 100-01, 83 A.2d at 790. The court noted that neither the complaint nor the facts gave rise to the issue of whether the seller fraudulently concealed the defect in the chain of title. *Id.* at 101, 83 A.2d at 790.

The *Summer* court borrowed the language of the *Apfelbaum* court:

> The case is utterly barren of any testimony or circumstance indicating that the respondents even knew of the existence of the restrictions in the ancient deed, or of any willful act on their part to which the failure to pass title and consummate the sale was due.

Id. (quoting *Apfelbaum*, 104 N.J.L. at 347, 140 A. at 297).

85 26 N.J. 397, 140 A.2d 193 (1958).

erty and granted him full power of sale.[86] Five years later, Sarah revoked her son's power of sale without his knowledge.[87] In 1956, Morris, his wife and a broker signed an agreement authorizing the broker to sell the apartment building with a commission payable upon the passage of title.[88] The broker procured a purchaser for the Friedmans' property.[89] Morris instructed his attorney to draw the contract of sale, and subsequently learned about his mother's revocation of the trust.[90] Sarah refused to participate in the sale and the buyer declined to proceed with the transaction.[91]

The broker sued to recover the commission he alleged he would have received if the Friedmans had not misrepresented their ownership of the property.[92] In holding for the plaintiff, the trial court determined that regardless of Morris's knowledge of the revocation, his power of sale was not the equivalent of ownership.[93] The court concluded that the contingency agreement would not deprive the broker of his right to a commission when he procured a "ready, willing and able" purchaser in reliance upon the Friedmans' misrepresentation.[94] The appellate division affirmed holding that in light of Morris's misrepresentation, even if made in good faith, the contingency clause could not shield him from liability.[95]

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86 *Id.* at 398, 140 A.2d at 193-94. Although Morris and his mother purchased the building together, only Morris's name appeared on the deed. *Id.* at 398, 140 A.2d at 193.

87 *Id.* at 398-99, 140 A.2d at 194.

88 *Id.* at 399, 140 A.2d at 194. The agreement stipulated that the commission was payable "if, as and when title to the property actually passes to the purchaser." *Id.* Additionally, since the sellers signed an exclusive agency listing agreement, the commission was payable to the broker, regardless of who produced the buyer. Blau v. Friedman, 46 N.J. Super. 573, 576, 135 A.2d 227, 228 (App. Div. 1957).

89 *Blau*, 26 N.J. at 399, 140 A.2d at 194.

90 *Id.* Morris and Sarah Friedman shared the same attorney. *Id.*

91 *Id.* Eager to sell, Morris offered to sell his half of the property, but the purchaser rejected the offer. *Id.* Morris also offered the broker a perpetual exclusive agency listing on the property. *Id.* The broker declined that offer. *Id.*

92 *Id.* at 399-400, 140 A.2d at 194. At trial, the seller's attorney testified that the broker knew of Sarah's interest in the property. *Id.* at 403-04, 140 A.2d at 196. The trial court did not expressly decide this issue. *Id.*

93 *Id.* at 400, 140 A.2d at 194. The trial court awarded the broker $5,685, which represented 5% of the $113,700 sales price stipulated in the agreement. *Blau*, 46 N.J. Super. at 576, 135 A.2d at 228-29.

94 *Blau*, 26 N.J. at 400, 140 A.2d at 194-95. The basis for the trial court's decision was that the defendants represented themselves as owners of the property "when in fact they knew they only owned a portion of it." *Id.* at 400, 140 A.2d at 194.

95 *Blau*, 46 N.J. Super. at 580-81, 135 A.2d at 231. The appellate court concluded that:

> At best, we are asked to envision a situation in a scenic environment in which the vendors actually deceived their broker but did not mean to do

The supreme court reversed and held that the lower courts had erroneously disregarded Morris's knowledge of Sarah's revocation as immaterial.[96] The court maintained that if the defendants knew or had reason to know of Sarah's revocation, they could not invoke the contingency clause as a defense.[97] Conversely, the court asserted that, if the sellers acted in good faith, and with the conscientious belief in their legal power as owners, the contingency clause protected them from liability for the broker's commission.[98]

The supreme court in *Ellsworth Dobbs, Inc. v. Johnson* addressed the issue of a seller's liability for a brokerage commission where the sale failed due to the prospective buyer's default.[99] In 1960, the Johnsons authorized Ellsworth Dobbs, Inc. to sell their 144 acre farm property.[100] Iarussi, a real estate developer, had contacted the Dobbs agency to assist him in the acquisition and purchase of property.[101] After Dobbs introduced Iarussi to the Johnsons, the prospective buyer and sellers entered into an oral agreement of sale.[102] Iarussi, however, failed to obtain financing, and the deal

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> so. In such an exigency of affairs, will the law permit the defendants to utilize the contingency clause as a shield to insulate them *ex aequo et bono* from rewarding the plaintiff for his acknowledged services? Upon mature consideration our answer is to the contrary.

