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FEATURED ARTICLES

The Problem With Nominees

Roger Bernhardt and Jon H. Sylvester

Introduction

Brokers, as well as other real estate professionals, are justifiably confused about what it means when an offer to purchase real estate is made on behalf of a purchaser "or her nominee." Can it lead to the formation of an enforceable contract or not? Of course, if the purchaser—call her Pearl—nominated Norma as her nominee, and Norma paid the price to the vendor, Van, and received a deed from him, it hardly matters that (perhaps) there never was any binding contract between Pearl and Van, and that either or both of them might have earlier successfully asserted a defense to its enforcement because of a nominee clause. When it does matter, of course, is when the deal does not go smoothly.

When litigation *does* follow, the reported decisions seem so inconsistent as to make us doubt whether a nominee clause amounts to anything more than an invitation to litigation. Some cases appear to hold that an offer so worded renders unenforceable any contract that might ostensibly arise by its acceptance, as well as any claim to a broker's commission based on having procured that offer. But other cases blithely enforce the resulting contract, ignoring the difficulties claimed to arise from the nominee language. Moreover, the cases that "uphold" the provision vary widely as to what they say it means. Consequently, do not expect to learn too much from the following brief review of the reported decisions.

The Case Law

Seven cases cause trouble to practitioners. They are all from the Second and Fourth Districts, although the disagreements are within the districts, not between them. We describe them in chronological order.

Cisco v Van Lew

In *Cisco v Van Lew* (1943) 60 CA2d 575, 141 P2d 433 (Fourth District), the original contract between Cisco and Van Lew was oral. When the broker opened escrow, he could not remember Cisco's name, so he listed himself or his nominee as the purchaser. Van Lew, the seller, tried to back out later when she got a better offer, but Cisco paid the purchase price into escrow and sued for specific per-

formance. He lost because the escrow instructions had been signed only by the broker (and Van Lew) and not by him, which meant that there was no consideration for a contract between Van Lew and Cisco since Cisco was not bound. The opinion also turned, in part, on the statute of frauds requirement of a writing that shows the identity of the purchaser.

The language of the opinion makes it hard to tell whether mutuality or identity was the real problem, but the court did say, "The Ciscos are not described therein as being either parties to the contract or purchasers thereunder, and nowhere therein do they assume any of the obligations of purchasers." 60 CA2d at 582. Because Cisco had tendered the entire purchase price when he sued, it is difficult to see why an assumption of obligations would have mattered—paying the price seems considerably better than promising to pay the price. The outcome may be better explained on the basis of a good many other unsavory facts in the deal. Miller & Starr cite this case for the assertion that "[w]hen a contract identifies a named buyer 'or nominee' without reference to the right of the buyer to assign the contract, generally there is not a sufficient identification of the unnamed nominee." 1 Miller & Starr, California Real Estate §1:21 (3d ed 2000).

Gelber v Cappeller

In *Gelber v Cappeller* (1958) 161 CA2d 113, 326 P2d 521 (Second District), the Gelbers' escrow instructions stated that title would be vested in Pacific Side Investment Corp., an entity owned by them, and the Cappellers' deed named that corporation as grantee. When the Cappellers tried to back out, the Gelbers deposited the required note (signed by them) and deed of trust (signed by Pacific) and successfully sued for enforcement. Reversing the trial court, the appellate court upheld the arrangement as a contract for purchase by the Gelbers, "with title to be taken in the name of their nominee." 161 CA2d at 117. The deed of trust was properly executed by Pacific because, as grantee in the deed, Pacific was the only person who could execute it. *Cisco v Van Lew*, *supra*, was not cited. Miller & Starr say of this case, "When the instructions provide for a conveyance to the buyer or nominee, execution of the purchase money deed of trust by the nominee of the buyer, who is also a grantee, is sufficient performance to compel the seller to convey." 3 Miller & Starr §6:27.

