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A Whole Sale or Wholesaling: Regulating the Wild West of Real Estate Purchase Contract Resale

I. Introduction

In recent years, states have confronted how to regulate real estate wholesaling.¹ Wholesaling occurs when an individual enters into a real estate purchase contract and subsequently markets and sells an assignment of that contract.² The assignment process has been likened to “tell[ing] your girlfriend you want to marry her and on the wedding day, she finds out you got paid to hand her off to some other guy.”³ Wholesalers earn a profit by “‘flip[ing]’ the contract [assignment] to [a] buyer for a fee.”⁴ A typical wholesaler assigns the purchase contract before the closing date.⁵ Some wholesalers, however, have full ownership over the properties they resell.⁶ Given the difference in wholesaling operation styles, it is unsurprising that the practice is portrayed as a Jekyll and Hyde situation: a brilliant investment strategy that grows fortunes versus a predatory practice that evades licensing standards.⁷

The practice of wholesaling has been portrayed as a high-reward but high-risk practice. Wholesaling is described by some as a “short-term real estate investment strategy that can be utilized to create quick profits.”⁸ Popular investment strategy books tout the benefits of using “contingency

1. See Jason R. Davis, *Is Wholesaling Legal?*, DAVIS FIRM, PLLC (Mar. 11, 2019), <https://www.davisfirmpllc.com/post/is-wholesaling-legal>.

2. THAN MERRILL, *THE REAL ESTATE WHOLESALING BIBLE: THE FASTEST, EASIEST WAY TO GET STARTED IN REAL ESTATE INVESTING* 9–10 (2014).

3. Brett Snodgrass, *Why Assigning Contracts Is One of the Worst Business Models for Real Estate Wholesalers*, BIGGERPOCKETS (Jan. 26, 2016), <https://www.biggerpockets.com/blog/2016-01-26-assigning-contracts-stupid-business-models-real-estate-wholesalers>.

4. Elizabeth Youngling, “*You Are the Architect of Your Own Success*”: *Selling Financial Freedom Through Real Estate Investment After the Foreclosure Crisis of 2008*, 7 ECON. ANTHROPOLOGY 108, 118 n.11 (2020).

5. Eddie Roach, *Local Agents Reveal Pitfalls of Selling a Home ‘As-Is’ in Online Seminar*, OKLAHOMAN (Mar. 17, 2020, 12:01 AM), <https://oklahoman.com/article/5657247/avoid-pitfalls-of-selling-home-as-is>.

6. See, e.g., *About Us*, NATURE’S HOMES, LLC, <https://natureshomesllc.managebuilding.com/Resident/public/custom/22> (last visited Jan. 14, 2021) (listing an investment company’s wholesale properties on its site) (“Nature’s Homes does not manage or sell 3rd party properties. We own the properties that are listed and continue to seek more properties in which to invest.”).

7. See Youngling, *supra* note 4, at 117.

8. MERRILL, *supra* note 2, at 9.

clauses in the contract” and “relatively small deposit[s]” to gain control of a property assignment that a wholesaler can market for a large profit with little risk.⁹ Wholesaling, often branded as real estate investment, is described as a simple starting point for new real estate investors.¹⁰ In the wake of the late 2000s recession and housing crisis, seminars focused on real estate investment encouraged wholesalers “[w]ith no money of their own . . . [to] become wholesalers and ‘flip the paper’ rather than the house.”¹¹ Seminar leaders failed to disclose the dangers of wholesaling, such as borrowing at high interest rates and being unable to meet payment obligations if a buyer cannot be found.¹² The use of high-interest rate loans is not the only predatory practice pervasive in wholesaling.

The link between wholesaling and the 2000s housing crisis extends beyond the increasing popularity of the process; wholesaling has been likened to predatory lending practices because it often takes advantage of sellers in financial distress.¹³ The potential hazards of wholesaling impact more than the individual seller, since “predatory real estate schemes to capture home equity . . . destabilize regional real estate markets.”¹⁴ Real estate professionals caution that the oversimplification of the process and lack of guidance from industry professionals can leave sellers exposed.¹⁵ The exposure is heightened if the wholesaler does not have the funding at closing and has not located a buyer to purchase the contract assignment.¹⁶ Further, some wholesale operations are blatant scams aimed at taking advantage of elderly homeowners.¹⁷ The contrast between the portrayal of the practice by wholesalers seeking profit and by real estate professionals seeking to protect their profession begs the question: is wholesaling real estate harmless in all forms, and if not, how should it be regulated?

9. *E.g., id.* at 11.

10. DC Fawcett, *Five Things to Know About Real Estate Wholesaling*, FORBES (Mar. 17, 2020, 8:00 AM EDT), <https://www.forbes.com/sites/forbesrealestatecouncil/2020/03/17/five-things-to-know-about-real-estate-wholesaling/#7e18e50270a3>.

11. Youngling, *supra* note 4, at 115.

12. *See id.*

13. Brian Parkinson, Note, *Caveat Venditor: Predatory Purchasing in the Post-Boom Residential Real Estate Market*, 2 NE. U. L.J. 41, 42–43 (2010).

14. *Id.* at 47.

15. Roach, *supra* note 5.

16. *Id.*

17. *Id.*

Although wholesaling has been linked to the practices that led to the housing crises, few states have directly addressed wholesaling.¹⁸ Oklahoma, however, is attempting to join the ranks of Illinois, Arkansas, and Texas in addressing real estate wholesaling concerns. This Comment explores the public interest hazards associated with real estate wholesaling and reviews the current conditions of Oklahoma, Illinois, Arkansas, and Texas real estate wholesaling regulation, including legislation, administrative rules, policy considerations, and political drivers. This Comment suggests a path forward for future Oklahoma legislation and, in the alternative, explores reframing licensable activity under the current rules in a way that would enable regulation of real estate wholesalers without new legislation.

II. Public Interest Concerns of Wholesaling

In recent years the news has been filled with cautionary tales of sellers harmed by unscrupulous wholesalers.¹⁹ For example, in November 2019, a Georgia news station covered the story of an “elderly woman [found] on the side of the road with her belongings while the wholesalers who bought her home cleared it out.”²⁰ The wholesalers used tactics, best characterized as undue influence over the woman, including visiting her house daily and pestering her to sell the property.²¹ The purchase from the elderly woman was for approximately \$145,000 less than the estimated value, and to add insult to injury, the wholesalers sold the property for a \$35,000 profit the same day.²² Although Georgia’s Department of Human Services indicates “deceiving an elder to buy their home at [a] bargain could be a crime,” the

18. See generally Marcus Maloney, *Warning: New Wholesaling Law Enacted in Illinois (& Why Your State Might Be Next!)*, BIGGERPOCKETS (Sept. 21, 2019), <https://www.biggerpockets.com/blog/real-estate-wholesaling-new-legislation-illinois> (noting that wholesaling legislation has yet to be enacted on a national level).

19. See, e.g., Jacob Adelman & Craig R. McCoy, *In Gentrifying Philly, Speculators Pay Heirs Peanuts — Then Flip Their Properties for Massive Gains*, PHILA. INQUIRER (Sept. 27, 2019), <https://www.inquirer.com/real-estate/housing/philadelphia-real-estate-flippers-gentrification-heirs-inheritance-20190927.html> (reporting that wholesalers in Philadelphia buy at a low cost, often from estates, and sell for high profits).

20. Justin Gray & Terah Boyd, *Buyer Beware: Are Wholesalers Taking Advantage of Elderly Home Sellers?*, WSB-TV (Nov. 21, 2019, 7:44 PM), <https://www.wsbtv.com/news/2-investigates/buyer-beware-are-wholesalers-taking-advantage-of-elderly-home-sellers-/1010860933/>.

21. *Id.*

22. *Id.*

news station pointed out that it “ha[d] not found evidence that the wholesalers ha[d] committed a crime.”²³

Unscrupulous wholesaling can victimize individuals; moreover, it may have negative impacts on society. Canadian realtors assert that “money laundering is a big concern in assignment-flipping deals.”²⁴ In the United States, the FBI indicates that money laundering is often accomplished through real estate purchases, which remove properties from the reach of authentic buyers.²⁵ In Oklahoma, federal courts have prosecuted real estate investors for money laundering and other crimes linked with real estate activities.²⁶ Although neither of these federal divisions directly implicate wholesaling, they both show a direct link between money laundering and real estate activity that could be further exploited through unlicensed wholesaling activities.²⁷

The macro-level and micro-level hazards associated with the practice illustrate that the regulation of real estate wholesaling is a balance between protecting the public interest and enacting a workable regulatory scheme.²⁸ Gaining control of the practice of wholesaling has been a unique challenge for states—primarily because states are reticent to require a real estate

23. *Id.*

24. Ben Ngai, ‘We’re Not Realtors!’ Former ‘Wholesaler’ Reveals Hidden Dark Side of Vancouver’s Red-Hot Real Estate Market, NAT’L POST (Mar. 9, 2016), <https://nationalpost.com/news/canada/were-not-realtors-former-wholesaler-reveals-hidden-dark-side-of-vancouver-red-hot-real-estate-market>.

25. Statement of Steven M. D’Antuono, Section Chief, Criminal Investigative Division, FBI, for Hearing Entitled “Combating Money Laundering and Other Forms of Illicit Finance: Regulator and Law Enforcement Perspectives on Reform,” U.S. SENATE COMM. ON BANKING, HOUS. & URB. AFFS. 4–5 (Nov. 29, 2018), <https://www.banking.senate.gov/imo/media/doc/D’Antuono%20Testimony%2011-29-18.pdf> (detailing ways real estate transactions are used to launder money).

26. Press Release, U.S. Attorney’s Office, W.D. Okla., Jury Finds City Man Guilty of Conspiracy, Wire Fraud, and Money Laundering in Real Estate Investment Ponzi Scheme (Apr. 16, 2012), <https://archives.fbi.gov/archives/oklahomacity/press-releases/2012/jury-finds-city-man-guilty-of-conspiracy-wire-fraud-and-money-laundering-in-real-estate-investment-ponzi-scheme>.

27. See OFF. OF REGUL. ANALYSIS, FIN. CRIMES ENF’T NETWORK, MONEY LAUNDERING IN THE COMMERCIAL REAL ESTATE INDUSTRY: AN ASSESSMENT BASED UPON SUSPICIOUS ACTIVITY REPORT FILING ANALYSIS 14 (2006), https://www.fincen.gov/sites/default/files/shared/commercial_real_estate_assessment_final.pdf.

28. See, e.g., Jon Broadbooks, *Real Estate License Act (RELA) Signed into Law*, ILL. REALTORS® (Aug. 12, 2019), <https://www.illinoisrealtors.org/blog/rela-signed-into-law/>.

license for an owner to sell his or her property.²⁹ The concerns about wholesaling parallel the concerns of the 2000s housing crisis, which ironically spawned the wholesaling movement.³⁰ The drive to regulate wholesaling echoes the concerns Senator Chuck Grassley addressed when discussing the legal changes necessary in the wake of the 2000s housing crisis.³¹ Senator Grassley stated, “Unfortunately, throughout the housing crisis we’ve seen innocent homeowners who have been victims of . . . unscrupulous individuals who have used a down market to line their own pockets at the expense of others. This bill is designed to send a message”³² The housing crisis legislation was reactive; now, legislators have a chance to take a proactive approach to real estate wholesaling.

III. Current Wholesaling Regulations in Oklahoma

During the Second Regular Session of the 57th Oklahoma Legislature, lawmakers introduced the Predatory Real Estate Wholesaler Prohibition Act (House Bill 3104).³³ The Bill would have altered the ownership exception for real estate licensing to prohibit unlicensed parties from “publicly market[ing] for sale an equitable interest in a contract for the purchase of real property between a property owner and a prospective purchaser.”³⁴ The Bill overwhelmingly passed in the Oklahoma House of Representatives,³⁵ but it failed to be enacted when the legislative session adjourned for the

29. See, e.g., Doug Emde, *Chairman’s Corner*, OKLA. REAL EST. COMM’N COMMENT (Okla. Real Est. Comm’n), May 2019, <https://content.govdelivery.com/accounts/OKREC/bulletins/231b9e4> [hereinafter Emde, *Chairman’s Corner*].

