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Legal Update

A WRA Publication Exclusively for the Designated REALTOR®

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"Favorite" Offer to Purchase Provisions

This *Legal Update* reviews some of WRA members' "favorite" provisions in the offer to purchase. The Department of Regulation and Licensing (DRL) will be updating the offer forms, but unfortunately it may be a couple of years before REALTORS® have revised offer forms to use. The Wisconsin real estate industry has outgrown the current offer contracts – some provisions are outdated and don't match the reality of real estate transactions today. REALTORS® all know that many of the offer provisions can stand some improvement or may need to be totally reworked or just eliminated. Nonetheless, real estate licensees must continue to work with the existing forms in the meantime. To that end, this *Update* reviews some of those "favorite" provisions that give agents fits and are thorns in the sides of brokers. As REALTORS® contend with the existing offer forms, they should think about what they would change and what would make Wisconsin purchase contracts easier for licensees to use and for consumers to understand.

Some of the problem offer provisions discussed in this *Update* include the inclusion and exclusion of personal property and fixtures, acceptance and binding acceptance, delivery of documents and written notices, occupancy, rental weatherization, funding concerns at closing, testing, financing contingency, unauthorized practice of law, earnest money issues, sale of buyer's property contingency, bump clause, secondary offers, pre-closing occupancy and the inspection contingency. Each section includes a REALTOR® practice tip and Legal Hotline questions and answers. This *Update* focuses on the WB-11 Residential Offer to Purchase form, but has application to all of the other DRL-approved offer to purchase forms because they have many provisions in common. All line references in this *Update* refer to the WB-11 Residential Offer to Purchase form with a mandatory use date of November 1, 1999.

Inclusions and Exclusions: Personal Property and Fixtures

If the sellers clearly told you that they were going to take the surround-sound stereo system with them and the buyers assumed that it was included in the purchase price because they believed it was built in, a dispute will materialize as soon as the buyers realize that the system is gone. The sellers are not about to return the system and the buyers are very upset with the cooperative agent, claiming it was his fault. To keep the peace and try to preserve the brokers' reputations in the community, the two agents agree to pay some or all of the cost of a stereo for the buyer and watch as parts of their commission checks float out the window. These disputes and the guilt that causes agents to contribute to replacement items can be avoided when REALTORS® take the time to pay attention to the details. It is a matter of due diligence by the agents involved in the transaction.

The agents and the parties must understand that the offer, not the listing contract or the data sheet, determines the agreement between the buyer and seller. The listing contract only

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expresses what the seller is willing to have included in an acceptable offer. Similarly, MLS or office data sheets only reflect what property is available.

The offer establishes the parties' agreement about personal property. The purchase price in the offer includes all fixtures that are on the property on the date of the offer, unless expressly excluded. The definition of a "fixture" in the offer concludes with the notation that, "The terms of the offer will determine what items are included/excluded."

If the buyer wants to have additional property included in the sale, such as freestanding appliances or curtains, this must be written into the offer in the "Additional items included in purchase price" section, unless it is clearly a fixture. It is prudent to list questionable items that are attached, yet may be readily removed, and thus may or may not be a fixture, such as a can opener attached to the kitchen wall or an ornate bathroom mirror. The seller must exclude fixtures and questionable items that he wants to take with him in the "Items not included in purchase price" section, such as an antique crystal chandelier, trees and shrubbery or built-in shelving. The seller must also exclude rented items such as a water softener or an LP (propane) tank because they are not included in the sale.

Some items most likely to be a concern include:

- Wall-mounted television stands or speakers. These are often readily removable and can be replaced; they usually are not specifically adapted.
- Home entertainment and satellite dish components.
- Garden statues, basketball hoops, flagpoles and swing sets. These may be fixtures if permanently cemented in or affixed to the property, but may be personal property if they can be readily transported.
- Invisible fences. It may be argued that the control box is a fixture if bolted onto the garage wall and if it goes with underground components, similar to a satellite dish system.
- LP tanks and water conditioning systems. These will generally be fixtures, so they must be excluded if rented.
- Appliances. These are not fixtures unless they are built in. When including appliances in the sale, parties should be careful to designate which refrigerator or freezer is included if there is more than one on the property on the date of the offer.
- Window treatments. Window shades, curtain and traverse rods and blinds are generally fixtures and curtains and drapes are frequently personal property, unless otherwise agreed to by the parties. Problems often arise when the offer does not specifically address exactly which window treatments go and which stay.