San Francisco Hotel Co. v Baior

In *San Francisco Hotel Co. v Baior* (1961) 189 CA2d 206, 11 CR 32 (Fourth District), "Fred Whitman or nominee" made a \$1000 deposit on his offer to purchase, and it was signed "Fred Whitman or nominee by EMJ Agent." Escrow instructions called for title to be vested in "Lembi or nominee." Lembi and Whitman were officers in the

San Francisco Hotel Company, which thereafter deposited the balance of the price into escrow and gave instructions (signed by Lembi) to the escrow agent to name it as vestee in the deed, and Whitman assigned the contract to it. In upholding the Hotel Company's specific performance action, the Fourth District held there was consideration, "established by commencement of the instant action as well as by tender of performance. . . ." 189 CA2d at 212. And there was no uncertainty (189 CA2d at 213):

The buyer was Fred Whitman. The fact that he was referred to as 'Fred Whitman or nominee' did not affect his identity. The phrase 'or nominee' as used in the deposit receipt was merely surplusage. Whitman was entitled to assign the rights under the agreement, including the right to enforce specific performance [Citations]. If he did not choose to assign, as the purchase price was payable in cash, he could have nominated a vestee of the title without affecting his rights under the agreement.

Because this was the same court that had gone the other way in *Cisco v Van Lew*, *supra*, the court had to say "that [the *Cisco* case] is clearly distinguishable from the one at bar in that the plaintiff in the cited case, who claimed as the nominee of a named buyer, has not received an assignment of the buyer's rights but nevertheless was attempting to enforce the same in an action for specific performance." 189 CA2d at 213.

Because fully deposited cash prices were involved in both cases (and the opinion had just explained that there was no need for a buyer to assign in a cash situation), the only remaining distinction is the hypertechnical one that the action in *Cisco* had been brought by the wrong plaintiff—*i.e.*, the broker fronting for his nominee Cisco should have filed, rather than Cisco himself—although there is nothing in the language of *Cisco* to suggest that that was the point at the time. See 1, 2 Miller & Starr §§1.22, 5.12.

Rivadell v Razo

In *Rivadell v Razo* (1963) 215 CA2d 614, 30 CR 622 (Second District), a broker claimed he had procured a ready, willing, and able purchaser and thereby earned a commission. Although most of the opinion turned on whether the offer matched the listing in light of its subordination provision, the court went on to add (215 CA2d at 625):

[T]he words "or nominee" completely destroy the instrument as a firm and binding offer on the part of Firestone Corp. to buy the property. What it says is, in effect, that Firestone or someone else designated by Firestone will buy the property. . . . Assuming defendant accepted the offer and that Firestone changed its mind, the latter could designate *anyone* as its nominee. The seller would then have to look to the nominee. The "nominee" would be an escape hatch for Firestone. Thus, it is apparent there was no binding, unqualified offer on the part of Firestone.

On a sale for cash, where the credit of the buyer is not so important a factor[,] an "or nominee" offer could possibly be construed as an obligation on the part of the named purchaser to either buy or see to it that the property is purchased. But, here, all the named buyer need do is to designate a substitute and walk away from the transaction."

Nominee clauses thus look like certain death.

This opinion did make a distinction between cash and credit purchases, and Miller & Starr pick up on it, stating, "There might be a difference if the sale was for all cash when the buyer's credit is less important, but when the seller is expected to finance a portion of the sales price, there is no person obligated to purchase the property with known trustworthy credit." 2 Miller & Starr §5.41. But we wonder about that distinction. *Cisco* was a cash deal that failed because of its nominee clause, whereas *Gelber* was a credit deal that was upheld despite such a clause. And unless the purchaser accompanies his offer with a tender of the entire price, is not every sale a credit sale until escrow actually closes?