30. See Youngling, *supra* note 4, at 109.

31. News Release, Sen. Chuck Grassley, Grassley, Leahy Introduce Anti-Fraud Legislation (Feb. 5, 2009), <https://www.grassley.senate.gov/news/news-releases/grassley-leahy-introduce-anti-fraud-legislation> (addressing the need to pass the Fraud Enforcement and Recovery Act to provide funding to “enforcement agencies to combat mortgage fraud and predatory lending”).

32. *Id.*

33. H.B. 3104, 57th Leg. (Okla. 2020) (engrossed), http://webserver1.lsb.state.ok.us/cf_pdf/2019-20%20ENGR/hB/HB3104%20ENGR.PDF [hereinafter H.B. 3104].

34. *Id.*

35. *Votes on H.B. 3104*, OKLA. STATE LEG., http://webserver1.lsb.state.ok.us/cf/2019-20%20SUPPORT%20DOCUMENTS/votes/House/HB3104_VOTES.HTM#RCS1196 (last visited Aug. 21, 2021).

term on May 29, 2020.³⁶ Thus, the practice of real estate wholesaling remains unregulated in Oklahoma.

Currently, the Oklahoma Real Estate Commission (“OREC”) does not classify the practice of wholesaling as a licensable activity.³⁷ Based on an over twenty-five-year-old state trial court case, purchase contracts are treated as an equitable interest in a property, which wholesalers use to assert an exemption from licensing.³⁸ Real estate wholesalers in Oklahoma use this case, paired with OREC’s unwritten policy of not taking enforcement action against unlicensed wholesaling, to flout the Oklahoma real estate licensing requirements.³⁹ Specifically, wholesalers indicate that OREC “does not have an official policy [on wholesaling with purchase contracts], but appears to have chosen to follow the reasoning of the 1994 Cleveland County decision: that binding contracts create sufficient ‘ownership’ in the wholesaler to allow them to sell the contract/house without a real estate license.”⁴⁰ Wholesalers’ exemption from licensing requirements, however, may impede OREC’s core purpose of protecting the public.⁴¹

Although wholesalers use the advantageous ownership exception interpretation to avoid the current licensing code, bypassing licensing may harm the public. The practice of wholesaling would require the wholesaler

36. *Oklahoma House Bill 3104 (Prior Session Legislation)*, LEGISCAN, <https://legiscan.com/OK/bill/HB3104/2020> (last visited Aug. 21, 2021) [hereinafter *Oklahoma House Bill 3104*] (listing the status of House Bill 3104 as “50% progression, died in committee”); Brad Boles, *Column: 57th Legislature Adjourns Sine Die*, DUNCAN BANNER (May 29, 2020), https://www.duncanbanner.com/opinion/column-57th-legislature-adjourns-sine-die/article_c7db62ae-a1d6-11ea-8276-ff87a04ee45e.html (reporting the date of adjournment for the 57th Legislature).

37. See, e.g., Emde, *Chairman’s Corner*, *supra* note 29 (indicating that wholesaling “keeps bringing complaints to the [agency] and [it is] trying to come up with a plan to address this issue”).

38. See *State ex rel. Okla. Real Est. Comm’n v. Cheshier*, No. CJ-94-259 BH, at 3 (Dist. Ct. Cleveland Cnty. Oct. 14, 1994) (holding that a future purchaser “becomes the ‘owner’ of the real estate at the time the contract is entered”).

39. See Casey Gray, *Wholesaling Real Estate in Oklahoma* (n.d.), *reprinted in* Matt Stacy, Comment to *Wholesaling in Oklahoma*, BIGGERPOCKETS, <https://www.biggerpockets.com/forums/93/topics/394515-wholesaling-in-oklahoma> (last visited Sept. 3, 2021).

40. *Id.*

41. See *Lodes v. State ex rel. Okla. Real Est. Comm’n*, 1992 OK CIV APP 23, ¶ 4, 837 P.2d 925, 926 (“One of the long-recognized purposes of Oklahoma’s real estate licensing law is the regulation of the business of selling real estate . . . for the protection of those members of the public who wished to buy real estate . . .”).

to be a licensed broker or agent in Oklahoma if the ownership exception was narrowly construed. A real estate license is required in Oklahoma to “act as a real estate licensee, or hold [oneself] out as such.”⁴² To put it plainly, if you perform the duties of a realtor or real estate broker or pretend to be one, you need a real estate license.⁴³ A licensee is “any person who performs any act, acts or transactions set out in the definition of a broker.”⁴⁴ Oklahoma defines a broker as

any person, partnership, association or corporation, foreign or domestic, who for a fee, commission or other valuable consideration, or who with the intention or expectation of receiving or collecting a fee, commission or other valuable consideration, lists, sells or offers to sell, buys or offers to buy, exchanges, rents or leases any real estate, or who negotiates or attempts to negotiate any such activity, or solicits listings of places for rent or lease, or solicits for prospective tenants, purchasers or sellers, or who advertises or holds himself out as engaged in such activities.⁴⁵

Under this definition, a wholesaler would be performing licensable activities.⁴⁶ However, Oklahoma provides a list of exceptions to licensing, including ownership.⁴⁷ Wholesalers use the licensing requirements’ ownership exemption to avoid OREC enforcement action.⁴⁸

Oklahoma exempts any person or entity that is an “owner, lessor or lessee of real estate” from licensing when “selling, renting, leasing, exchanging, or offering to sell, rent, lease or exchange, any real estate so owned or leased.”⁴⁹ Wholesalers claim that executing a contract to purchase property makes the purchaser an “owner” of the subject property and thus the assignment of that contract does not require a license.⁵⁰ This argument

42. 59 OKLA. STAT. § 858-301 (West, Westlaw through 1st Reg. 2021 Sess.).

43. *Id.*

44. *Id.* § 858-102(11).

45. *Id.* § 858-102(2).

46. *See id.*

47. *Id.* § 858-301(1).

48. *See Emde, Chairman’s Corner, supra* note 29.

49. 59 OKLA. STAT. § 858-301(1).

50. *See Gray, supra* note 39; *see also State ex rel. Okla. Real Est. Comm’n v. Cheshier*, No. CJ-94-259 BH (Dist. Ct. Cleveland Cnty. Oct. 14, 1994) (addressing the employee of a home builder who sold assignments of contracts to purchase real estate without a real estate license claiming the contract was an ownership of real estate under the statutory definition).

is plausible because the Oklahoma Real Estate License Code defines “real estate” as “any interest or estate in real property, . . . whether vested, contingent or future.”⁵¹ Oklahoma expressly articulates that future interests are encompassed in the definition of real estate.⁵² Therefore, according to this argument, the purchase contract is a “contingent or future” interest in the property.⁵³ Standing alone, the definition of real estate would not be problematic; paired with the ownership exception, however, it is problematic.

Wholesalers exploit the expansive definition of real estate to assert that a purchase contract is a future ownership interest in the property, which allows them to evade real estate licensing requirements.⁵⁴ An Oklahoma trial court adopted this interpretation in 1994.⁵⁵ It indicated that failure to define ownership in the statute, but making “real estate” a defined term, supports the contention that a future purchaser “becomes the ‘owner’ of the real estate at the time the contract is entered.”⁵⁶ It is unclear, however, whether a purchase contract with no intention to finalize is a future or contingent interest in a property.⁵⁷ The practice of wholesaling could be licensable real estate activity in Oklahoma if the definition of ownership was redefined to remove contingent and future interests or, alternatively, if the ownership exception was more narrowly construed.⁵⁸

Having failed to enact legislative prohibitions⁵⁹ and after identifying the problem as a broadly construed ownership exception,⁶⁰ interested parties may be tempted to resolve the wholesaling problem through administrative agency action.⁶¹ Altering the ownership exception through administrative

51. 59 OKLA. STAT. § 858-102(1).

52. *Id.*

53. *See id.*

54. *See* Emde, *Chairman’s Corner*, *supra* note 29.

55. *Cheshier*, No. CJ-94-259 BH, at 3.

56. *Id.* at 2–3.

57. *See infra* Part VI.

58. *See infra* Part VI.

59. *See Oklahoma House Bill 3104*, *supra* note 36.

60. *See* Emde, *Chairman’s Corner*, *supra* note 29.

61. *See* Okla. Real Est. Comm’n, Regular Business Meeting Agenda (Sept. 9, 2020) (on file with author) (referencing the Wholesaling Task Force charged with administrative solutions to real estate wholesaling).

action, however, faces additional barriers in Oklahoma.⁶² The state currently has a moderately sized regulatory code, which includes 9,286,099 words and a total of 143,962 restrictions.⁶³ Oklahoma agencies are constrained by Governor Kevin Stitt's Executive Order that requires a "1-in-2-out" rule.⁶⁴ This rule prohibits state agencies from adding mandatory rules without identifying two existing mandatory rules that can be revoked.⁶⁵ This limitation potentially frustrates agency efforts to promulgate enforcement regulations designed to monitor the practice of real estate wholesaling.

Barriers in implementing new legislation,⁶⁶ enforcing existing regulations,⁶⁷ and promulgating new regulations,⁶⁸ however, have not impaired key stakeholders' desire to regulate the practice of real estate wholesaling.⁶⁹ In addition to Representatives Mike Osburn and Brian Hill's sponsorship of House Bill 3104, the Bill was also sponsored by Senator Paul Rosino.⁷⁰ Senator Rosino's sponsorship is notable because he is a licensed realtor and broker in Oklahoma and owns Rosino Realty,⁷¹ which serves the Oklahoma City metro area.⁷² All three congressional members' sponsorship of the legislation is striking because they are Republican

62. See Okla. Exec. Order No. 2020-03 (Feb. 3, 2020) (mandating that every new mandatory administrative regulation implemented correlate with the abrogation of two regulations within the code).

63. Mercatus Ctr. at George Mason Univ., *State RegData*, QUANTGOV, <https://www.quantgov.org/state-regdata> (last visited Aug. 21, 2021).

64. Okla. Exec. Order No. 2020-03 (Feb. 3, 2020). National Executive Order 13,771 similarly directs that "whenever an . . . agency . . . publicly proposes for notice and comment or otherwise promulgates a new regulation, [the agency] shall identify at least two existing regulations to be repealed." Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Feb. 3, 2017).

65. Okla. Exec. Order No. 2020-03 (Feb. 3, 2020).

66. See, e.g., *Oklahoma House Bill 3104*, *supra* note 36.

67. See, e.g., *State ex rel. Okla. Real Est. Comm'n v. Cheshier*, No. CJ-94-259 BH (Dist. Ct. Cleveland Cnty. Oct. 14, 1994).

68. See Okla. Exec. Order No. 2020-03 (Feb. 3, 2020).

69. See Roach, *supra* note 5 (warning of wholesaling consequences to sellers); see also Emde, *Chairman's Corner*, *supra* note 29.

70. H.B. 3104, *supra* note 33.

71. *Senator Paul Rosino*, OKLA. SENATE, <https://oksenate.gov/senators/paul-rosino> (last visited Aug. 21, 2021).

72. *Id.*; see also *About Us*, ROSINO REALTY, <https://www.rosinorealty.com/about/> (last visited Aug. 21, 2021) (allowing users to search properties managed by Rosino Realty in Oklahoma City).

representatives.⁷³ Traditionally, Republican politicians are reticent to impose additional regulation because they believe it harms business interests.⁷⁴ Further, attempts to implement new restrictive legislation in Oklahoma are notable because, based upon a 2018 study, 46% of the state is classified as Republican or leaning Republican.⁷⁵ The break from traditional political party values may indicate that outside concerns or pressures are shaping wholesaling regulation attempts in Oklahoma.

Support for wholesaling regulation is not constrained to the Legislature; other key stakeholders have indicated a desire to regulate the practice.⁷⁶ OREC has indicated that the practice “keeps bringing complaints to the Commission and [it is] trying to come up with a plan to address this issue without restricting the ability of . . . property owner[s] to sell their property on their own.”⁷⁷ Further, wholesaling is the topic of a special task force for OREC as it strives to develop a balanced plan.⁷⁸ Additionally, Oklahoma realtors have undertaken a public education campaign to inform consumers about the dangers they perceive in real estate wholesalers.⁷⁹ Realtors warn consumers that “[w]ithout an advocate and guide to direct the process, people are often taken advantage of.”⁸⁰ With a desire to craft a plan to address real estate wholesaling, it is appropriate to evaluate other states’

73. Representative Mike Osburn, OKLA. STATE LEGIS.: HOUSE OF REPRESENTATIVES, <https://okhouse.gov/Members/District.aspx?District=81> (last visited Aug. 21, 2021); Representative Brian Hill, OKLA. STATE LEGIS.: HOUSE OF REPRESENTATIVES, <https://okhouse.gov/Members/District.aspx?District=47> (last visited Aug. 21, 2021); Senator Paul Rosino, *supra* note 71.