Id.

96 *Blau*, 26 N.J. at 404, 140 A.2d at 196. The supreme court held that the trial and appellate courts made no inquiries into the sellers' good faith or conscientious belief in their legal power, as owners, to sell the premises. *Id.* On this basis, the supreme court remanded the issue of whether the seller acted in good faith for further proceedings consistent with its opinion. *Id.*

97 *Id.* at 403, 140 A.2d at 196 (citing Murray Apfelbaum, Inc. v. Topf, 104 N.J.L. 343, 140 A. 295 (1928). According to the *Blau* court, the contingency clause shielded the sellers from liability for the commission "unless . . . they fraudulently concealed the limited nature of their title to the property or engaged in some other willful act which prevented the consummation of the sale." *Id.*

98 *Id.* The supreme court noted that the sellers signed the exclusive listing agreement on a form prepared by the broker "with his own choice of language." *Id.* at 403, 140 A.2d at 196. The court held that if the sellers viewed the terms of the agreement as "simply descriptive of the property and their ability to convey it," then their conduct could not be characterized as fraudulent or intentionally misleading. *Id.*

99 50 N.J. 528, 236 A.2d 843 (1967).

100 *Id.* at 536, 236 A.2d at 847. The Johnsons also listed the property for sale with several other agencies. *Id.*

101 *Id.* Iarussi was interested primarily in acquiring the property for residential development. *Id.* at 536-37, 236 A.2d at 847. According to the broker, Iarussi agreed that if Dobbs successfully located satisfactory property, Iarussi would enter into a contract of sale with the seller, who would pay Dobbs' commission. *Id.* at 536, 236 A.2d at 847. At trial, Iarussi admitted that Dobbs had previously assisted him in acquiring "at least four pieces of property." *Id.* at 537, 236 A.2d at 847. In each of these transactions, the seller paid Dobbs a commission. *Id.*

102 *Id.*

collapsed.[103]

The following year, Iarussi met with the Johnsons again, and on May 1, 1961, they entered into a contract of sale, and set the closing date for September 1 of that year.[104] The parties agreed that the Johnsons would pay the Dobbs agency a commission for "services rendered in consummating [the] sale" in accordance with the terms of the contract.[105] At the closing, Iarussi revealed that his attempts to secure financing again were futile, and the Johnsons granted his request for an extension of time until February 20, 1962.[106] At this new closing date, despite Iarussi's claim that he had acquired the necessary backing, a disagreement arose over the prior extension agreement and the closing again failed.[107] Iarussi instituted an ac-

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103 *Id.*

104 *Id.* The *Ellsworth Dobbs* court noted conflicting testimony with regard to Iarussi's financial ability to complete the transaction. *Id.* at 537-38, 236 A.2d at 847-48. According to the Johnsons, the Dobbs agency assured them that Iarussi would be financially able to consummate the deal. *Id.* at 537, 236 A.2d at 847. Iarussi contended that Dobbs offered assistance in securing the necessary financial backing. *Id.* at 538, 236 A.2d at 847-48. The Dobbs agency denied any discussion of financial assistance with Iarussi. *Id.* at 538, 236 A.2d at 848.

105 *Id.* at 539, 236 A.2d at 848. The contract of sale provided for a purchase money note and mortgage. *Id.* at 538, 236 A.2d at 848. In addition, the Johnsons agreed to release the mortgage, one lot at a time, for each payment of $2,500. *Id.* The contract further stipulated that the sellers pay the broker's commission in installments:

> The commission hereinafter mentioned shall be payable as follows: $5,000[ ] when sellers shall have received a total of $25,000[ ] on account of the above purchase price ($10,000[ ] herewith and $15,000[ ] on account of the principal sum of the above mentioned purchase money note and mortgage); an additional $5,000[ ] when an additional $25,000[ ] shall have been paid on account of the principal sum of purchase money note and mortgage; and the remaining $5,000[ ] when an additional $25,000[ ] shall have been paid on account of the principal sum of said purchase money note and mortgage. The entire commission of $15,000[ ] shall become immediately due and payable upon any sale or assignment by sellers of said purchase money note and mortgage.

Id. at 539, 236 A.2d at 848.

106 *See id.* at 539-40, 236 A.2d at 848-49. By September 1, 1961, the Johnsons received $2,500 from Iarussi. *Id.* at 539, 236 A.2d at 848. The Johnsons testified that they agreed to extend the closing date in return for Iarussi's promise to pay the property taxes from September 1 until the new closing date of February 20, 1962. *Id.* The Johnsons, eager to close the sale, assisted Iarussi in his efforts to obtain a financial backer. *See id.*, 236 A.2d at 849. Dismayed with the "lack of progress," the Johnsons approached the broker from the Dobbs agency, who agreed to lower the commission from $15,000 to $10,000 if the Johnsons sent a "time-of-the-essence" letter to Iarussi. *Id.* at 539-40, 236 A.2d at 849. The letter was sent to Iarussi on February 9, 1962. *Id.* at 540, 236 A.2d at 849.