JMR, Inc. v Hedderly

JMR, Inc. v Hedderly (1968) 261 CA2d 144, 67 CR 742 (Second District) involved the following issue: When a buyer makes an offer on behalf of himself or "corporate nominee" to purchase, proposing to secure payment of the price by a "pledge of corporate stock," one would think that a binding contract with the nominee is unlikely to be found, even after the offer was accepted and the nominee named. But if the nominee plaintiff could show "that the contract was made in the contemplation of the formation of the plaintiff corporation, and for its benefit, and that it adopted and ratified the contract after its formation. . . . [, then] the plaintiff corporation may enforce the contract." 261 CA2d at 148. Miller & Starr read this to mean that "[a] contract may be enforceable by a nominee when the identity of the nominee is known to the parties and the contract is for its benefit." 1 Miller & Starr §1.21; see also 2 Miller & Starr §5.41 ("[T]here is no material variation between the listing and the offer when the offer is on the terms and conditions of the listing but provides that the property will be purchased by a name buyer and the buyer reserves the right to take title in his or her own name or in the name of a 'nominee.' ")

McCown v Spencer

In *McCown v Spencer* (1970) 8 CA3d 216, 87 CR 213 (Second District), a buyer was permitted to sue in his own name despite having named a nominee (with the seller assenting) as long as the arrangement did not amount to an assignment to the nominee. Only in the case of an assignment would the original buyer no longer be a proper plaintiff. (Miller & Starr do not cite this decision.)

C. *Robert Nattress & Assocs. v Cidco*

In *C. Robert Nattress & Assocs. v Cidco* (1986) 184 CA3d 55, 229 CR 33 (Fourth District), the offeror's suit failed when he could not show he had sufficient funds to purchase, and his proof that he intended to use the nominee clause to nominate *F*—who did have enough and was willing—was no help, because *F* was not a party to the action and could not be compelled to purchase. Miller & Starr cite this case for the proposition that “[s]pecific performance may be denied if the purchaser is not adequately identified. . . .” 12 Miller & Starr §34.25; see also 12 Miller & Starr §34.20.

Illusory Promises and the Requirement of Consideration

Of these seven cases, four validate nominee clauses and three repudiate them. What is perhaps most noteworthy is that six of the seven are reversals, giving trial courts a pretty high error rate for predicting how these clauses should be treated. With sufficient scholastic ingenuity we might attempt to reconcile these disparate results; we doubt, however, that much practical good would come of the exercise, since it would almost certainly involve nuances too subtle to remember or apply. Getting to the nub of the issue, we think the problem is not with the reported decisions, but with the underlying clause. The confusion arises because a single provision is being used to cover many different needs. We believe that everyone would be better off if brokers gave some forethought to what their clients truly desire and then more carefully tailored their offers to match those desires. Instead of an all-purpose clause that only occasionally fits and rarely works, there should be specific clauses that do fit and will work. No clause will work, however, if it runs afoul of the most basic contract law principle of all—the requirement that a promise be real.

For an offer to have the power to lead to an enforceable contract, the offeror's stated commitment must be real and not “illusory”; it cannot be only an apparent commitment, from which the offeror has reserved an unrestricted means of escape. *Mattei v Hopper* (1958) 51 C2d 119, 122, 330 P2d 625; see also, generally, Restatement (Second) of Contracts §177 (1981). So, returning to the fact situation hypothesized in the Introduction, if Pearl's offer to pay the price is subject to her unfettered discretion to walk away from it by transferring that burden to someone else, her promise is illusory and she has not made a real offer. If the offer is not real, there can be no binding acceptance of it, and no contract would arise between Pearl and Van, even though he signed “accepted” on her purported offer. In other words, if Pearl's promise is, in effect, that she either will buy the property or she will not, at her pleasure, it provides no basis for enforcing Van's “reciprocal”

promise to sell. (This can also be explained in terms of consideration: Van's promise to sell is enforceable only if it was supported by consideration, *i.e.*, constituted an enforceable promise to buy; if Pearl's promise is illusory, it furnishes no consideration and Van is free to disaffirm his counter promise.) There is no such thing as a contract in which only one side is bound, and the other party has neither performed nor made a promise to perform. Once a court concludes that the clause allows a buyer to escape her obligation to perform, her seller will be held equally free to terminate the arrangement, even when the buyer may be actually seeking to perform.