74. See generally *The Partisan Divide on Political Values Grows Even Wider: 2. Government, Regulation and the Social Safety Net*, PEW RSCH. CTR. (Oct. 5, 2017), <https://www.pewresearch.org/politics/2017/10/05/2-government-regulation-and-the-social-safety-net/> [hereinafter *The Partisan Divide Grows Even Wider*] (“Two-thirds of Democrats (66%) say government regulation of business is necessary to protect the public interest. . . . Just 31% of Republicans say government regulation of business is needed; about twice as many say such regulation ‘usually does more harm than good.’”); Gerhard Peters & John T. Woolley, *Republican Party Platforms: Republican Party Platform of 1980*, AM. PRESIDENCY PROJECT (July 15, 1980), <https://www.presidency.ucsb.edu/documents/republican-party-platform-1980> (discussing the need to limit federal regulation for small business growth).

75. Jeffrey M. Jones, *Democratic States Exceed Republican States by Four in 2018*, GALLUP (Feb. 22, 2019), <https://news.gallup.com/poll/247025/democratic-states-exceed-republican-states-four-2018.aspx>.

76. Emde, *Chairman’s Corner*, *supra* note 29; see also Roach, *supra* note 5.

77. Emde, *Chairman’s Corner*, *supra* note 29.

78. *Id.*

79. See Roach, *supra* note 5.

80. See *id.*

schemes of real estate licensing and the regulations they have implemented to address wholesaling.

IV. Multi-state Analysis of Wholesale Regulations

Illinois, Texas, and Arkansas each define licensable activity as any activity that falls within the scope of a licensee equivalent to a broker.⁸¹ These states each provide an exception to licensable activity that includes some type of exemption for property owners.⁸² However, each state takes a different approach to regulating the practice of wholesaling. The spectrum of policies ranges from Illinois effectively prohibiting unlicensed wholesaling⁸³ to Texas expressly allowing unlicensed wholesaling if the wholesaler meets certain conditions.⁸⁴

Two driving factors may shape implementing new state laws and regulations: overall political party leanings of the state⁸⁵ and the level of regulation already enacted in the state.⁸⁶ Politics and the size of the regulatory state, however, cannot account for the unique legislative approaches taken by states with facially similar metrics in those areas. Additional factors help shape the unique legislation.⁸⁷ Gaining an understanding of the driving factors behind wholesaling regulation requires a state-by-state evaluation.

81. 225 ILL. COMP. STAT. 454/1-10 (2019); *see* TEX. OCC. CODE ANN. § 1101.002(1)(A) (West 2016); *see* ARK. CODE ANN. § 17-42-103(13) (2017).

82. *See* 225 ILL. COMP. STAT. 454/1-10 (permitting a person to sell his own property without a license once per year); TEX. OCC. CODE ANN. § 1101.004 (restricting the definition of a broker to one who performs services for another); ARK. CODE ANN. § 17-42-104(a)(1)(A), (10) (defining a broker as one who acts for another person rather than for himself).

83. *See* 225 ILL. COMP. STAT. 454/1-10.

84. TEX. OCC. CODE ANN. § 1101.0045.

85. *See generally* *The Partisan Divide Grows Even Wider*, *supra* note 74.

86. *See generally* Sheri Berman, *Review: Ideas, Norms, and Culture in Political Analysis*, 33 COMPAR. POL. 231, 236 (2001) (“New ideas do not enter an ideological vacuum. They are inserted into a political space already occupied by historically formed ideologies.”).

87. *See generally id.* at 232 (“Economic development, cultural change and political change go together in coherent and even, to some extent, predictable patterns.”).

A. Illinois

Illinois prohibits unlicensed real estate wholesaling through a combination of clearly defined licensable activities and limits on the licensing exception for property owners.⁸⁸

1. Regulations

Illinois defines licensable activities as “activities listed in the definition of ‘broker.’”⁸⁹ Illinois provides a broad definition for the term “broker” that includes typical realtor actions performed “either directly or indirectly,” such as receiving a commission, listing, advertising, selling, offering to sell, or negotiating a “purchase, rental, or leasing of real estate.”⁹⁰ The act of holding oneself out as a real estate professional or “procuring . . . leads or prospects, intended to result in” licensable activities related to real estate are also encompassed in the Illinois definition of a broker and are thereby licensable activities.⁹¹ Unfortunately, a detailed definition of licensable activities is no guarantee against wholesaling.

In an attempt to bring real estate wholesaling under the licensing requirements of the state, Illinois passed Public Act 101-0357.⁹² The Act updates the Real Estate License Act of 2000, and it alters the definition of a broker to place a limit on the ownership exception to licensing.⁹³ The Act limits the exception to a single transaction per rolling twelve-month period.⁹⁴ As applied, this limitation requires a wholesaler to be licensed if they perform more than one transaction per year.⁹⁵ Additionally, the Act includes safeguards against shell entities by linking the yearly transaction

88. 225 ILL. COMP. STAT. 454/1-10 (outlining licensable activities and limits under the definition of “broker”). See generally *Summary of SB 1872: The Real Estate License Act of 2000 (RELA)*, ILL. REALTORS®, https://www.illinoisrealtors.org/wp-content/uploads/2019/07/IllinoisREALTORS_Summary_SB1872_v1.pdf (last visited Sept. 4, 2021) (referencing changes to Illinois wholesaling regulations made in 2000).

89. 225 ILL. COMP. STAT. 454/1-10.

90. *Id.*

91. *Id.*

92. See Elizabeth A. Urbance, *RELA: 5 Areas of Change to the Real Estate License Act*, ILL. REALTORS® (Aug. 12, 2019), <https://www.illinoisrealtors.org/blog/sb-1872-rela-or-real-estate-license-act-explained/>.

93. Pub. Act 101-0357, 2019 Ill. Legis. Serv. P.A. 101-357 (West) (codified at 225 ILL. COMP. STAT. 454/1-10), <https://www.ilga.gov/legislation/publicacts/101/PDF/101-0357.pdf>.

94. *Id.*

95. See *id.*

limit to interconnected individuals and entities.⁹⁶ The Illinois structure is currently one of the strongest prohibitions against wholesaling without a real estate license.⁹⁷ Under the auspice of providing strong public protection,⁹⁸ Illinois substantially limits the ownership exception to licensing. As of 2019, Illinois appears to have closed the loophole of an ownership interest exempting a wholesaler from licensing requirements.⁹⁹

2. Policy Consideration and Political Drivers

Two key, sometimes overlapping, drivers shaped the initiative to close the ownership exemption to licensing: lobbying efforts from regulated real estate professionals and public interest concerns.¹⁰⁰ The 2019 amendments to the Real Estate License Act of 2000 were shaped by the “work [of] Illinois REALTORS® and the state Department of Financial and Professional Regulation.”¹⁰¹ The real estate industry, which pushed for the reforms, articulated that “[a]t the core of the rewrite effort was the guiding principle that consumers would benefit from additional protections.”¹⁰² Further, the legislation “was initiated by the Illinois Association of Realtors, which is part of the National Association of Realtors (NAR).”¹⁰³ The NAR is an organization that is active on local, state, and federal levels and controls the REALTORS® Political Action Committee (“RPAC”).¹⁰⁴ In 2019, the NAR spent \$41,241,006 on federal lobbying efforts, ranking third on a list of profiled lobbying organizations.¹⁰⁵ The NAR’s involvement in the legislation coupled with its “very strong lobbying body” has led to speculation that additional states will consider and implement licensing requirements that parallel the Illinois amendments affecting

96. *See id.*

97. *See generally* *How to Wholesale Real Estate in Illinois—Ethically and Legally*, HOMEVESTORS (Sept. 9, 2020), <https://homevestorsfranchise.com/blog/midwest/2020/09/how-to-wholesale-real-estate-in-illinois-ethically-and-legally/>.

98. *See* Broadbooks, *supra* note 28.

99. *See* *How to Wholesale Real Estate in Illinois—Ethically and Legally*, *supra* note 97.

100. *See* Broadbooks, *supra* note 28.

101. *Id.*

102. *Id.*

103. Maloney, *supra* note 18.

104. *Political Advocacy*, NAT’L ASS’N REALTORS®, <https://www.nar.realtor/political-advocacy> (last visited Aug. 21, 2021); *see RPAC*, NAT’L ASS’N REALTORS®, <https://www.nar.realtor/rpac> (last visited Aug. 21, 2021).

105. *National Assn of Realtors*, OPENSECRETS, <https://www.opensecrets.org/orgs/national-assn-of-realtors/summary?all=2020&id=D000000062> (last visited Aug. 21, 2021).

wholesalers.¹⁰⁶ Lobbying efforts were likely more successful in Illinois because of the political and regulatory composition of the state.

Of the states surveyed in this Comment, Illinois is the most Democratic-leaning state, with 50% of the state reported as Democrat or leaning Democrat.¹⁰⁷ Illinois also has the most voluminous regulatory code, which includes 18,552,669 words and a total of 278,475 restrictions.¹⁰⁸ This combination of factors indicates that Illinois is more likely to perceive government regulation of business as necessary,¹⁰⁹ and is more accepting of regulations because the state has normalized a comprehensive regulatory code.¹¹⁰

B. Arkansas

In contrast to the express Illinois prohibition of unlicensed wholesaling, Arkansas has a more nuanced approach to constraining wholesalers. Arkansas has attempted to limit unlicensed real estate wholesaling by defining unlicensed activity and disqualifying wholesalers from utilizing the ownership exception to licensing.¹¹¹

1. Regulations

The Arkansas Legislature directly defines “unlicensed real estate activity” as “offering or engaging in any practice, act, or operation set forth in [the definition of principal broker] without a valid active Arkansas license issued by the commission.”¹¹² “Principal broker” is defined as “an individual expecting to act or acting for another for a fee, commission, or other consideration,” who performs any one activity of a list of twelve categories of activities common to real estate professionals.¹¹³ Common activities include selling, negotiating, offering, and listing for “purchase,

106. Maloney, *supra* note 18.

107. Jones, *supra* note 75.

108. Mercatus Ctr. at George Mason Univ., *supra* note 63. The RegCensus Explorer tool gives access to data after choosing “Sub-national” level from the drop-down list and searching “Illinois” with the search tool.

109. See generally *The Partisan Divide Grows Even Wider*, *supra* note 74 (indicating that Democrat politicians are more likely to support government regulation than Republican politicians).

110. See *supra* note 86.

111. See ARK. CODE ANN. § 17-42-103(13) (2017); see also *id.* § 17-42-104(c)(1).

112. *Id.* § 17-42-103(13).

113. *Id.* § 17-42-103(10).

rent, or lease real estate.”¹¹⁴ The Arkansas Code articulates an extensive list of exceptions to licensing requirements, and it includes an exemption for property owners.¹¹⁵ Arkansas’s ownership exemption, however, is not absolute.¹¹⁶

To qualify for an ownership exception to the licensing requirement, an individual or entity must intend to own the property.¹¹⁷ To properly confine the ownership exception to licensing requirements, Arkansas adopted new legislation.¹¹⁸ In 2017, Arkansas added language clarifying that an owner could not “qualify for an exception” when the owner “[o]btain[ed] an equitable interest in real estate with knowledge that the interest was obtained on behalf of a person or entity that intends to gain an interest in the real estate other than that of ownership.”¹¹⁹ The statute forbids the use of the ownership exception when it is utilized “[s]trategically [to] circumvent[] the requirement for licensure.”¹²⁰ The Arkansas exemption language prevents real estate wholesalers from utilizing the ownership exemption because wholesalers do not intend to own the property.¹²¹ Further, misuse of the ownership exception comes at the risk of a Class D felony.¹²² The addition of an intent requirement and implementation of strong penalties indicate that specific concerns may have shaped the Arkansas legislation.