107 *Id.* The dispute concerned Iarussi's failure to pay the interest and taxes which he allegedly agreed to do when the Johnsons had granted him an extension of time.

tion for specific performance, claiming that he was "ready and willing" to buy.[108] The Johnsons, who filed an answer asserting their willingness to proceed with the deal asked the court to set another closing date.[109] The trial court granted the Johnsons' motion for a summary judgment and ordered a closing date set for "not later than May 15, 1962."[110] On that date, Iarussi announced that he had lost his financial backing, and the closing failed for the fourth and final time.[111]

Ellsworth Dobbs, Inc. filed suit against the Johnsons and Iarussi to recover the brokerage commission.[112] The trial court interpreted the commission clause as a time provision and held that the broker earned his commission when the buyer and the seller executed their contract of sale.[113] The trial court held that, in the alternative, if the commission clause was a contingency provision, the parties' mutual releases prevented the fulfillment of the contingency under the contract.[114] In holding that a jury question existed as to the Johnsons'

Id. Although Iarussi denied that he had ever agreed to such terms specifically, he admitted in an affidavit that he "never denied he would pay the Johnsons something for interest and taxes . . . ." *Id.* at 539, 236 A.2d at 848-49.

108 *Id.* at 540, 236 A.2d at 849.

109 *Id.* In addition to their answer, the Johnsons counterclaimed requesting specific performance and also sought a judgment to enforce Iarussi's agreement to pay the interest and taxes. *Id.*

110 *Id.* The trial court transferred the Johnsons' damages claim for the interest and taxes to the Law Division of the New Jersey Superior Court. *Id.*

111 *Id.* at 540-41, 236 A.2d at 849. When the closing failed, the Johnsons' attorney advised them that they would be unable to sell their land if they pursued further legal action against Iarussi. *Id.* at 541, 236 A.2d at 849. Iarussi realized that he was confronted with the judgment for specific performance and with the suit for the payment of interest and taxes. *Id.* Both parties executed written mutual releases and discharged their mutual obligations under the contract of sale. *Id.* at 541, 236 A.2d at 850. Under the terms of their respective releases, the Johnsons agreed to refund Iarussi's $2,500 down payment when they received $25,000 cash from the next prospective buyer. *Id.* at 541-42, 236 A.2d at 850. The parties also agreed to drop the suit pending in the superior court. *Id.* at 542, 236 A.2d at 850. In return, Iarussi stipulated that he would turn over to the Johnsons "all maps, surveys, plans and engineering data" relating to the subdivision of the land, and that he would "save the Johnsons harmless from any commission claim" made by the Dobbs agency. *Id.*

112 *Id.* The Dobbs agency sought to recover a $15,000 commission with interest accruing from the final closing date. *Id.*

113 *Id.* The Johnsons urged the trial court to consider their dilemma resulting from Iarussi's frustrating conduct. *Id.* Relying on established law, the trial court refused to consider their argument. *Id.*

114 Ellsworth Dobbs, Inc. v. Johnson, 92 N.J. Super. 271, 277, 223 A.2d 199, 202 (App. Div. 1966). The trial court held that a determination of Iarussi's liability raised a jury question as to whether Iarussi "breach[ed] an implied agreement with [his] broker to complete the transaction." *Ellsworth Dobbs*, 50 N.J. at 543, 236 A.2d at 850. The jury found that an implied agreement existed, and that Iarussi

liability, the appellate division reversed the trial court's decision and remanded for a determination of that issue.[115] The New Jersey Supreme Court reversed the appellate division's decision to remand the issue of seller liability, and held that the trial court erred in imposing liability on the Johnsons for the brokerage commission.[116] The supreme court held that as a matter of law "a broker is not entitled to [a] commission from the seller if title does not pass because of the inability or fault of the customer . . . ."[117]

Justice Francis, writing for the court, initially undertook a comprehensive analysis of the traditional legal principles governing a brokerage commission.[118] The justice posited that in a realistic setting, the relationship between the seller and the broker was based on the seller's reasonable expectation that the broker's commission would be derived from the proceeds of the sale.[119] The court main-

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breached the agreement by failing to perform under the terms of the contract of sale. *Id.* at 535, 236 A.2d at 846. Rather than submit the issue of the Johnsons' liability to the jury, the trial judge instructed the jury to find for the broker and to assess the amount of commission due him. *Id.* The jury found that Iarussi was liable for the $15,000 commission. *Ellsworth Dobbs*, 92 N.J. Super. at 277, 223 A.2d at 202.