When a buyer writes an offer, the agent working with the buyer should very carefully review and list fixtures and personal property items that will be included or excluded from the sale. The listing agent should carefully review fixtures and personal property with the seller, cross checking the offer with the listing contract and any other list compiled during the listing process before any offer is accepted. If a discrepancy is discovered after the offer is accepted, the parties and agents can try to negotiate an amendment to resolve the situation.

REALTOR® Practice Tips: REALTORS® must carefully write in personal property items to be included or excluded from the purchase price unless the item is clearly a fixture. A dispute between the parties at closing over personal property may result in the agents paying to replace disputed items.

Legal Hotline Questions and Answers – Personal Property and Fixtures

The MLS remarks sheet for the listed house refers to "invisible fencing." The invisible fencing was not mentioned in the offer. The buyers asked what parts of the invisible fencing the sellers were going to leave. The fence is under the ground, so that is considered a fixture. There is a control panel that is held by two screws and collars for the dogs. Is the control panel part of the invisible fence system?

As a general rule, a fixture is an item of property that, under certain circumstances, may be treated legally as personal property, but has become so attached to land or buildings, or is used in such close association with land or buildings, that it is treated as a part of the land. The courts have attempted to lay down certain tests to determine when an article takes on the character of a fixture. (1) Is the article physically attached? Is it easily removable without damage to the premises? If it cannot be removed without serious damage either to the item or premises, is it practically conclusive that it is a fixture? (2) Is there a special adaptation between the article and the premises? (3) What is the intent of the person attaching the article to the premises? Are there general community "customs?" None of these tests are conclusive on their own, nor do they operate mechanically. When in doubt, the parties should clearly agree in advance on the nature of such items. The seller must expressly reserve the right to remove the item; the broker must make clear to the buyer that the item is not included.

The offer determines the agreement between the buyer and seller. In order for the buyer to have the property included in the sale this would have to be written into the offer. The listing contract really only expresses what the seller is willing to have included in the offer and still have it meet acceptable terms (one must always remember the function of the listing contract: to establish the terms of an offer which, if procured, earns the broker a commission). Similarly, the MLS or office data sheet only reflects what property is available and the offer establishes the parties' agreement about personal property.

It may be argued that the control box is a fixture because it was screwed into the garage wall and it goes with the underground components of the system, similar to a satellite dish system.

The buyer's offer said that the water softener was included. At the inspection, the buyer and the buyer's agent saw a Culligan sticker on it so the agent thought it may be rented, which it was. The seller agreed to pay a one-year fee for the water softener. However, there was also an iron filter connected to the softener that has a separate fee that the agent did not know about. The seller was aware of this but did not disclose it. Who is responsible for this fee?

Absent language to the contrary, the iron filter would be included in the sale assuming it met the definition of a "fixture." As a fixture, the seller would be obligated to purchase the iron filter for the buyer (or make some other mutually agreeable arrangement). The seller should have heeded the bold-faced warning in the offer to address rented fixtures such as water softeners and iron filters.

Two items were on an MLS sheet: 1) a satellite dish that is located 100 feet from the home on a concrete slab with component parts, and 2) a wood stove in the living room. Neither of these items was mentioned in the offer as included or excluded. What is the seller's obligation if the buyer would want the items?

Per the offer to purchase, the satellite dish and component parts are clearly fixtures. They must stay because they are automatically included unless the offer clearly excludes them.

The situation with the stove is less clear. Per the definition of fixtures (lines 124-133 of the WB-11 Residential Offer to Purchase form), it may be possible to argue either way. If it is a fixture, it must stay; if it is not a fixture, it may be removed. The parties would be prudent to address these items in an amendment.

Acceptance

As indicated on lines 17-18 of the WB-11, "Acceptance occurs when all Buyers and Sellers have signed an identical copy of the Offer, including signatures on separate but identical copies of the Offer." This provision specifically allows for the use of counterparts, which is helpful, for example, when there are parties living in different states. Wisconsin case law recognizes that contracts may be signed in counterparts (that is, no one piece of paper has all the original signatures, but taken together, all parties have executed a copy of the same contract). It is the assent of the parties to the same terms and conditions that makes a contract. When counterparts are being used, it is prudent to include a statement in the offer explaining that the contract is being executed by the buyers/sellers in counterparts (multiple copies of the same offer).

Contract acceptance must be in writing to satisfy the Wis. Stat. § 706.02 requirements for a written contract conveying an interest in real estate. § 706.02 requires that a real estate conveyance document, such as an offer to purchase, must identify the parties and be signed by or on behalf of all the parties to create a binding contract.