114. *Id.*

115. *Id.* § 17-42-104(a)(1) (stating that “owner[s] of an individual freehold or leasehold interest in real estate” and “individual[s] attempting to acquire for [their] own use a freehold or leasehold interest in real estate” are exempt from licensing requirements related to their own properties).

116. *See id.* § 17-42-104(c).

117. *See id.*

118. Although House Bill 1163 was withdrawn, nearly identical language appeared in the final revisions to the statutes. The only change between the proposed language and what was passed was the addition of clarifying language, “other than that of ownership.” *Compare* An Act to Clarify Provisions Concerning Real Estate License Exceptions; and for Other Purposes, H.B. 1163, 91st Gen. Assemb., Reg. Sess. § 2(c)(1) (Ark. 2017) [hereinafter H.B. 1163] (withdrawn), <https://www.arkleg.state.ar.us/Bills/FTPDocument?path=%2FBills%2F2017R%2FPublic%2FHFB1163.pdf> with ARK. CODE ANN. § 17-42-104(c)(1).

119. ARK. CODE ANN. § 17-42-104(c)(1).

120. *See id.* § 17-42-104(c)(2).

121. *See generally Window to the Law: Real Estate Wholesaling*, NAT’L ASS’N REALTORS® (June 4, 2019), <https://www.nar.realtor/window-to-the-law/real-estate-wholesaling> (“The wholesaler has no intention of actually purchasing the property and never takes title to the property.”).

122. *See* ARK. CODE ANN. § 17-42-105(d).

2. Policy Consideration and Political Drivers

The statutory changes may have been triggered by a failure of enforcement actions by the Arkansas Real Estate Commission (“AREC”) against real estate wholesalers, such as in *Stassi v. Isom*.¹²³ In *Stassi*, AREC attempted to assert that a wholesaler engaged in unlicensed real estate activity.¹²⁴ The Arkansas Court of Appeals, however, held the AREC “did not address and decide the [ownership] ‘exemption’” argued at the trial level.¹²⁵ The AREC’s prosecution in *Stassi*, which occurred before the 2017 clarification language was added, indicated a desire to regulate wholesalers.

Wholesalers assert that the limitations placed on the industry under the revised Arkansas law were influenced by the real estate lobby.¹²⁶ In the wake of the introduction of House Bill 1163, which led to the changes requiring an examination of intent to own, wholesalers charged, “The Realtors lobbyist [has] millions of dollars to fund this campaign to stop your business if you wholesale. . . . Several other state’s realtors associations have tried this already and it hurt the investors until someone challenged the law.”¹²⁷ Wholesalers’ assertions are supported in part by the fact that House Bill 1163 was sponsored by Representative Laurie Rushing,¹²⁸ who is a licensed realtor.¹²⁹ Although the bill in question was withdrawn, nearly identical language appeared in the final revisions to the statute.¹³⁰ While regulations may be influenced by lobbying efforts, they are often impacted by other factors.

123. 525 S.W.3d 27, 28 (Ark. Ct. App. 2017); *see also* Mark Rogers, *Arkansas Real Estate Commission Views on Wholesaling in Arkansas*, BIGGERPOCKETS, <https://www.biggerpockets.com/forums/547/topics/672453-arkansas-real-estate-commission-views-on-wholesaling-in-arkansas> (last visited Sept. 3, 2021).

124. *Stassi*, 525 S.W.3d at 27–28.

125. *Id.* at 29.

126. *See* Randy T., *Warning Notice to Investors in Arkansas*, ARK. LANDLORDS MEETUP MESSAGE BD. (Jan. 21, 2017, 1:23 PM), <https://www.meetup.com/Arkansas-Landlords-Meetup/messages/boards/thread/50537254>.

127. *Id.*

128. *See* H.B. 1163, *supra* note 118.

129. *Representative Laurie Rushing (R)*, ARK. STATE LEGIS., <https://www.arkleg.state.ar.us/Legislators/Detail?member=Rushing&ddBienniumSession=2019%2F2020F> (last visited Aug. 23, 2021).

130. *See* H.B. 1163, *supra* note 118 (“(c) A person or entity shall not under any circumstance qualify for an exemption under this section if the person or entity: (1) Obtains an equitable interest in real estate with knowledge that the interest was obtained on behalf of a person or entity that intends to gain an interest in the real estate; or (2) Strategically

Political make-up, norms surrounding regulations, current events, and constituents' desires all impact the process of enacting new statutes and regulations.¹³¹ Of the states surveyed in this Comment, Arkansas is the most Republican-leaning state, with 48% of the state reported as Republican or leaning Republican.¹³² The traditional reticence of Republican political ideals towards regulation may indicate that other factors influenced the Arkansas regulation.¹³³ Those factors include public interest concerns¹³⁴ and frustration with the failure to regulate the real estate wholesaling industry through the existing structure, as seen in cases like *Stassi v. Isom*.¹³⁵ As of the writing of this Comment, there has not been a comprehensive report that details the word and restriction counts for the Arkansas administrative code.¹³⁶ Lacking this information, it is difficult to determine if Arkansans have normalized government regulation.

circumvents the requirement for licensure thereby eliminating remedies available to consumers through the commission.”); see also ARK. CODE ANN. § 17-42-104(c) (2017) (“(c) A person or entity shall not under any circumstance qualify for an exemption under this section if the person or entity: (1) Obtains an equitable interest in real estate with knowledge that the interest was obtained on behalf of a person or entity that intends to gain an interest in the real estate other than that of ownership; or (2) Strategically circumvents the requirement for licensure thereby eliminating remedies available to consumers through the commission.”).

131. See *supra* note 87.

132. Jones, *supra* note 75.

133. See *supra* note 74.

134. See generally Randy Thomason, Comment to *Arkansas Real Estate Commission Views on Wholesaling in Arkansas*, BIGGERPOCKETS, <https://www.biggerpockets.com/forums/547/topics/672453-arkansas-real-estate-commission-views-on-wholesaling-in-arkansas> (last visited Sept. 3, 2021) (stating that the AREC was concerned with wholesalers who used assignments as “a blatant attempt to circumvent licensee law [where] you should have a real estate license”).

135. See also Mark Rogers, *Arkansas Real Estate Commission Views on Wholesaling in Arkansas*, BIGGERPOCKETS, <https://www.biggerpockets.com/forums/547/topics/672453-arkansas-real-estate-commission-views-on-wholesaling-in-arkansas> (last visited Sept. 3, 2021).

136. See James Broughel & Patrick McLaughlin, *Quantifying Regulation in US States with State RegData 2.0*, MERCATUS CTR. GEO. MASON UNIV. (Aug. 31, 2020), <https://www.mercatus.org/publications/regulation/quantifying-regulation-us-states-state-regdata-20> (“Unfortunately, the regulatory code[] of . . . Arkansas . . . w[as] not analyzed due to limitations in data availability.”).

C. Texas

Diverging from Arkansas's intent analysis, Texas expressly allows unlicensed real estate wholesaling through a combination of exceptions to licensing and by requiring the disclosure of wholesaling to buyers.¹³⁷

1. Regulations

Like other states, Texas requires a real estate license to “(1) act as or represent that the person is a broker or sales agent; or (2) act as a residential rental locator.”¹³⁸ Determining what constitutes licensable real estate activities in Texas requires an examination of the definition of a broker, as well as a sales agent and residential rental locator.¹³⁹ Texas defines a broker as “a person who, in exchange for a commission or other valuable consideration or with the expectation of receiving a commission or other valuable consideration, performs *for another person*” any of multiple enumerated activities.¹⁴⁰ The enumerated activities include typical realtor activities such as selling, negotiating, offering, or listing real estate for “exchange[], purchase[], or lease[].”¹⁴¹ Further, a sales agent is any person that performs any of the above acts of a broker, under a broker's sponsorship.¹⁴² A residential rental locator is a person, other than the owner of a multi-family property, who “offers for consideration to locate a unit in an apartment complex for lease to a prospective tenant.”¹⁴³ Although Texas outlines an array of activities as licensable, it also articulates a thorough set of exemptions to licensing.

Texas exempts individuals with an ownership interest in the property from licensing standards because broker activities must be “perform[ed] for another person” to require licensing.¹⁴⁴ Additionally, Texas provides a list of exemptions from licensing including attorneys, a power of attorney if used three or fewer times a year, auctioneers for purposes of auctions, and public officials acting in an official context.¹⁴⁵ Coupled with various

137. See TEX. OCC. CODE ANN. § 1101.0045 (West 2016).

138. *Id.* § 1101.351.

139. See *id.*

140. See *id.* § 1101.002(1) (emphasis added).

141. *Id.*

142. *Id.* § 1101.002(7).

143. *Id.* § 1101.002(6).

144. See *id.* § 1101.002.

145. *Id.* § 1101.005.

exceptions, Texas balances public protection with the need for robust real estate investment strategies.¹⁴⁶

Texas expressly allows wholesaling as long as the wholesaler discloses the practice to the potential buyer and the wholesaler is not engaging in a real estate brokerage.¹⁴⁷ By statute, a wholesaler must disclose to a prospective buyer that the seller is marketing a mere purchase contract assignment and that the seller is not the party with legal title to the property.¹⁴⁸ This requires the wholesaler to advertise that they do not own the property being listed for sale and only have a purchase agreement for the property.¹⁴⁹ The Texas Occupation Code directly addresses the sale of an assignment of a purchase contract without a real estate license.¹⁵⁰ It states that “[a] person may acquire an option or an interest in a contract to purchase real property and then sell or offer to sell the option or assign or offer to assign the contract without holding a license” as long as “the option or contract to purchase [is not used] to engage in real estate brokerage.”¹⁵¹ In addition to not engaging in a real estate brokerage, the wholesaler must “disclose[] the nature of the equitable interest to any potential buyer.”¹⁵² A wholesaler who fails to disclose the assignment structure “to a potential buyer is engaging in a real estate brokerage.”¹⁵³

The statute expressly prohibits a wholesaler from engaging in a real estate brokerage without a license.¹⁵⁴ This prohibition has little force against real estate wholesalers because the statutory definition of a real estate brokerage exempts owners and real estate investors.¹⁵⁵ Texas clarifies that an individual or entity “is not engaged in real estate brokerage, regardless of whether the person is licensed . . . , based solely on engaging

146. See Christine Anderson, *Sale of Equitable Interests in Real Estate Clarified*, TEX. REAL EST. COMM’N (July 7, 2017), <https://www.trec.texas.gov/article/sale-equitable-interests-real-estate-clarified> (“The practice of ‘wholesaling’ remains legal if these ‘truth in advertising’ rules are adhered to.”).

147. TEX. OCC. CODE ANN. § 1101.0045(a).

148. See *id.* § 1101.0045(b).

149. See *id.*

150. *Id.* § 1101.0045(a).

151. *Id.* § 1101.0045(a)(1).

152. *Id.* § 1101.0045(a)(2).

153. *Id.* § 1101.0045(b).

154. See *id.* § 1101.0045(a)(1).

155. See *id.* § 1101.004(b)(2)–(b)(3).

in . . . sponsoring, promoting, or managing, or otherwise participating as a principal, partner, or financial manager of, an investment in real estate.”¹⁵⁶

Although Texas allows wholesaling without a real estate license, it balances public protection by requiring disclosure to the buyer.¹⁵⁷ The statute provides that a failure to properly disclose the wholesaling structure makes the unlicensed investor a real estate brokerage.¹⁵⁸ Classification as a real estate brokerage brings the potentially troublesome wholesaler under the regulatory authority of the Texas Real Estate Commission.¹⁵⁹ Texas’s approach appears to be a savvy compromise between enforcing strict licensing regulation and protecting the public interest.¹⁶⁰

2. Policy Consideration and Political Drivers

The legislators likely struck a compromise between enforcing strict licensing requirements and protecting the public interest to balance the goals of regulators and the regulated.¹⁶¹ Senate Bill 2212, which implemented the wholesale disclosure and transparency requirements in Texas, was “developed in a coordinated effort between the Texas Real Estate Commission (TREC), the Texas Association of REALTORS, and stakeholders across the state to ensure more transparency and disclosure in real estate transactions.”¹⁶² The Texas Association of REALTORS was responsible for lobbying in favor of the initial real estate licensing laws in Texas and continues to advocate each session for “pro-real estate public policy to protect consumers.”¹⁶³ This aligns with TREC’s regulatory “mission to protect consumers of real estate services in Texas.”¹⁶⁴

156. *Id.* § 1101.004(b)(2).