For the same reason, the broker may fail to earn a commission in such a situation. A commission is ordinarily earned only if the broker procures a ready, willing, and able purchaser, which requires the existence of an offer that can lead to an enforceable contract; if the offer is “illusory,” there was, *ipso facto*, no ready and willing purchaser. Thus, there is a real likelihood that an offer made on behalf of “Pearl or her nominee” will not entitle Van's broker to a commission, even when it fully matches the terms of his listing agreement. For the same reasons, even after such an offer has been accepted, the seller may avoid commission liability if he later decides to withdraw.

However, offerors do not generally include nominee provisions merely to allow them to back out of their deals later on. Some of the possible objectives buyers may have in mind when they use the term “nominee” are:

- Pearl might fully intend to remain bound by the obligation to pay the price, and may merely want the flexibility of having title vest in a third person whom she intends to identify later (such as, for example, a business entity that has not yet been formed).
- Pearl may intend to “flip” the contract to a new buyer (probably at a higher price), substituting the third party in for herself and walking away with no further liability.
- Pearl may intend to assign her right to purchase the property, but is still willing to remain liable herself if her assignee fails to perform.

We next consider these alternatives in the context of various deals.

Vesting Title in a Third Party

Cash Sales

A contract identifying the buyer as “Pearl or her nominee” may mean simply that Pearl intends to have title vest in some name that does not currently appear in the contract, *e.g.*, in the name of Pearl's corporation, or in Norma's name, or in the name of both Pearl and Norma (*e.g.*, as joint tenants). If a purchaser offers to pay all cash for the property, usually the vendor will not care about the identity of the ultimate grantee. (We are not here consid-

ering those unique situations, *e.g.*, when the vendor has some special objection to a particular purchaser, or when the purchaser has a special reason to keep her identity secret.) Since Van can anticipate being paid in full before or at the time he is required to pass title to anyone, Pearl has no need to state in her offer her intent to nominate anyone. If Van later objects to the insertion of Norma's name into the grantee blank on the deed, Pearl can simply take title in her own name and reconvey the property to Norma thereafter.

Consequently, we suggest that when the purchaser intends to perform the contract herself and use a nominee merely for title vesting purposes, she should *not* use the unqualified phrase "or her nominee" in her offer. Apart from the fact that such language may lead the seller to reject the offer out of fear of a trap, the purchaser runs the perverse risk that if the seller does accept it and then later changes his mind, a court may let him out on the ground that the contract was unenforceable because it was founded on an illusory promise. If a judge thinks that the language gave Pearl too much of a back door, she will not be able to close that door by saying that she never intended to go out that way anyway.

Thus, if an offeror truly wants no more than to later name a third party as vestee of the title, and to say something about that in her contract, she may include a nominee clause in her offer; but, then she should also include language along the following lines to qualify that clause:

Reference to "nominee" in this offer is for convenience only and is intended solely to declare Purchaser's possible intent to subsequently include additional or other names as grantee(s) in the deed she is to receive after the price has been paid. Use of the word "nominee" shall not be construed as excusing Purchaser from the duty of performing any and all obligations specified in this agreement or otherwise imposed by law upon her.

Such a limitation on the scope of the clause should dispose of any risk that use of a nominee renders the buyer's obligation illusory. The inclusion of such a clause should present no threat to the vendor, and should eliminate any danger of judicial invalidation.