115 *Id.* at 282, 223 A.2d at 205. The appellate division also held that the trial court erred in submitting the issue of Iarussi's liability to the jury. *Id.* at 283, 223 A.2d at 205.

116 *Ellsworth Dobbs*, 50 N.J. at 562, 236 A.2d at 861. The supreme court asserted that contrary to the trial court's holding, the issue of Iarussi's liability was a question for the jury. *Id.* at 543, 236 A.2d at 850. The court further declared that a jury question existed as to whether Dobbs understood and agreed "expressly or impliedly" to a contingency provision in the commission agreement. *Id.* at 562, 236 A.2d at 861. The court stated that if the jury found for Iarussi on the latter issue, Dobbs would have no right to a commission. *Id.*

117 *Id.* at 555, 236 A.2d at 857. Justice Francis summarized the rule governing brokerage commissions as follows:

> When a broker is engaged by an owner of property to find a purchaser for it, the broker earns his commission when (a) he produces a purchaser ready, willing and able to buy on the terms fixed by the owner, (b) the purchaser enters into a binding contract with the owner to do so, and (c) the purchaser completes the transaction by closing the title in accordance with the provisions of the contract.

Id. at 551, 236 A.2d at 855. The court premised the decision on public policy grounds which traditionally looked upon the broker as a fiduciary and required him to exercise "fidelity, good faith and primary devotion to the interests of his principal." *Id.* at 553, 236 A.2d at 856 (citing Wilcox v. Reynolds, 169 Okla. 153, 36 P.2d 488 (1934); Haydock v. Stow, 40 N.Y. 363 (1869)).

118 *Ellsworth Dobbs*, 50 N.J. at 543-61, 236 A.2d at 850-60.

119 *Id.* at 547, 236 A.2d at 852-53. The court stated that:

> There can be no doubt that ordinarily when an owner of property lists it with a broker for sale, his expectation is that the money for the payment of commission will come out of the proceeds of the sale. He expects that if the broker produces a buyer to whom the owner's terms of sale are satisfactory, and a contract embodying those terms is executed, the

tained that the seller could similarly anticipate liability for a commission if the failure to close title was due primarily to his wrongful or frustrating conduct.[120] The court then held that regardless of special contingency agreements based on the passage of title,[121] the general rule governing the broker-seller relationship was "absent default by the owner, the contract of sale must be performed by the buyer before liability for commission is imposed upon the owner."[122] Nearly twenty years later, in *Van Winkle & Liggett v. G.B.R. Fabrics, Inc.*, the New Jersey Supreme Court considered the result of the *Ellsworth Dobbs* decision in the context of a seller's default.[123]

> buyer will perform, *i.e.* he will pay the consideration and accept the deed at the time agreed upon. Considering the realities of the relationship created between owner and broker, that expectation of the owner is a reasonable one, and, in our view, entirely consistent with what should be the expectation of a conscientious broker as to the kind of ready, willing and able purchaser his engagement calls upon him to tender to the owner.

Id.

120 *Id.* at 548, 236 A.2d at 853.

121 *Id.* at 551, 236 A.2d at 855. Unlike prior courts' handling of cases involving contingency agreements, the *Ellsworth Dobbs* decision hinged on its interpretation of the "ready, willing and able" theory rather than the closing of title. *Id.* This decision, however, had the same effect, because the closing was the event by which the purchaser's ability to perform would be judged. Note, *A Reexamination*, *supra* note 2, at 87-88 n.35 (1968).

122 *Ellsworth Dobbs*, 50 N.J. at 551, 236 A.2d at 855. The *Ellsworth Dobbs* court, concerned with the "substantial inequality of bargaining power" between the seller and the broker, sought to reinforce the protection afforded the unsophisticated seller by restricting the broker's freedom to contract unfairly. *Id.* at 555, 236 A.2d at 857.

123 103 N.J. at 335, 511 A.2d at 124. Other states have accepted some form of the *Ellsworth Dobbs* rule. *See, e.g.*, Drake v. Hosley, 713 P.2d 1203 (Alaska 1986); Potter v. Ridge Realty Corp., 28 Conn. Supp. 304, 259 A.2d 758 (Super. Ct. 1969); Strout Realty, Inc. v. Milhous, 107 Idaho 330, 689 P.2d 222 (Ct. App. 1984); Mullenger v. Clause, 178 N.W.2d 420 (Iowa 1970); Winkelman v. Allen, 214 Kan. 22, 519 P.2d 1377 (1974); Tristram's Landing, Inc. v. Wait, 367 Mass. 622, 327 N.E.2d 727 (1975); Associated Agency of Bozeman, Inc. v. Pasha, 625 P.2d 38 (Mont. 1981); Cornett v. Nathan, 196 Neb. 277, 242 N.W.2d 855 (1976); Goetz v. Anderson, 274 N.W.2d 175 (N.D. 1978); Setser v. Commonwealth, Inc., 256 Or. 11, 470 P.2d 142 (1970); *see also, e.g.*, Adams v. Adams, 283 So.2d 503 (La. Ct. App. 1973). *Cf.*, Taylor Real Estate & Ins. Co. v. Greene, 274 Ala. 694, 151 So.2d 397 (1963). Colorado codified the rule entitling brokers to commissions as follows:

> No real estate agent or broker is entitled to a commission for finding a purchaser who is ready, willing, and able to complete the purchase of real estate as proposed by the owner until the same is consummated or is defeated by the refusal or neglect of the owner to consummate the same as agreed upon.