157. *See id.* § 1101.0045(a)(2)–(b).

158. *Id.* § 1101.0045(b).

159. *See The Legality of Wholesaling Real Estate in Texas*, SILBERMAN L. FIRM, PLLC (June 29, 2017), <https://silblawfirm.com/real-estate-law/the-legality-of-wholesaling-real-estate-in-texas/>.

160. *See supra* note 146.

161. *See* TEX. SENATE RSCH. CTR., 85R20555 BEE-F, BILL ANALYSIS S.B. 2212, at 1 (2017), <https://capitol.texas.gov/tlodocs/85R/analysis/pdf/SB02212S.pdf#navpanes=0>.

162. *Id.*

163. Jaime Lee, *A Century of Advocacy*, TEX. REALTORS® (May 1, 2020), <https://www.texasrealestate.com/members/communications/texas-realtor-magazine/issues/may-2020/a-century-of-advocacy>.

164. *About TREC*, TEX. REAL EST. COMM’N, <https://www.trec.texas.gov/agency-information/about-trec> (last visited July 14, 2021).

Importantly, the regulation of wholesalers does not limit the practice in Texas; it merely mandates disclosure.¹⁶⁵

This careful balance in the regulation of wholesaling favoring disclosure rather than licensure departs from the limitations placed by Illinois or Arkansas and is likely shaped by Texas's political values. Of the states that regulate real estate wholesaling, Texas is the state with the cleanest split along party lines.¹⁶⁶ The state is categorized as "competitive" when comparing party advantage; 42% of the state reported as Republican or leaning Republican, while 39% of the state reported as Democrat or leaning Democrat.¹⁶⁷ Although Texas has over twice the population of Illinois,¹⁶⁸ Texas has slightly fewer mandatory regulations, including 17,175,100 words and a total of 262,763 restrictions.¹⁶⁹ The party split in Texas and the unique approach to regulation may reflect a compromise between Democratic perception that government regulation of business is necessary and the traditional reticence of Republican political ideals towards regulation.¹⁷⁰ Further, the similar number of regulations between Texas and Illinois may support that although more evenly split along party lines, Texas is accepting of regulations because the state has normalized a comprehensive regulatory code.¹⁷¹ Overall, lobbying efforts and the political split between parties in Texas has culminated in unique wholesaling regulations that allow a broad assertion of ownership rights while protecting consumers with mandatory disclosure of the wholesaling structure.

V. Proposed Legislative Approach for Oklahoma

The disparate legislative approaches to wholesaling in Illinois, Arkansas, and Texas, contrasted with the numerous states that have no wholesaling regulation, illustrate the divergent path legislatures have before them. In Oklahoma, the state Legislature can revive a bill identical to the unenacted

165. See *supra* note 146.

166. See Jones, *supra* note 75.

167. *Id.*

168. *QuickFacts: Illinois; Texas*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/IL,TX/RHI725219> (last visited Aug. 3, 2021).

169. Mercatus Ctr. at George Mason Univ., *supra* note 63.

170. See *supra* note 74.

171. See *supra* note 86.

2020 Predatory Wholesaler Prohibition Act,¹⁷² model legislation after another state, introduce novel legislation, or do nothing and maintain the status quo. Protection of home sellers and buyers alike demands that either legislatures act or that administrative enforcement agencies find a way to work within the existing system. In Oklahoma, given the challenges faced with administrative enforcement against wholesalers, the Legislature should carefully construct wholesaling regulation that meets the needs of the state.

Meeting Oklahomans' needs requires identifying which real estate wholesaling structures need to be regulated. The Legislature has the choice of regulating all wholesaling by closing the ownership exception gap or narrowing the focus to only those wholesalers that never take title to the property. Carefully crafted legislation could leave an ownership exemption in place for bona fide homeowners, while protecting parties to real estate transactions from those wholesalers seeking to exploit the ownership exception.

A. Oklahoma Compared to Federal Securities Regulation

Federal securities law provides an example of how to effectively narrow exemptions to licensing meant to allow bona fide private owners to bypass licensing requirements.¹⁷³ An analogy to securities law is appropriate because a real estate wholesaler's intent to resell property, instead of using it as an owner, is similar to the role an underwriter plays in securities. An underwriter is "[s]omeone who buys stock from the insurer with an intent to resell it to the public," and often this role is held by an investment banker.¹⁷⁴ Similarly, real estate "[w]holesaling is [a] business model being taught to novice real estate investors . . . [where] [t]he wholesaler contracts on [a] property and then attempts to sell the contract at a higher price."¹⁷⁵ Additionally, the failed 2020 Predatory Wholesaler Prohibition Act sought to prohibit unlicensed real estate wholesaling by preventing the sale of a purchase contract, similar to the way that securities underwriters are prohibited from reselling securities interests without appropriate licensing

172. H.B. 3104, *supra* note 33 (prohibiting all unlicensed marketing of real estate purchase contract interests).

173. See 1 THOMAS LEE HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION § 4:106 (2020).

174. *Underwriter*, BLACK'S LAW DICTIONARY (11th ed. 2019).

175. Roach, *supra* note 5.

and registration.¹⁷⁶ Not only are the investment goals and sales structures of real estate wholesalers and securities investors the same, but the hazards are also similar.

The purpose of licensing and registration requirements for securities underwriters and real estate professionals is to protect the general public in their respective transactions.¹⁷⁷ When a securities purchaser “intends to turn around immediately and sell the securities to the general public, the purpose of the private offering exemption would be undermined because the securities could fall into the hands of unsophisticated investors who lacked the information to properly value the security.”¹⁷⁸ Similar concerns are echoed in the dangers of real estate transactions without a licensed real estate professional, including that “[w]ithout an advocate and guide to direct the process, people are often taken advantage of.”¹⁷⁹ Restricting licensing exceptions to parties that intend to own the regulated item limits the evasions of licensing by parties quickly flipping an ephemeral interest. Determining intent to own, however, can be challenging.¹⁸⁰

Intent to own is addressed in federal securities underwriting regulation by denoting that a prolonged holding indicates the “securities have ‘come to rest’” and fall into an exemption category to underwriting licensing and registration.¹⁸¹ The substantial one-year period required for an individual to hold a security before resale, without registering, illustrates the securities approach to ensuring that the ownership exemptions are not abused.¹⁸² This

176. Compare H.B. 3104, *supra* note 33 (proposing legislation that would prohibit unlicensed marketing of real estate purchase contract interests), with BRENT A. OLSON, CALIFORNIA BUSINESS LAW DESKBOOK § 39.47 (2020) (explaining that a safe harbor resale of securities does not require registration as an underwriter that sells securities subject to the Securities Act of 1933).

177. See 15 U.S.C. § 78b (“[T]ransactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are effected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto”); see also *Ratcliff v. Cobb*, 1968 OK 34, ¶ 9, 439 P.2d 194, 196 (“[O]ne purpose of the [Real Estate License] Act was to regulate such business and the parties engaged therein for the protection of . . . the public . . .”).

178. OLSON, *supra* note 176, § 39.24.

179. Roach, *supra* note 5.

180. See *United States v. Sherwood*, 175 F. Supp. 480, 483 (S.D.N.Y. 1959) (analyzing behavior of an investor holding securities and then reselling after two years) (“From such behavior, it is impossible to infer the intention to distribute, *at the time of acquisition*” (quoting the defendant)).

181. OLSON, *supra* note 176, § 39.24.

182. See HAZEN, *supra* note 173, § 4:106.

holding period was predicated on the idea that a substantial period passing “before the commencement of distribution . . . is an insuperable obstacle to [a] finding that [an individual] took the[] shares with a view to distribution thereof, in the absence of any relevant evidence from which [it] could [be] conclude[d] [that] he did not take the shares for investment.”¹⁸³ In contrast, real estate wholesalers seek to quickly turn over their interests in wholesale properties.¹⁸⁴ Mirroring federal securities regulation by imposing a similar minimum period for holding a property before resale, without a real estate license, would limit the opportunity to bypass real estate licensing.

Implementing a mandatory holding period for a real estate interest would curtail abuses of the ownership exemption; however, it may not prevent all types of real estate wholesaling. Although many real estate wholesalers quickly resell or assign their purchase contract interest,¹⁸⁵ some become legitimate owners of the properties they buy.¹⁸⁶ A mandatory holding period would address concerns of wholesalers that abandon transactions and harm home sellers.¹⁸⁷ Further, requiring wholesalers to close on the property and then hold it for some time to assert any ownership exemption to licensing would abrogate the wholesaling tactic of utilizing contingency clauses, reduced earnest money, and creative contracting to avoid closing on properties.¹⁸⁸ Finally, requiring unlicensed wholesalers to carry through with their purchase contracts and become bona fide owners reduces significant bypass of licensing and returns to the spirit of the exemption for property owners.¹⁸⁹ Understanding the problems potential legislation should address allows an effective evaluation of whether existing state legislation models would meet Oklahoma’s needs.

B. Oklahoma Compared to Illinois

The Illinois model of wholesaling regulation, although currently the most restrictive in the country, is less restrictive than the failed 2020 Oklahoma legislation.¹⁹⁰ The more in-depth Illinois regulations, including wholesaling

183. *Sherwood*, 175 F. Supp. at 483.

184. MERRILL, *supra* note 2, at 10.

185. Roach, *supra* note 5.

186. *About Us*, NATURE’S HOMES, LLC, <https://natureshomesllc.managebuilding.com/Resident/public/custom/22> (last visited Jan. 14, 2021).

187. *See generally* Roach, *supra* note 5.

188. *See generally* MERRILL, *supra* note 2, at 11.

189. *See infra* Part VI.

190. *Compare* 225 ILL. COMP. STAT. 454/1-10 (2019) (licensable activities are any activity included under the activities of a broker including purchase contract assignments),

transaction limits, align with the concept that the Illinois definition of licensable activities is more comprehensive than the Oklahoma definition.¹⁹¹ Just as these states' legislative attempts overlap, there is an overlap in the basic licensable real estate activities.¹⁹² Both states address receiving a commission, advertising, and making offers to sell, buy, rent, and lease.¹⁹³ The similarities between the licensing structures indicate that similar challenges would occur in Oklahoma if new legislation, similar to the strong Illinois prohibition, is enacted.

There are potential problems with the Illinois single transaction limit on unlicensed real estate sales.¹⁹⁴ For example, an unlicensed individual who legitimately owns several properties and wishes to sell them without a realtor in a given year would be prohibited from using the licensing exemption.¹⁹⁵ Under the single transaction limit, the unlicensed owner is acting as a broker and would be performing licensable activities.¹⁹⁶ The problems that make the Illinois model inappropriate, however, extend beyond prohibiting a legitimate owner from selling multiple properties in a single year.

The Illinois statute reflects an expansion of licensable activities that may prove difficult to enforce and lacks clear enforcement precedent.¹⁹⁷ An Illinois real estate attorney noted that the revisions impacting wholesalers are anticipated to result in “a large number of disgruntled sellers, licensed Brokers, and especially licensed Wholesalers . . . submitting complaints to

with H.B. 3104, *supra* note 33 (proposed legislation would prohibit unlicensed marketing of real estate purchase contract interests).

191. Compare 225 ILL. COMP. STAT. 454/1-10 (anyone acting as a broker requires a license for activities including the sale and assignment of more than one purchase contract per year), with 59 OKLA. STAT. §§ 858-301, 858-102(2), (11) (West, Westlaw through 1st Reg. 2021 Sess.) (a license is mandatory for anyone acting as a broker, which includes leasing, renting, selling, or otherwise arranging the exchange of property interests).

192. See 225 ILL. COMP. STAT. 454/1-10; 59 OKLA. STAT. § 858-102(2) (a license is required to receive a commission, advertise, and make offers to sell, buy, rent, and lease property).

193. 225 ILL. COMP. STAT. 454/1-10; 59 OKLA. STAT. § 858-102(2).