Credit Sales

In California, a secured purchase money note given to the vendor is uncollectible except by way of foreclosure of the deed of trust. CCP §580b. Thus, if the vendor is being asked to accept a note secured by a deed of trust for the unpaid balance of his price, it might seem that it does not matter whether the offeror or her nominee executes the note, since neither party incurs any personal liability for it. The signature on the deed of trust must, of course, be that of the person identified as grantee on the deed, whether it is the purchaser, the nominee, or a new third

party, but the signature on the underlying note is inconsequential in terms of creating any personal liability. Van may recover the property by foreclosure if his note is not paid, but he can sue neither Pearl nor Norma for deficiency liability if the proceeds of the foreclosure sale do not satisfy the debt. And, because of California's "one action" rule (CCP §726), Van cannot ignore his security and proceed solely on the note. (In the rare case where an unsecured note is taken, the signature will matter, because there is no purchase money antideficiency protection in that case. *Van Vleck Realty v Gaunt* (1967) 250 CA2d 81, 58 CR 246. There will be liability on the note, and that liability will attach to the person who signed it. But, again, the identity of the grantee on the deed is irrelevant: One does not become liable on a note one has not signed merely by virtue of acquiring title to property whose purchase generated the price represented by that note. If Pearl is the one who signed the contract obliging her to pay the price, she is the one who must sign the (unsecured) note, and the nominee clause cannot be read to permit Norma to sign it instead of her. Adding her nominee's signature will give Van the extra protection of having two makers to go after, but will not release Pearl from her liability as note maker.)

However, although the identity of the buyer might not matter in legal theory, it may have practical significance to the vendor. A vendor may not want to collect his money through foreclosure and might prefer to have a credit-worthy buyer who will likely satisfy her payment obligations in a timely manner rather than compel a costly and time-consuming enforcement action. Thus, even in a credit sale, a clause that appears to possibly allow the offeror to substitute herself out of the contract may cause alarm to the seller, which can be ameliorated by the language we proposed above.

Substituting in a New Buyer

For many brokers and players, the nomination clause is consciously intended to let the originator take herself out of the picture entirely, thereafter free from all price liability the moment her nominee is named. Pearl's plan may be precisely to flip the contract over to someone else, make a profit, and then walk away, and move on to another deal. This practice however, implicates some contractual principles of which the parties may be unaware.

Although it is common to speak of "assigning a contract," that phrase is imprecise and misleading. Assignment properly refers only to the transfer of a party's contractual rights, which is generally permissible without the need for any express authorizing language in the contract. The dislike of restraints on alienation is not confined to real estate; all contractual rights can be assigned except when it is prohibited by statute or materially increases the

burden or risk on the other party. See generally Restatement (Second) of Contracts §317 (1981).

However, an assignment affects only rights; it has no effect on an assignor's responsibility to perform duties created by the contract. The transfer of duties under a contract is by "delegation," which is more restricted than the power to assign because a promisee generally has greater reason for concern about the identity of the promisor than has a promisor about the identity of the promisee. An obligor cannot automatically delegate away her contractual duties when the obligee has a substantial interest in having those duties performed by the original obligor.

This restriction, however, is most often invoked in personal services contracts, where a substitution might make a real difference. Restatement (Second) of Contracts §318(2) (1981). In a real estate case, it need not prevent, for example, Pearl's delegating to Norma the duty to pay the price owed to Van. Van has a legitimate interest in being paid, but not in being paid by Pearl in particular. Moreover, any claim he makes that he relied on Pearl's individual credit-worthiness is satisfied by the rule that she remains bound by her promise to him notwithstanding her delegation to Norma. If Norma does not pay, Van can compel Pearl to pay, as she originally promised.

In a cash sale, therefore, Van should not care about assignment and delegation because he does not have to convey the property until he receives the purchase price, and he retains the ability to recover from Pearl, the original promisor. This is almost certainly not what Pearl wants. What she desires is a "novation": an assignment of her rights, a delegation of her duties, and a release of her liability for any nonperformance by Norma (her assignee/delegee). The release component explains why a novation requires the express consent of the promisee. Van, after all, did not agree to enter into a deal with Norma. Pearl needs Van to consent not to the *addition* of Norma to the contract, but to the *substitution* of Norma for Pearl under it, with the crucial consequence of releasing Pearl from further liability on the contract.