COLO. REV. STAT. § 12-61-201 (1985). As of this writing, New Jersey has not yet codified the *Ellsworth Dobbs* rule. *See* N.J. STAT. ANN. § 45:15-1 to -33 (West 1986).

In *Van Winkle*, the supreme court noted that while *Ellsworth Dobbs* settled the constructional difficulties associated with contingency clauses, the decision fell short of delineating the types of seller default that would render a seller liable for the payment of a brokerage commission.[124] Writing for the court, Justice Stein observed that "other decisions make it clear that a seller does not become liable for a commission merely because its conduct is a contributing factor in the breakdown of the sales transaction."[125]

The court articulated the general rule that the seller's inability to convey clear title constituted default.[126] However, the court further noted that this kind of default did not necessarily render the seller liable to the broker for the commission even though it may have contributed to the collapse of the sales transaction.[127] On the other hand, the court posited that where the seller's inability to perform was related to a willful or fraudulent act, or a "purely capricious refusal to act," liability would be imposed.[128] The court observed that the "fraudulent-willful" terminology had been extended to a case where the seller had "innocently misrepresented the quantity of land."[129] The court then determined that where the seller prevented the consummation of the sale as the result of "wrongful, fraudulent, willful or capricious" conduct, the seller would be estopped from invoking the contingency clause in order to avoid liability.[130]

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124 *Van Winkle*, 103 N.J. at 344, 511 A.2d at 130.

125 *Id. See also infra* notes 132-34 and accompanying text.

126 *Van Winkle*, 103 N.J. at 344, 511 A.2d at 130 (citing Conklin v. Davi, 76 N.J. 468, 388 A.2d 598 (1978); LaSalle v. LaPointe, 14 N.J. 476, 102 A.2d 761 (1954)).

127 *Id.* at 344-45, 511 A.2d at 130 (citing Blau v. Friedman, 26 N.J. 397, 140 A.2d 193 (1958); Lippincott v. Content, 123 N.J.L. 277, 8 A.2d 362 (1939); Murray Apfelbaum, Inc. v. Topf, 104 N.J.L. 343, 140 A. 295 (1928); Alexander Summer v. Weil, 16 N.J. Super. 94, 83 A.2d 787 (App. Div. 1951); Century 21-Candid Realty v. Cliett, 203 N.J. Super. 78, 495 A.2d 920 (Law Div. 1985)).

The New Jersey Superior Court has held that a seller, who withdrew from the contract of sale pursuant to an "attorney review clause," would not be held liable for a broker's commission. Century 21-Candid Realty v. Cliett, 203 N.J. Super. 78, 81, 495 A.2d 920, 922 (Law Div. 1985). The *Century 21* court declared that the seller's right to rescind the contract, pursuant to an attorney review clause, would be meaningless if the seller was held liable for the brokerage commission. *Id.* at 81, 495 A.2d at 922. The court further urged that the economic loss resulting from the seller's liability, in such a situation, might have the effect of preventing the seller from exercising his right to enforce the attorney review clause. *Id.*

128 *Van Winkle*, 103 N.J. at 345, 511 A.2d at 130 (quoting Alexander Summer v. Weil, 16 N.J. Super. at 99, 83 A.2d at 787).

129 *Id.* (citing Gottlieb v. Connolly, 5 N.J. Misc. 372, 136 A. 599 (Sup. Ct. 1927)).

130 *Van Winkle*, 103 N.J. at 346, 511 A.2d at 131 (quoting Note, *A Reexamination*, *supra* note 2, at 90). The court stated that the remedy afforded a broker in a situation involving a seller's misconduct is "equitable in nature and based on the princi-

Justice Stein next examined GBR's conduct as it related to the sales contract.[131] The justice stated that the rights of a broker were determined by the rights of the parties to the contract of sale.[132] Accordingly, Justice Stein noted that if the seller's conduct merely contributed to the failure to close title, the broker was not entitled to collect a commission.[133] Justice Stein indicated that in such instances the court would reject the broker's claim for a commission against the seller if the seller had not breached the sales contract.[134]