194. See Bob Floss II, *Wholesalers Require Brokers License in Illinois*, FLOSS L. (Aug. 14, 2019), <http://flosslaw.com/blog/wholesale>.

195. See Bryan Johnson, *Real Estate Wholesaling in Illinois: An Investment Strategy Under Scrutiny*, REJOURNALS (Feb. 12, 2020), <https://rejournal.com/real-estate-wholesaling-in-illinois-an-investment-strategy-under-scrutiny/>.

196. *Id.*

197. See Floss, *supra* note 194.

[the Illinois real estate licensing agency].”¹⁹⁸ Similar challenges to enforcement are foreseeable in Oklahoma because OREC is already faced with ongoing complaints related to wholesaling, which is a practice it does not currently regulate.¹⁹⁹ Further, the Illinois structure would require additional investigation of complaints to determine whether multiple sales had occurred during the year and tracing of separate entities to ensure that wholesalers are not using shell entities to bypass the licensing requirement.²⁰⁰ The Illinois structure is likely too restrictive and faces enforcement challenges that would make modeling Oklahoma legislation after the Illinois statute unadvisable.

C. Oklahoma Compared to Arkansas

The proposed Oklahoma legislation would have limited a wholesaler’s ability to use the ownership exception to sell purchase contract assignments, while the Arkansas statute seeks to limit the exception by determining a purchaser’s intent.²⁰¹ Although the two states have taken different paths regulating wholesaling, similarities between real estate regulations suggest Oklahoma may benefit from core concepts of the Arkansas regulation. Similar to the Oklahoma statute, Arkansas exempts individuals from licensing standards if the individual has an ownership interest in the property.²⁰² Unlike Oklahoma, Arkansas has included exceptions to the list of licensing exemptions to limit loopholes.²⁰³ The Arkansas statute makes it improper to assert the licensing exception if a wholesaler does not intend to own the property.²⁰⁴ This limitation removes evasion of the licensing requirement by performing back-to-back closing, but proving intent may lead to difficulties in enforcement.

Although the Arkansas statute facially limits unlicensed wholesaling, as seen with securities regulation, it can be difficult to determine intent to own

198. *Id.*

199. Emde, *Chairman’s Corner*, *supra* note 29.

200. *See* 225 ILL. COMP. STAT. 454/1-10 (2019).

201. *Compare* H.B. 3104, *supra* note 33 (proposed legislation would prohibit unlicensed marketing of real estate purchase contract interests), *with* ARK. CODE ANN. § 17-42-104(c) (2017) (the ownership exception does not apply if the property was not obtained with the intent to own).

202. *See* ARK. CODE ANN. § 17-42-104(a)(1)(A); 59 OKLA. STAT. § 858-301(1) (West, Westlaw through 1st Reg. 2021 Sess.).

203. ARK. CODE ANN. § 17-42-104(c).

204. *Id.*

without a defined holding period.²⁰⁵ The Arkansas statutory language that requires “knowledge that the [property] interest was obtained” for “other than that of ownership” may be difficult to enforce.²⁰⁶ One potential problem includes determining how long ownership must be maintained to fulfill the intent-to-own requirement.²⁰⁷ For example, if title to the property is transferred into the wholesaler’s name before the end buyer, through back-to-back closings, that may be enough to satisfy the intent-to-own requirement.²⁰⁸ This difficulty could be cured with a minimum holding period, similar to the holding periods in securities underwriting.²⁰⁹ Although the Arkansas statute may be an adequate method to prevent wholesaling, the ambiguities will probably make long-term enforcement against creative wholesalers difficult.²¹⁰ The Arkansas structure is likely too ambiguous to prevent wholesalers from circumventing the licensing process. Additionally, when crafting a new statute for Oklahoma, the potential enforcement challenges presented make modifications appropriate.

D. Oklahoma Compared to Texas

The full disclosure approach to wholesaling regulation makes Texas the least restrictive state that has directly addressed the practice.²¹¹ Additionally, the Texas legislation that expressly allows wholesaling stands in stark contrast to the 2020 proposed Oklahoma legislation, which would have banned unlicensed wholesaling of purchase contract interests.²¹² Both states, however, have common ground in recognizing an ownership

205. *See supra* note 180.

206. ARK. CODE ANN. § 17-42-104(c).

207. *See Sherwood*, 175 F. Supp. at 483.

208. Davis, *supra* note 1.

209. *See generally* OLSON, *supra* note 176, 176 § 39.42 (“Whether the securities have ‘come to rest’ depends on the length of time the purchaser held them. Under the Rule 144 safe harbor, the holding period was originally set at two years.”); *see also Sherwood*, 175 F. Supp. at 483.

210. *See* Davis, *supra* note 1 (article by an Arkansas attorney) (detailing how the intent to own can be circumvented with “closings [that] occur back-to-back so [the wholesaler] do[es] not hold the property for long and put[s] no-money into it for rehabilitation”).

211. *See generally* TEX. OCC. CODE ANN. § 1101.0045 (West 2016).

212. *Compare id.* (sale of purchase contract assignments does not require a real estate license if the sale structure is disclosed), with H.B. 3104, *supra* note 33 (proposed legislation would prohibit unlicensed marketing of real estate purchase contract interests).

exemption to licensing requirements.²¹³ Texas, unlike Oklahoma, has addressed real estate wholesaling by requiring full disclosure of purchase contract assignment sales.²¹⁴ The direct acquiescence to wholesaling in Texas ostensibly removes the need to limit the ownership exception because potential wholesaling issues are addressed through disclosure requirements.²¹⁵ Disclosure of purchase contract sales, however, may not cure all the potential problems of wholesaling.

Disclosure would require a wholesaler to inform the seller of the deal structure, but disclosure alone may not protect against unscrupulous wholesalers.²¹⁶ It has long been established that parties are bound to the terms of the contract, whether they read them or not.²¹⁷ The purpose of real estate regulation is not contractual enforcement—it is for public protection.²¹⁸ Further, a standalone policy of required disclosure would not impact the operations of wholesalers that intend to close on properties and take short-term ownership instead of flipping paper contracts.²¹⁹ A policy of disclosure alone, modeled after the Texas statute, does not address the full array of concerns with wholesaling. Therefore, it would be prudent to couple disclosure with additional requirements to fully protect Oklahoma consumers.

213. See 59 OKLA. STAT. § 858-301(1) (West, Westlaw through 1st Reg. 2021 Sess.) (property owners are exempt from real estate licensing requirements when performing licensable activities related to their property); see also TEX. OCC. CODE ANN. § 1101.002(1) (the activities of a broker are licensable when the broker “performs for another person”).

214. TEX. OCC. CODE ANN. § 1101.0045.

215. See generally *id.*

216. Cf. HAZEN, *supra* note 173, § 2:11 (“It is generally conceded to be a fiction that each investor or potential investor reads the prospectus from cover to cover; and thus, it has been suggested by some observers that most disclosures that are required by the securities laws are not in fact relevant to the majority of investors. . . . Other observers have disagreed, expressing the view that disclosure requirements are directly meaningful to investors.”).

217. *Upton v. Tribilcock*, 91 U.S. 45, 50 (1875) (“A contractor must stand by the words of his contract; and, if he will not read what he signs, he alone is responsible for his omission.”).

218. *E.g.*, *Ratcliff v. Cobb*, 1968 OK 34, ¶ 9, 439 P.2d 194, 196 (“[O]ne purpose of the [Real Estate License] Act was to regulate such business and the parties engaged therein for the protection of . . . the public . . .”).

219. See, e.g., *Adelman & McCoy*, *supra* note 19 (reporting that wholesalers in Philadelphia buy at lost cost, often from estate, and sell for high profit days or weeks after closing).

E. New Legislative Path for Oklahoma

After examining existing state regulations of wholesalers, it is apparent that Oklahoma should craft novel legislation. Oklahoma should take a two-fold approach to wholesaling regulation. First, it should close the exploited gap in the ownership exception by requiring a holding period before a property can be reconveyed under the ownership exception. Even a short minimum holding period of six months would return the licensing exception to its intended purpose, which is exempting property owners. Second, new legislation should require disclosure of the wholesaling structure when a purchase contract assignment is sold without a real estate license. Similar to the Texas requirement, if a wholesaler fails to disclose the assignment structure, then the wholesaler would be performing unlicensed real estate activities.²²⁰ Combining the holding period requirements of federal securities regulation with the disclosure requirements of the Texas real estate statute would effectively regulate both types of wholesaling in Oklahoma.

Regulation of both types of wholesaling is appropriate to fulfill the public protection mission of OREC.²²¹ Requiring a holding period for the ownership exception would allow bona fide owners to dispose of their property without a real estate license, while making back-to-back closing on properties to assert the ownership exemption impossible. It is likely that a holding period would strongly discourage unscrupulous wholesalers from taking advantage of buyers and sellers. A holding period would prevent wholesalers from flipping paper by engaging in back-to-back closings that the wholesaler could not fund independently.²²² Further, requiring disclosure of the purchase contract assignment structure would keep all parties to a wholesale transaction fully informed of the intent. Knowledge of the structure would help to put the seller on notice of the risk and allow the seller to make an informed decision whether to enter into a purchase contract with a wholesaler. Fulfilling the mission of OREC with effective regulation would place Oklahoma at the forefront of addressing real estate wholesaling regulation.

Oklahoma has a unique chance to revive and reshape the failed Predatory Real Estate Wholesaler Prohibition Act into the new model for real estate wholesaling regulation. Further, states that lack mechanisms to address real

220. *See generally* TEX. OCC. CODE ANN. § 1101.0045(a).

221. *See Ratcliff*, 1968 OK 34, ¶ 9, 439 P.2d at 196.

222. *See, e.g., Youngling, supra* note 4, at 115.

estate wholesaling could benefit from a hybrid approach. Closing gaps in the ownership exception protects legitimate property owners' rights to sell their property without a real estate license, while avoiding undermining the purpose of licensing. Disclosure of the purchase contract assignment structure allows sellers the opportunity to take on the risk of contracting with a wholesaler, while avoiding enforcement challenges due to complicated yearly transaction limits. Overall, a hybrid structure of regulation would be beneficial to all states seeking to protect consumers from wholesalers; however, existing Oklahoma regulations may provide sufficient protections.

VI. Alternative Reframing of Existing Statutes

Although the Oklahoma Legislature²²³ and OREC²²⁴ have framed the issue of real estate wholesaling as one that must be addressed through additional legislation, the key question is: should a twenty-five-year-old state trial court case²²⁵ dictate that outcome? A thorough re-evaluation of existing precedents and current Oklahoma law reveals that a purchase contract likely is not sufficient to qualify for the ownership exception to the licensing requirement.²²⁶ Reaching this conclusion requires a thorough understanding of the ownership interest claimed to assert the ownership exception, the Legislature's intent in creating the exception, and the public policy impacts of the current enforcement policy.

At the most basic level, the ownership exception allows an owner of real estate to manage, market, and sell an interest in real estate without a real estate license issued by OREC.²²⁷ Wholesalers, however, do not have an ownership interest in the real estate sold because existing Oklahoma case law indicates that a purchase contract alone, without intent to close the purchase, does not create an equitable or legal ownership interest in real property.²²⁸ Additionally, a typical wholesaler does not take additional

223. H.B. 3104, *supra* note 33.

224. *See* Emde, *Chairman's Corner*, *supra* note 29.

225. *See State ex rel. Okla. Real Est. Comm'n v. Cheshier*, No. CJ-94-259 BH, at 3 (Dist. Ct. Cleveland Cnty. Oct. 14, 1994) (holding that contracts to purchase are an ownership interest in real estate entitled to exemption from licensing).

226. *See infra* Section VI.A.

227. 59 OKLA. STAT. § 858-301(1) (West, Westlaw through 1st Reg. 2021 Sess.).

228. *See Bank of Commerce v. Breakers, L.L.C.*, 2011 OK CIV APP 45, ¶¶ 15–19, 256 P.3d 1053, 1057–58 (holding a purchase contract alone does not create an interest in a property); *see also* *First Nat'l Bank & Tr. Co. v. United States*, 462 F.2d 908, 910 (10th Cir.

steps, such as possession of the property or taking title, that would evidence ownership.²²⁹ Therefore, OREC can present a strong case to establish wholesalers do not have an ownership interest in the real property when they perform the unlicensed activity; this would depart from current policy.