If this is Pearl's objective, she must be careful that her offer does not lead, on the one hand, to an unenforceable contract or, on the other hand, to a contract that binds her even after an assignment to Norma. The general "or nominee" clause language cannot be counted on to accomplish these objectives.

The drafting problem here is to keep Pearl from backing into the "illusory promise" problem discussed above. But her promise is illusory only if it gives her unfettered unilateral discretion to substitute herself out of the contract. What her offer should say is what in fact is often proposed in response to sellers' counteroffers to nominee proposals: A seller's broker often advises the client to respond to a nominee offer with a provision that prohibits

assignment without consent and/or requires the assignee to assume the obligations under the contract as a precondition to releasing the original offeror. These are wise provisions and we propose that the buyer herself include them without waiting for her seller to add them to the counteroffer. The following language could be used, for example:

Purchaser reserves the right to assign her rights and to delegate her obligations under this agreement to a third party to be subsequently named by her. Vendor understands and agrees to release purchaser from all obligations under this contract under the following conditions: 1) that Vendor's consent to said transfer be first obtained, which assent shall not be unreasonably withheld, and 2) that said Assignee fully assume in writing all of the obligations of Purchaser under this agreement. Vendor agrees to execute any and all documents necessary to accomplish this result when these preconditions are met.

If the seller accepts from the buyer an offer containing such a provision, the parties have created a two-stage contract. As of that moment, and between themselves, both parties are bound and neither one is free to withdraw. Their promises are not illusory. If nothing else happens, each must go through with the deal: Pearl must pay and Van must convey. If, later on, Pearl desires to substitute Norma for herself, she has a right to do so, but it is not unrestricted—it can only happen with Van's consent. (This would require a one-sentence note stating, for example, "I assent to the nomination of _ [Assignee] _ and hereby release _ [Purchaser] _ from all obligations under this contract.") And Van's right to withhold assent is similarly fettered, since he cannot be unreasonable in withholding it. (Civil Code §1995.260, requiring reasonable landlords' responses to tenants' proposals to assign leases in the absence of contrary language, may come to be used by analogy in contract cases.) If a court determines that Norma was an acceptable nominee, Van must convey to her (and she is probably a proper party plaintiff in litigation) and must release Pearl (who could also join in the action for a declaration that she is no longer bound by any of the contract provisions). If the court concludes that Norma does not qualify, Van is not bound to convey to her, and, at the same time, he can hold Pearl to the contract, and she must either pay the price or find another acceptable substitute within the time allowed.

Assignment of the Right to Purchase

As mentioned above, we think it unlikely that the offeror's intent is to assign the right to purchase, while continuing to remain contingently liable for payment of the purchase price. But if that is what Pearl wants—*i.e.*, simply the power to assign her contract rights to Norma, who would not be responsible for paying the price and whose presence does not relieve Pearl of that duty to pay—nothing special needs to be said in the offer, whether cash

or credit; the all-cash situation takes care of itself, and the antideficiency rules effectively eliminate meaningful choice anyway. Likewise, the inclusion of a clause that says exactly that should give the vendor no reason to reject the offer, for either business or legal purposes, nor should it furnish any basis for a court to refuse to enforce the resultant contract if the seller did accept and then later sought to withdraw. If either Pearl or Norma (or both) is prepared to pay Van, the source of funds will not matter; and if Van is not paid, his recovery rights are the same—indeed better—than before: He can sue Pearl for damages or specific performance despite her “assignment,” and, if Norma has assumed Pearl’s duties, he will also have the same remedies against Norma.

Even though special language is unnecessary, it may be wise for Pearl to specify her right to transfer, with language similar to the following:

Purchaser reserves the right to assign her rights under this agreement to a third party of her choosing. Vendor acknowledges purchaser’s right to do so, provided that such assignment does not relieve purchaser of any and all personal liability for performance of purchaser’s obligations under this agreement.