Justice Stein then reviewed the terms of the sales contract and noted that the sale was conditioned explicitly on the SBA's release of its mortgage in accordance with the terms proposed by GBR.[135] As a result, the court determined that GBR had the duty to use its best efforts to obtain a release from the lien.[136] The justice noted that the record revealed no claim for breach of contract against GBR.[137] Moreover, the court maintained that GBR made substantial efforts to secure the release of the mortgage.[138] The supreme court rejected Van Winkle's argument that the contract's provision for the collateral substitution was "unreasonable and inconsistent" with GBR's duty to Van Winkle to refrain from preventing the sale

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ple of estoppel: 'One who actively prevents the occurrence of a condition cannot rely on the nonoccurrence of that condition [to avoid liability].' " *Id.* (citing George H. Beckmann, Inc. v. Rainbow's End (Zincke's), 40 N.J. Super. 193, 199-200, 122 A.2d 519, 522-23 (App. Div. 1956); Kiefhaber v. Yannelli, 9 N.J. Super. 139, 142, 75 A.2d 478, 479 (App. Div. 1950); Rothman Realty Corp. v. Bereck, 73 N.J. 590, 602-03, 376 A.2d 902, 908 (1977)).

131 *Id.* at 347-48, 511 A.2d at 131-32.

132 *Id.* at 347, 511 A.2d at 131. In examining the seller's conduct and the rights of the parties to the contract, the court stated that "there is no reason to elevate the rights of the broker to a level higher than that of the parties to the contract of sale." *Id. See also id.* at 347 n.6, 511 A.2d at 131 n.6 (citing Note, *A Reexamination*, *supra* note 2, at 91-92 & n.61). The *Van Winkle* court reasoned that a broker expected to earn a commission *only if he was successful*. *Van Winkle*, 103 N.J. at 347, 511 A.2d at 131 (citing Harris v. Perl, 41 N.J. 455, 462, 197 A.2d 359, 363 (1964) (emphasis added).

133 *Van Winkle*, 103 N.J. at 347, 511 A.2d at 131.

134 *Id.*

135 *Id.* at 347-48, 511 A.2d at 132. The court noted that, in the contract of sale, GBR and Columns agreed that GBR's release from the SBA lien was conditioned "upon terms which are satisfactory to the Seller, in its sole discretion, by July 7, 1980." *Id.*

136 *Id.* at 348, 511 A.2d at 132. The supreme court found that in the contract of sale with Columns, GBR had the duty to insert reasonable terms and to use its best efforts to secure the release of the lien with the SBA's consent. *Id.* at 349, 511 A.2d at 132.

137 *Id.* at 348, 511 A.2d at 132. The *Van Winkle* court found that GBR and Columns terminated the contract of sale pursuant to the contingency regarding the SBA's release of the lien. *Id.* at 340-41, 511 A.2d at 128.

138 *See id.* at 348, 511 A.2d at 132.

from closing.[139] Justice Stein noted that GBR reasonably had intended to substitute the tax-exempt securities, using the proceeds of the sale of the property.[140]

The justice also dismissed the SBA's and the trial court's charge that the loan funds were being used to purchase the proposed securities, since GBR owned the property before applying for the disaster loan.[141] Additionally, the court noted that the proposed collateral was equal to the value of the property and was by far more liquid than the property itself.[142] The court was also satisfied with the fact that the SBA would retain exclusive approval over the purchase or sale of securities in the portfolio.[143]

After considering these factors, the court found nothing to sustain an allegation of unreasonableness as to the proposal.[144] Justice Stein asserted that under the contract, GBR had the duty to propose reasonable terms and use its best efforts to obtain the release of the lien.[145] The justice opined that the SBA's rejection of the proposal was irrelevant since the proposal itself satisfied GBR's contractual obligation to both the buyer and Van Winkle.[146] The court stated that it was almost inconceivable that GBR could violate its duty to Van Winkle without simultaneously breaching its contractual duty to the buyer.[147]

Finally, the court held that in the absence of bad faith or special circumstances, the threshold standard for imposing seller liability

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139 *Id.* The justice advanced that Van Winkle's argument was unfounded. *Id.* The court observed that GBR's proposal for the release of the lien was actually suggested by the SBA. *Id.* at 348 n.8, 511 A.2d at 132 n.8. According to GBR's attorney, the SBA had indicated during the negotiations for the loan that they would consider releasing or substituting part of the collateral if GBR established a good payment record. *Id.*

140 *Id.* at 348, 511 A.2d at 132.

141 *Id.* The court reasoned that "[s]ince GBR had not acquired the property with the loan proceeds, the SBA's and the trial court's concern that the low interest loan funds were being used to buy tax exempt securities is without foundation." *Id. See also supra* note 25 and accompanying text.