Currently, OREC does not classify the practice of wholesaling as a licensable activity.²³⁰ Purchase contracts are treated as an equitable interest in real estate, which wholesalers use to assert an exemption from licensing.²³¹ Wholesalers' exemption from licensing requirements may impede OREC's core purpose of protecting the public.²³² The practice of wholesaling, however, would be a licensable real estate activity in Oklahoma if the ownership exception was narrowly construed.

A. Purchase Contracts Do Not Create an Ownership Interest in Real Property Because They Do Not Vest Equitable Title

A wholesaler's licensing exception claim is predicated on the assertion that a purchase contract creates a future interest in a property that is sufficient to evidence ownership.²³³ Oklahoma law indicates a purchase contract alone, however, is not enough to grant a future purchaser interest in the real property.²³⁴ Courts deciding cases under Oklahoma law have found that completion of the purchase contract,²³⁵ assuming the risk of loss to the subject property,²³⁶ physical possession before closing,²³⁷ and modifications

1972) (determining the "intention of the parties . . . to be bound" by the purchase contract impacts ownership of property under contract); *State Life Ins. Co. v. State ex rel. Kehn*, 1942 OK 385, ¶ 15, 135 P.2d 965, 967 (finding the parties' intentions matter when evaluating if a purchase contract vests equitable title).

229. See *Window to the Law: Real Estate Wholesaling*, *supra* note 121.

230. See Gray, *supra* note 39.

231. See *supra* note 38.

232. *Lodes v. State ex rel. Okla. Real Est. Comm'n*, 1992 OK CIV APP 23, ¶ 4, 837 P.2d 925, 926 (citing *Ratcliff v. Cobb*, 1968 OK 34, ¶ 9, 439 P.2d 194, 196).

233. See sources cited *supra* note 50.

234. See, e.g., *Bank of Commerce v. Breakers, L.L.C.*, 2011 OK CIV APP 45, ¶¶ 15–19, 256 P.3d 1053, 1057–58 (holding a purchase contract alone does not create an interest in a property).

235. See *Bradford v. Jones*, 1935 OK 193, ¶ 8, 41 P.2d 857, 859 (holding that a contract to purchase property conferred "no legal title to the property until [the purchaser] had paid the full consideration"). Additionally, "[u]nder the rule announced in *Parks v. Classen Company*, [the buyer] had no equitable title." *Id.* (citing *Parks v. Classen Co.*, 1932 OK 157, ¶ 23, 9 P.2d 432, 434).

236. See *Bank of Commerce*, 2011 OK CIV APP 45, ¶ 2, 15–19, 256 P.3d at 1054, 1057–58 (holding in a foreclosure action that a buyer with a valid purchase contract is not entitled

to the property before closing²³⁸ are each sufficient to create a property interest. The common factor between these cases is that equitable title only vests with the execution of a purchase contract plus something additional. For almost ninety years, Oklahoma courts have indicated that a purchase contract, absent additional actions, such as assuming risk of loss on the property, does not create an ownership interest in real property.

The ownership exception to licensing does not apply to most wholesalers because, as most wholesale deals are structured, the wholesaler only has a contract to purchase the property in the future.²³⁹ As established nearly ninety years ago, the signing of a purchase contract does not create equitable title.²⁴⁰ The performance of the purchase contract is contingent on the future act of title transfer and payment at closing, which makes a finding that title vests inappropriate.²⁴¹ Further, wholesalers do not assume the risk of loss while the property is under contract.²⁴² The opposite is true; the wholesaler can delay or leave the purchase contract with little to no consequences since there is little or no earnest money put forward and no firm closing date is included in the purchase contract.²⁴³ The full burden of risk, including loss of the property, belongs to the seller that contracts with the wholesaler.²⁴⁴ Absent something more, a purchase contract does not evidence an ownership interest in real property; however, a future buyer that takes additional steps to exhibit ownership intent may acquire an ownership interest.

to notice because the purchase contract does not create an interest in the property, in part, because under the terms of the purchase contract “the risk of loss remain[s] on the seller until closing”).

237. *State Life Ins. Co. v. State ex rel. Kehn*, 1942 OK 385, ¶¶ 15–18, 135 P.2d 965, 967–68 (holding that a contract’s provision for immediate possession, followed by the buyer’s actual possession, combined to function as a completed sale that vested a “present equitable estate . . . in the [buyer]”).

238. *See First Nat’l Bank & Tr. Co. v. United States*, 462 F.2d 908, 909–10 (10th Cir. 1972) (the “intention of the parties . . . to be bound,” as manifest through improvements to the property before the funding of the purchase or transfer of legal title, “operates as an equitable conversion” of title to the contract property).

239. *See, e.g., Window to the Law: Real Estate Wholesaling*, *supra* note 121.121

240. *Bradford*, 1935 OK 193, ¶ 7, 41 P.2d at 859 (citing *Parks*, ¶ 23, 9 P.2d at 432).

241. *Id.* ¶ 8, 41 P.2d at 859 (citing *Parks*, ¶ 23, 9 P.2d at 432).

242. *See MERRILL*, *supra* note 2, at 10–11.

243. *See generally id.*

244. *See generally id.*

A future purchaser that manifests ownership intent, while under a valid purchase contract, may be vested with equitable title.²⁴⁵ A typical wholesaler, however, does not manifest ownership intention under the purchase contract, such as through taking physical possession of the property or receiving legal title at the closing of the property.²⁴⁶ Without additional actions supporting an intent to own, equitable title does not vest, and the ownership exception does not apply.²⁴⁷ Oklahoma courts have stressed that the intention of the parties is important.²⁴⁸ In examining the intention of a wholesaler, it appears a typical wholesaler has no intent to own the property.²⁴⁹ If the wholesaler were to assume control over the property once it was under contract, then the wholesaler could assert the ownership exception to licensing.²⁵⁰ Assuming immediate control of the property is only one way a wholesaler could manifest ownership intent.

A wholesaler could manifest ownership intent during the purchase contract period by making improvements to the property.²⁵¹ A typical wholesaler intends to sell an assignment of the purchase contract before the estimated closing date.²⁵² Therefore, it is unlikely that a wholesaler would ever undertake actions that display an intent to own because that is the exact opposite goal of a wholesale operation.²⁵³ Wholesalers intend to make a profit by facilitating the sale of a discounted property to a third-party buyer—not to purchase the property from the buyer.²⁵⁴ Making property improvements would undercut the financial gain of quickly flipping a contract assignment and go against the practice of “‘flip[ping] the paper’ rather than the house.”²⁵⁵ Absent additional action by a wholesaler,

245. *See* First Nat’l Bank & Tr. Co. v. United States, 462 F.2d 908, 910 (10th Cir. 1972) (determining the “intention of the parties . . . to be bound” by the purchase contract impacts ownership of property under contract); *see also* State Life Ins. Co. v. State *ex rel.* Kehn, 1942 OK 385, ¶ 15, 135 P.2d 965, 967 (stating the parties’ intentions matter when evaluating if a purchase contract vests equitable title).

246. *See generally* Youngling, *supra* note 4, at 115.

247. *See* cases cited *supra* note 245.

248. *E.g.*, State Life Ins. Co., ¶ 15, 135 P.2d at 967 (noting “the intention of the parties . . . governs” in all contracts).

249. *See, e.g.*, Youngling, *supra* note 4, at 115.

250. *See* State Life Ins. Co., ¶ 17, 135 P.2d at 968 (stating a present equitable estate in property is vested through possession).

251. *See* First Nat’l Bank & Tr. Co., 462 F.2d at 910.

252. *See, e.g.*, Youngling, *supra* note 4, at 115.

253. *See id.*

254. *See id.*

255. *See id.*

Oklahoma case law suggests a purchase contract is not an ownership interest, but there is a lack of direct guidance from Oklahoma courts related to wholesaling.²⁵⁶

Oklahoma courts appear to have addressed the issue of whether a purchase contract qualifies as an ownership interest under the Real Estate License Code and Rules only one other time.²⁵⁷ In 1994, a Cleveland County District Court highlighted that the definition of what it means to “own” real estate was an issue of first impression.²⁵⁸ The court was asked to review the applicability of the ownership exception to an employee of a home builder who was selling assignments of contracts to purchase real estate without a real estate license.²⁵⁹ The home builder claimed the purchase contracts were an ownership interest in real estate under the statutory definition.²⁶⁰ The court agreed, and it determined that a future purchaser “becomes the ‘owner’ of the real estate at the time the contract is entered.”²⁶¹ Due to the lack of Oklahoma case law, the court relied on *First National Bank & Trust Co. of Chickasha* to extend the concept of equitable conversion to real estate ownership.²⁶²

First National Bank & Trust Co. of Chickasha, however, is distinguishable because in that case the future buyer undertook improvements to the property while under purchase contract.²⁶³ The future buyer then used those improvements to assert an ownership interest for tax write-off purposes on a property the buyer eventually owned.²⁶⁴ Wholesaling is distinct from the circumstances of *First National Bank & Trust Co. of Chickasha*, because wholesalers have no intention of ever taking title to the property and do not make improvements while under contract.²⁶⁵ A wholesaler’s lack of intent to own the property indicates that a purchase contract is not an ownership interest in real estate that exempts

256. See, e.g., *Bank of Commerce v. Breakers, L.L.C.*, 2011 OK CIV APP 45, ¶¶ 15–16, 256 P.3d 1053, 1057.

257. Gray, *supra* note 39; see also *State ex rel. Okla. Real Est. Comm’n v. Cheshier*, No. CJ-94-259 BH (Dist. Ct. Cleveland Cnty. Oct. 14, 1994).

258. *Cheshier*, No. CJ-94-259 BH, at 2.

259. *Id.* at 1–2.

260. See *id.* at 2.

261. *Id.* at 3.

262. *Id.*

263. *First Nat’l Bank & Tr. Co. v. United States*, 462 F.2d 908, 909–10 (10th Cir. 1972).

264. *Id.*

265. See generally Youngling, *supra* note 4, at 115.

the wholesaler from the licensing requirement.²⁶⁶ Not only is the nature of a purchase contract interest such that it likely does not qualify for the ownership exception, but the Legislature probably did not intend the exception to be used in that fashion.

B. The Legislature Did Not Intend for a Purchase Contract to Be Classified as an Ownership Interest in Real Property

Beyond the ethereal nature of purchase contract assignments there lurks a problem with reconciling court interpretation, legislative intent, and the wholesalers' exploitation of the exception. First, when interpreting the Oklahoma Real Estate Licensing Code, "[w]henever possible, words used in a statute will be interpreted [by the court] according to their common, everyday meaning."²⁶⁷ To align with legislative intent, a court should "refrain from interpreting words used so liberally that great inconvenience or absurd consequences result. Nor may the courts adopt an interpretation of a statute which is so expansive that the court's interpretation has the effect of amending, repealing or circumventing the purpose of the statute."²⁶⁸ Second, an undercurrent of protecting the public interest is present in interpreting the Real Estate Licensing Code and counsels against an application of estoppel.²⁶⁹

Applying these two concepts to wholesaling reveals that enforcing licensing requirements against wholesalers may be successful. First, the dictionary definition of a word should prevail, absent evidence of legislative intent of another meaning.²⁷⁰ Other than the previously discussed 1994 Cleveland County District Court case, there appears to be an absence of court interpretation of the meaning of an ownership interest.²⁷¹ Lacking a direct interpretation, it is appropriate to explore the dictionary definition.

266. See *Bank of Commerce v. Breakers, L.L.C.*, 2011 OK CIV APP 45, ¶¶ 15–19, 256 P.3d 1053, 1057–58; see also *Youngling*, *supra* note 4, at 115 (explaining that wholesalers "[w]ith no money of their own . . . become wholesalers and 'flip the paper' rather than the house").

267. *Yoder v. State ex rel. Case*, 1989 OK 103, ¶¶ 7–11, 776 P.2d 1273, 1275–76 (determining the meaning of the word "sent" in the Real Estate Licensing Code by using the dictionary definition).

268. *Id.* ¶ 8, 776 P.2d at 1275.

269. *Id.* ¶ 13, 776 P.2d at 1276 (stating that "[a]pplication of estoppel against government agencies is not favored" absent compelling public interest).