Since this provision merely clarifies what is already the rule and adds nothing substantive to the contract, its inclusion should not weaken the attractiveness of an offer to purchase, at least once it is explained to the seller by his attorney.

What happens if Van accepts an offer that contains such a clause and then later seeks to withdraw? If no assignment has yet been made, Pearl has the right to sue for damages or for specific performance. If the contract is otherwise valid, she can obtain specific performance of Van’s obligation to convey to her. It may be tactically wiser, however, for Pearl to sue in her own name at this stage rather than to also seek to specifically enforce the right-to-assign clause; that feature can be taken care of later.

If Pearl has already assigned, Norma should also be a proper plaintiff. Pearl may still be a necessary party if there are remaining obligations that she must perform. Norma probably qualifies as a third party beneficiary—an intended, rather than an incidental, third party beneficiary and with full enforcement rights. See *Martinez v Socoma Cos., Inc.* (1974) 11 C3d 394, 398, 113 CR 585. Van might disapprove of her as an assignee, but he has no automatic or guaranteed right to reject her, except for reasons stated in the original agreement.

When the Broker Is Entitled to a Commission

In the title-vesting and assignment situations discussed above, the seller’s broker should be entitled to a commis-

sion as soon as the seller accepts the offer, since the buyer has thereby qualified as a ready, willing, and able purchaser acceptable to the seller. The substitution situation might appear to present more complexity due to uncertainty over any future novation, but that turns out not to be the case. As we have shown, the original buyer and seller are locked into an enforceable contract even if no acceptable substitute buyer is ever nominated. Therefore, the “ready, willing, and able” condition has been satisfied. Finding a substitute purchaser is not a contingency comparable to getting financing or approving inspection reports (these latter types of contingencies are actually *conditions*, which must be satisfied in order to activate the duties of the parties to the contract).

Nevertheless, we suggest that the listing agreement, as well as the sales contract, include language to resolve any uncertainty about the broker’s entitlement to a commission. The following language in the listing agreement between the seller and his broker should be acceptable to both sides in most situations:

Broker shall be entitled to a commission upon presentation of any bona fide offer that matches the terms of this listing or is accepted by vendor. Presentation or acceptance of an offer which includes language that authorizes the purchaser to nominate or assign her rights to a third party shall not prevent an offer from qualifying as a bona fide offer. Presentation of an offer which requires vendor to subsequently release purchaser upon satisfactory substitution of a new purchaser and which is accepted by vendor shall *not* entitle broker to a commission until such release is actually granted or when the sales contract closes, with or without such release.

This provision sets forth rules that conform to the sales contract provisions covered earlier. If the offer matches the terms of the seller’s listing or if the seller accepts it anyway, the broker may be then entitled to a commission even though the later right to nominate is included in it. When the offer instead proposes to substitute the buyer out, no commission is earned until the seller has accepted the nominee and the nominee has assumed the original offeror’s obligations under the contract.

Conclusion

The courts are only partly responsible for the confusion surrounding the use and enforcement of nominee clauses. Yes, there is some inconsistency in the decisions, but the more basic problem is that buyers and their brokers try to use one “standard” clause to accomplish several distinct purposes. This problem will not be solved by some all-encompassing and universally accepted judicial decision or statute making everything plain for everyone. The more practical solution is to draft clauses more carefully and tailor them more precisely to clients’ desires. That will require some thinking by brokers about what their clients

really want and also some reduced expectations as to what can actually be accomplished. But brokers, buyers and sellers—as well as their lawyers and the judges—will all be the better off for it.

False Alarm? Effect of *MacKinnon v Truck Insurance Exchange* on Mold Exposure Claims

Christopher R. Wagner

Introduction

After more than a decade of decisions confirming California's adherence to the so-called "plain meaning" approach to insurance policy interpretation, the California Supreme Court appeared to abruptly change course when it issued its unanimous decision in *MacKinnon v Truck Ins. Exch.* (2003) 31 C4th 635, 3 CR3d 228. Despite an apparently unambiguous pollution exclusion contained in a landlord's commercial liability policy, the court refused to apply the exclusion and, in doing so, called into question whether pollution exclusions can ever operate in residential situations. See 31 C4th at 653.