142 *Id.* The supreme court took note of the fact that GBR viewed its proposed collateral substitution as beneficial to the SBA, urging that they "believe[d] the purchase price to be somewhat in excess of the worth of the real property." *Id.* at 340, 511 A.2d at 127-28 (quoting Letter from Samuel Bornstein, counsel for GBR, to Ronald Langell, acting chief portfolio manager of the SBA (July 16, 1980)).

143 *Id.* at 348, 511 A.2d at 132. *See also supra* note 24 and accompanying text.

144 *Van Winkle*, 103 N.J. at 349, 511 A.2d at 132. The *Van Winkle* court determined that there was "nothing about this proposal to be unreasonable or capricious, or so lacking in good faith as to constitute a breach either of the contract or of the seller's duty to its broker." *Id.*

145 *Id.*

146 *Id.*

147 *Id.*

for a brokerage commission in a failed transaction would be a determination that the seller breached the sales contract.[148] The court declared that while some contractual breaches would not result in liability, the sales contract had to be the standard for the determination of the seller's liability.[149] Justice Stein noted that in GBR's case, the sales contract conditioned the broker's commission upon the consummation of the transaction.[150] The court concluded that since the seller's conduct comported with its contractual obligations, liability could not be imposed for the payment of the broker's commission.[151]

The New Jersey Supreme Court was faced with the issue of defining default within the context of a complex commercial real estate transaction. The *Van Winkle* court properly examined the seller's conduct within the context of the circumstances surrounding the transaction. The issue confronting the supreme court arose from the intricacies of a seller's unsuccessful attempt to sell property which was subject to a lien. As stated earlier, the *Ellsworth Dobbs* decision did not address the concept of seller default.[152] Thus, the *Van Winkle* court assumed the task of reviewing the traditional principles governing a seller's inability to convey title. The apposite decisional law directed the court to review the seller's conduct in relation to the seller's obligations under the contract of sale. The well-settled precedential principles clearly indicated that the seller's wrongful conduct which resulted in the failure to consummate the sales transaction rendered the seller liable for the real estate broker's commission.[153]

The crux of the *Van Winkle* decision involved the reasonableness of GBR's proposed collateral substitution which was included in their contract of sale. The supreme court properly found that the proposal was reasonable. The court indicated that the buyer assisted GBR in its efforts to obtain the release of the SBA lien. Furthermore, the buyer's willingness to release GBR from the contract convinced the court that the conditions of the contract of sale were

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148 *Id.*

149 *Id.*, 511 A.2d at 132-33. The court indicated that "not every contractual breach by a seller will result in liability for the commission. The seller's breach may be innocent or unavoidable and therefore not qualitatively sufficient to justify liability for the brokerage commission." *Id.*

150 *See id.*, 511 A.2d at 133.

151 *Id.* The court also noted that it intentionally avoided the issues of Van Winkle's breach of fiduciary duty or GBR's waiver of rights resulting from the breach. *Id.* at 349 n.9, 511 A.2d at 133 n.9.

152 *See supra* notes 10, 99-122 and accompanying text.

153 *See supra* notes 126-30 and accompanying text.

indeed reasonable. Implied in a contract of sale conditioned upon the occurrence of an event is the possibility that the event may not occur. Obviously, if the parties appear to have accepted the contract as conditional, the supreme court will not invalidate the contract's terms on the grounds of unreasonableness simply because the event fails to occur. This principle comports with the generally accepted notion of a party's freedom of contract.[154]

In assessing the reasonable expectations of the real estate broker and seller, it accords with common sense that the parties who have signed the listing agreement anticipate the completion of a sale, and not a breach.[155] The supreme court's approach to determining seller liability yields to the reality of the possibility of a transaction's deterioration even where the seller in good faith has performed all obligations under the contract of sale. Accordingly, the terms of the contract define the seller's duties and the broker's right to a commission. The *Van Winkle* decision recognized that despite the seller's good faith efforts to convey title, circumstances beyond the seller's control may prevent the sale from closing. Thus, the court deems it necessary to protect the seller from incurring liability for a brokerage commission. In so doing, the supreme court has preserved the initial expectations of the seller and the broker.

Arguably, the supreme court's preference for the seller in transactions that never close produces an unfavorable outcome for the real estate broker. In limiting seller default to a wrongful conduct determination, the court effectively denies the broker a commission where the seller's default results from circumstances beyond the seller's control. Ironically, the broker's right to a commission depends in large part upon circumstances beyond the broker's control, because it is determined primarily by the conduct of the parties brought to the contract of sale by the broker.[156] Ostensibly, the broker has expended long hours and has incurred costs in rendering a service, for which the broker anticipates compensation by way of a

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154 *See, e.g.*, Midland Carpet Corp. v. Franklin Assoc. Properties, 90 N.J. Super. 42, 46, 231 A.2d 231, 234 (App. Div. 1966) (citing Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43, 161 A.2d 717, 720-21 (1960); Washington Construction Co. v. Spinella, 8 N.J. 212, 217, 84 A.2d 617, 619 (1951) (New Jersey courts are reluctant to "make a different or a better contract than the parties themselves have seen fit to enter into.")).