270. See *id.* ¶¶ 11–12, 776 P.2d at 1276.

271. See generally *State ex rel. Okla. Real Est. Comm'n v. Cheshier*, No. CJ-94-259 BH (Dist. Ct. Cleveland Cnty. Oct. 14, 1994).

The dictionary definition of ownership of real property indicates that a wholesaler is not the owner of the property under contract.²⁷² “Own” is defined as the right to (1) “have or possess as property”; or (2) “have legal title to [property].”²⁷³ Applying the legal dictionary definition of the term in question indicates wholesalers do not own property merely under a purchase contract.²⁷⁴ Wholesalers do not possess the property, in conformance with the primary definition, because a property under purchase contract remains in the homeowner’s possession.²⁷⁵ Further, Oklahoma case law indicates a purchase contract alone does not vest title.²⁷⁶ Lack of title means that a wholesaler does not “own” the property in conformance with the second definition.²⁷⁷ Although a wholesaler does not own property in conformance with a plain meaning interpretation of the statute, a savvy legal defense may try to assert that the historic lack of enforcement actions demonstrates an acquiescence to the practice.

Following the 1994 Cleveland County trial court case, which found that purchase contracts are an ownership interest,²⁷⁸ enforcement actions for licensing violations against wholesalers effectively ceased.²⁷⁹ A wholesaler should not, however, be able to utilize the application of estoppel to prevent OREC from asserting that a purchase contract is not an ownership interest.²⁸⁰ An application of estoppel would be contrary to the public protection mission of OREC.²⁸¹ The plain meaning of ownership indicates the exception does not apply to wholesaling, and the Legislature likely did not intend the exception to be used as a licensing bypass.

272. *See Own*, BLACK’S LAW DICTIONARY (11th ed. 2019).

273. *Id.*

274. *Cf. Yoder*, ¶¶ 7–10, 776 P.2d at 1275 (determining that the statutory meaning of “sent” should be construed based on its literal, ordinary usage).

275. *See generally* Youngling, *supra* note 4, at 115.

276. *See* cases cited *supra* note 228.

277. *See Own*, BLACK’S LAW DICTIONARY (11th ed. 2019).

278. *See also* State *ex rel.* Okla. Real Est. Comm’n v. Cheshier, No. CJ-94-259 BH (Dist. Ct. Cleveland Cnty. Oct. 14, 1994) (addressing the employee of home builder who sold assignments of contracts to purchase real estate without a real estate license claiming the contract is an ownership of real estate under the statutory definition).

279. *See generally* Gray, *supra* note 39

280. *See Yoder v. State ex rel.* Case, 1989 OK 103, ¶ 13, 776 P.2d 1273, 1276 (citation omitted).

281. *See Lodes v. State ex rel.* Okla. Real Est. Comm’n, 1992 OK CIV APP 23, ¶ 4, 837 P.2d 925, 926 (citing Ratcliff v. Cobb, 1968 OK 34, ¶ 9, 439 P.2d 194, 196) (stating that the purpose of the Commission is protecting the public).

Although wholesaling was not a common practice when the Legislature enacted the ownership exception, it is unlikely that the Legislature intended the exception to include properties that are merely under contract.²⁸² An everyday citizen thinks of ownership similar to the legal definition—ownership is the right to have physical possession or legal title of a property.²⁸³ The statute’s plain text and the word’s common meaning make it absurd to believe that the Legislature meant to exempt wholesalers from real estate licensing requirements simply by asserting an ownership interest through an executory, assignable purchase contract. Legislative intent, however, is only one consideration in interpreting a statute; public policy concerns permeate legislative action and guide interpretation.

C. The Unchecked Use of Contract Assignments as an Exemption to Real Estate Licensing Is Harmful to the Public Interest

Public policy concerns are central to real estate licensing and must be considered in reviewing possible enforcement avenues related to wholesaling.²⁸⁴ In Oklahoma, “[o]ne of the long-recognized purposes of [the] real estate licensing law is the regulation of the business of selling real estate for a fee or commission for the protection of . . . the public.”²⁸⁵ Additionally, to protect the public the Legislature has “furnish[ed] a full and comprehensive descriptive statement of the acts and activities embraced in the business of brokers and salesmen engaged in selling real estate for other persons for a fee or commission.”²⁸⁶ Comprehensive regulations are not enough to protect consumers; courts must interpret challenged regulations in a way that allows effective agency enforcement.

The Oklahoma Supreme Court has mandated that Oklahoma courts should not interpret a statute in a way that is adverse to the public-protection interest of the enforcement agency.²⁸⁷ Further, enforcement officials analyze real estate licensing enforcement actions through a public policy lens by

282. See 59 OKLA. STAT. § 858-301 (West, Westlaw through 1st Reg. 2021 Sess.) (codifying ownership exception in 1974). See generally Youngling, *supra* note 4, at 109 (referencing rise of wholesaling occurred in the wake of 2000s housing crisis).

283. See Own, BLACK’S LAW DICTIONARY (11th ed. 2019).

284. See *supra* note 218.

285. *Lodes*, ¶ 4, 837 P.2d at 926.

286. *Ratcliff*, ¶ 9, 439 P.2d at 196.

287. *Lodes*, ¶¶ 3–6, 837 P.2d at 926–27 (holding that statutory restraints on broker behavior prohibiting “untrustworthy, improper, fraudulent, or dishonest dealings” were not too broad to be enforceable) (“[I]t is proper to consider the purpose of the statute, and the legitimate interest that the state is seeking to protect by the statute.”).

reviewing the impact on the enforcement agency and then considering what a reasonable industry professional's interpretation of the regulations would be.²⁸⁸ A wholesaler's use of a purchase contract to assert an exemption fails on both a public-protection and the reasonable industry professional interpretation analysis.

Interpreting a wholesaler's purchase contract as an ownership interest that exempts a party from licensing would be adverse to the enforcement mission of OREC and the public interest.²⁸⁹ A traditional application of the ownership exception would remove a limited number of transactions from the agency's regulatory oversight; however, treating a purchase contract as an ownership interest provides a de facto workaround for licensing.²⁹⁰ Wholesalers often fail to close on properties because they do not have the financing to complete the transaction.²⁹¹ While a licensed broker is required to "treat all parties with honesty" and "exercise reasonable skill and care,"²⁹² unlicensed wholesalers do not have the same duties of professional competence. A broker's duty of competency would prohibit him or her from engaging in a pattern of arranging contracts that cannot close.²⁹³ Further, a licensee breaching this duty would be subject to penalties under the Oklahoma Real Estate License Code; however, because wholesalers work outside the licensing structure, they are not subject to enforcement penalties.²⁹⁴ Interpreting a purchase contract as an ownership interest that exempts a seller from licensing not only undermines public protection, but it is also contrary to a real estate professional's common-sense interpretation.

The real estate licensing code should be interpreted as a reasonable businessperson engaged in the profession would understand the ownership exemption.²⁹⁵ Utilizing purchase contracts as an ownership exemption would

288. *See id.* ¶ 6, 837 P.2d at 927 (stating that a reasonable businessperson would understand what the real estate licensing provisions meant in the context of the profession regulated).

289. *See id.* ¶ 4, 837 P.2d at 926 (citing *Ratcliff*, ¶ 9, 439 P.2d at 196) (stating the core purpose of OREC is to protect the public in real estate transactions).

290. *See, e.g.,* Emde, *Chairman's Corner*, *supra* note 29. The regulatory body indicates it is working towards a "plan to address [wholesaling] without restricting the ability of a property owner to sell their property on their own." *Id.*

291. *See generally* Roach, *supra* note 5.

292. *See* 59 OKLA. STAT. § 858-353(A)(1) (West, Westlaw through 1st Reg. 2021 Sess.).

293. *See generally id.*

294. *See id.* § 858-401(A).

295. *See* *Lodes v. State ex rel. Okla. Real Est. Comm'n*, 1992 OK CIV APP 23, ¶¶ 2-3, 837 P.2d 925, 926.

allow virtually limitless exceptions to Oklahoma's real estate licensing requirements. If this were the case, why would a real estate professional ever meet the education requirement, take the licensing exam, and pay the required fees to obtain a real estate license? The stream of enforcement complaints to OREC indicates a reasonable real estate professional does not believe a wholesaler needs to merely enter into a purchase contract to avoid the licensing and regulatory authority of OREC.²⁹⁶ Further, a wholesaler's commercial interest in marketing the future ownership of a property cannot outweigh the public protection purpose of OREC and the Oklahoma Real Estate License Code and Rules.

A wholesaler performs unlicensed real estate activity when it markets and sells an assignment of a property for a fee without a valid Oklahoma real estate license. Existing Oklahoma case law indicates equitable title is not created by a purchase contract. Further, the Legislature probably did not intend for the definition of ownership to include a purchase contract that the reseller had no intention of consummating. Therefore, a wholesaler has no actual ownership interest in the property. Absent an ownership interest in the property, wholesalers are performing unlicensed activities that are subject to regulation by OREC. Overall, the Oklahoma Real Estate Licensing Code and Rules were designed to protect the public. Extending the ownership exemption of licensing to the sale of an assignment of a purchase contract is contrary to the public protection mission of OREC and the regulatory purpose of the Code and Rules.

Given that public protection is the purpose of licensing and the ongoing problems with wholesaling, explicit legislation that subjects wholesaling to real estate licensing requirements may be the most appropriate course of action. Requiring real estate licensing for wholesaling is arguably more appropriate now that significant barriers to licensing have been removed.²⁹⁷ The passage of House Bill 1373 in May 2019 removed limitations on licenses to those with "good moral character" and limits license refusals to the "convict[ion] of a felony crime that [is] substantially relate[d] to the occupation of a real estate agent and poses a reasonable threat to public

296. See Emde, *Chairman's Corner*, *supra* note 29.

297. See Barbara Hoberock, *Gov. Kevin Stitt Rolls Out New Criminal Justice Reform Package*, TULSA WORLD (May 2, 2019), https://tulsaworld.com/news/state-and-regional/gov-kevin-stitt-rolls-out-new-criminal-justice-reform-package/article_1f514e08-3493-5be9-91f8-8d18f1e81f26.html ("Stitt wants lawmakers to send him House Bill 1373 that would let those with a nonviolent felony conviction . . . be licensed in occupations as long as the job is not substantially related to the offense. The goal is to reduce barriers to employment.").

safety.”²⁹⁸ Further, because the Oklahoma definition of real estate includes a future interest in property, enforcement without a new statute may be tenuous.²⁹⁹ A textualist reading of the existing statute and expansive definition of real estate in Oklahoma makes new, targeted legislation appropriate to swiftly and effectively address real estate wholesaling.

VII. Conclusion

Key Oklahoma stakeholders, including realtors, OREC, and the Oklahoma Legislature, have expressed an interest in addressing the practice of wholesaling. It is undisputed that wholesaling practices should be proactively addressed to protect the public from the dual-nature dangers of wholesaling.³⁰⁰ Although it can be lucrative for the individual wholesaler, wholesaling is linked to predatory practices that harm individuals and the economy as a whole. It is unclear, however, if the proposed Predatory Real Estate Wholesaler Prohibition Act is the best method, or even required, to regulate real estate wholesalers.

A reframing of enforcement under the current rules may serve the purpose of regulating wholesalers without requiring additional legislation. If the Legislature desires to make a clear policy statement, then Oklahoma should adopt a hybrid approach. Oklahoma should blend a minimum holding period to claim the ownership exception and wholesale disclosure requirements to become the model for regulating the dualistic nature of real estate wholesaling. This approach to regulating the wild west of the real estate market would effectively address all types of wholesaling in the state. Overall, a hybrid approach encompasses Oklahomans’ values of limited government interference with business and minimal regulatory restrictions, while being effective and efficient at protecting the public. Thus, if Oklahoma chooses to adopt new legislation, a hybrid approach of limited regulation paired with full consumer disclosure is likely the best model for Oklahoma.

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298. H.B. 1373, 57th Leg. (Okla. 2019) (enacted) http://webserver1.lsb.state.ok.us/cf_pdf/2019-20%20ENR/hB/HB1373%20ENR.PDF.

299. 59 OKLA. STAT. § 858-102(1).

300. See, e.g., Roach, *supra* note 5 (noting the dangers both to sellers and to wholesalers).