The basis of the court's ruling in *MacKinnon* was that the absolute pollution exclusion in the policy was not "conspicuous, plain and clear." 31 C4th at 639. The supreme court has long acknowledged that exclusionary language in an insurance policy must satisfy this standard. See *State Farm Mut. Auto. Ins. Co. v Jacober* (1973) 10 C3d 193, 201, 110 CR 1. However, because of the court's willingness to use this rule—and others—as a basis for its analysis, the long-term impact of *MacKinnon* on California insurance law has been the subject of debate. Now that *MacKinnon* has been on the books for more than one year, an answer is emerging. *MacKinnon* will likely have a significant impact on how California courts interpret policy exclusions in the future because *MacKinnon* has re-focused judicial attention on the requirement that exclusionary language be conspicuous, plain, and clear.

However, *MacKinnon* will have only a marginal impact on exposure-related bodily injury claims that mimic the *MacKinnon* fact pattern—such as asbestos and mold liability claims. Put another way, although the *MacKinnon* decision may substantially influence the way California courts analyze policy exclusions, ironically, it will have much less influence on how insurers handle exposure-related claims similar to the claim addressed by the court.

MacKinnon and the Supreme Court's Analysis

The *MacKinnon* case arose from a claim against an apartment building owner for wrongful death, which allegedly occurred after a tenant was exposed to a pesticide sprayed to eradicate yellow jackets near the tenant's apartment. The trial court and the court of appeal both ruled that the absolute pollution exclusion contained in the apartment owner's general liability policy precluded coverage for this claim. Both concluded that the bodily injury fit precisely within the rubric of the exclusion, which precluded coverage for bodily injury arising from a discharge or release of "pollutants," defined as any irritant or contaminant, including "chemicals." Significantly, the wrongful-death complaint against the apartment owner specifically alleged that the pesticides that caused the injury were "dangerous chemicals." 31 C4th at 640.

Presented with a facially applicable exclusion, the supreme court was obviously troubled by the prospect that a pesticide exposure claim at an apartment building might be barred by the absolute pollution exclusion. This exclusion—so the argument goes—was intended to exclude coverage for CERCLA-type pollution claims, not exposure-related bodily injury that occurs in a residential setting. Given the numerous quirks found in the court's opinion, it appears that this visceral reaction to the facts of *MacKinnon* may have ultimately driven the court's analysis.

For instance, the court in *MacKinnon* relied heavily on the drafting history of the absolute pollution exclusion (31 C4th at 643), even though such evidence had generally been considered inadmissible for purposes of interpreting unambiguous policy language (see *ACL Technol. v Northbrook Prop. & Cas. Ins. Co.* (1993) 17 CA4th 1773, 1790, 22 CR2d 206; *Mez Indus., Inc. v Pacific Nat'l Ins. Co.* (1999) 76 CA4th 856, 871, 90 CR2d 721). The court also supported its opinion by referring to hypothetical situations not presented in the *MacKinnon* case. This was done even though such "slippery slope" arguments are generally not considered when analyzing insurance policy language. See *Martinez v State Compensation Ins. Fund* (1995) 32 CA4th 1589, 1593, 38 CR2d 639 ("The question of ambiguity in an insurance contract addresses the circumstances of the present case, not a hypothetical uncertainty wholly removed from the facts of the case."); see also *Blumberg v Guarantee Ins. Co.* (1987) 192 CA3d 1286, 1296, 238 CR 36. More striking, though, was the supreme court's unprecedented citation to a LexisNexis Allnews word placement search in support of its thesis that the absolute pollution exclusion should not apply to a residential pesticide exposure claim. 31 C4th at 651.