155 *See Van Winkle*, 103 N.J. at 343, 511 A.2d at 129 (citing *Ellsworth Dobbs*, 50 N.J. at 547-48, 236 A.2d at 852-53). The supreme court recognized that "[a] seller seeks a buyer who is able to close, not merely one who is able to sign a contract . . . ." *Id.* at 343, 511 A.2d at 129.

156 *See* D. BURKE, *supra* note 5 at § 93.5.

commission.[157] Thus, regardless of the broker's good faith efforts to bring the seller and buyer together on the seller's terms, the nonfulfillment of the seller's contractual obligations render the broker unable to recover unless the broker can prove that the seller's recalcitrance constituted fraudulent or wrongful conduct. Furthermore, the court will bar a broker from recovery in cases involving passive seller default except, perhaps, where the broker is able to demonstrate a seller's bad faith in dealing with the broker or a prospective buyer.[158] Moreover, from the broker's point of view, pursuing a recovery through litigation may prove to be the least cost-effective method of earning a commission. Essentially *Van Winkle*, in conjunction with *Ellsworth Dobbs*, imposes on the real estate broker a resignation to the risk of a failure in every real estate transaction.

One puzzling aspect of the *Van Winkle* court's decision involves the extent to which the supreme court is willing to extend its seller protection. In *Van Winkle*, the seller was engaged in a commercial enterprise. It is recognized that the bargaining power and expertise of commercial sellers are undoubtedly superior to that of any average home seller or buyer.[159] As such, the necessity of providing additional protection to a commercial seller is questionable, especially absent public policy considerations such as inequality of bargaining power or position between the seller and the broker.

In addition to enhancing the risks associated with each transaction, the *Van Winkle* decision may have an impact upon other aspects of the real estate brokerage industry. As previously stated, the real estate profession is competitive. Concomitant with the risk of an incomplete transaction is the realization that losses must be absorbed by the broker. Inevitably, the losses will be spread among other transactions, which in turn may intensify the aggression associated with such a competitive industry.[160] Furthermore, since the

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157 *See* Note, *A Reexamination*, *supra* note 2, at 91-92 & n.61.

158 *See id.* at 91. *Cf.* Rothman Realty Corp. v. Bereck, 73 N.J. 590, 376 A.2d 902 (1977). In *Rothman Realty*, the New Jersey Supreme Court denied a broker's claim for commission against the purchasers of residential property. *See id.* The *Rothman Realty* court justified the added protection it afforded the purchasers by distinguishing their position from that of the purchaser in *Ellsworth Dobbs* who "was engaged in a commercial enterprise and [whose] position *vis-a-vis* the broker was quite different than that of the individual who is purchasing a residence." *Id.* at 602, 376 A.2d at 908. The *Rothman Realty* court added: "The bargaining power and expertise of such buyers are far superior to those of the average home purchaser. The added protection which we afford to consumer purchasers today is not warranted or required for the type of buyer exemplified in *Ellsworth Dobbs* . . . ." *Id.*

159 *Rothman Realty*, 73 N.J. at 602, 376 A.2d at 908.

160 *See* R. LIFTON, *supra* note 3, at 88. One commentator explains the competitiveness of the brokerage profession as follows:

broker has a substantial stake in the completion of a transaction, the *Van Winkle* decision may heighten the industry's exercise of due diligence.

Nonetheless, the supreme court should remain sensitive to the seller's expectation in real estate transactions. This is not to say that the court should disregard the interests of the broker. The *Van Winkle* decision clearly provides recourse for a broker where a seller acts unscrupulously. In establishing the contract of sale as the focal point for the seller's liability for the commission, the court places the risks and burdens of the brokerage business firmly on the shoulders of the broker. A contrary response to the seller in *Van Winkle* would have impinged upon the policy considerations set forth in *Ellsworth Dobbs*.

The court's decision poses no new threat to the real estate brokerage profession. The nature of the profession imbues the broker with a sense of confidence in the ability to sell real estate, so it is realistic to assume that a broker is equally equipped with the ability to spread the losses through subsequent transactions. By fixing the seller's breach of contract as the focal point for imposing liability upon the seller for the broker's commission, the court has safeguarded the potential seller's interest in selling real estate. While the real estate broker may view the right to a commission as an all-or-nothing proposition, the court justifiably retains a pragmatic approach toward all real estate transactions.

Kathleen H. Dooley

> If a broker is successful he may earn substantial commissions, often disproportionately large for the time and effort spent on the particular transaction. But, if despite all his time and efforts, he fails to make a deal—which happens most often—he earns nothing. Obviously, it takes an aggressive personality to survive in a business where you live by your wits and risk your livelihood on your ability to produce a deal.

Id.