The date of acceptance – when all parties have signed the offer – is used as the benchmark in the offer for determining the time frame for several provisions and contingencies. For example, the deadline in the

home inspection contingency is measured from the date of acceptance. Lines 18-19 of the WB-11 caution that, "Deadlines in the Offer are commonly calculated from acceptance. Consider whether short term deadlines running from acceptance provide adequate time for both binding acceptance and performance."

Binding Acceptance

Acceptance is not the same as binding acceptance. The offer is binding only if a copy of the accepted offer is delivered to the buyer. This means that a copy of the offer showing the signatures of all parties must be delivered back to the buyer before the offer can be binding. There must be signatures for acceptance and there must be delivery for binding acceptance. In addition, the acceptance and the delivery back must occur before the deadline specified on line 21 of the WB-11 – the binding acceptance deadline.

With a typical real estate offer to purchase, the power of the seller to accept the offer is terminated by the seller's rejection of the offer, the lapse of time beyond the stated deadline for binding acceptance, the buyer's revocation or withdrawal of the offer, or the death or incapacity of either party. The seller may affirmatively indicate on the offer to purchase form that the offer is rejected by initialing and dating the line provided for this purpose (line 336 of the WB-11), or the seller may simply allow the binding acceptance deadline to pass without taking any action.

If the acceptance deadline is inadvertently missed, all is not lost. The seller may counter back to the buyer on the same terms and conditions to restore the offer. The drawback is that this gives the buyer time to reconsider and he or she may have cold feet, have found another property or decided it is too much money – it is always possible that the buyer may not accept the seller's counter-offer.

REALTOR® Practice Tips: The binding acceptance deadline in an offer to purchase is just that – the deadline by which time a party wishing to accept the offer must complete the binding acceptance steps: signature and delivery back. This deadline has no meaning if the offer is being rejected or countered.

Legal Hotline Questions and Answers – Acceptance and Binding Acceptance

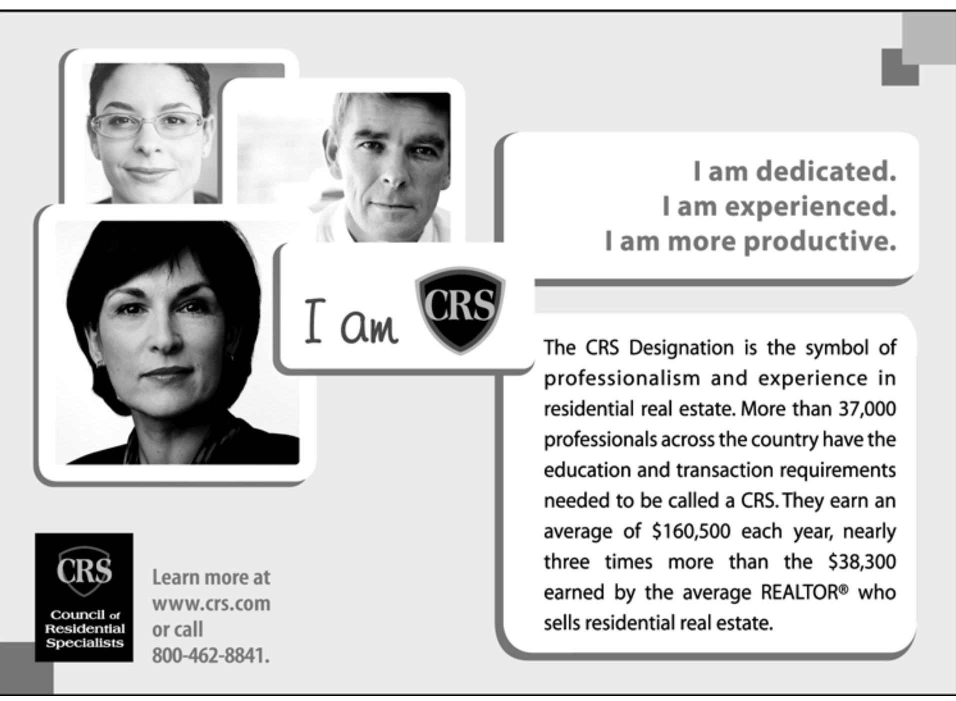
An offer was submitted to both sellers, but only Mrs. Seller signed the offer before the binding acceptance deadline. Mr. Seller did not sign the offer until the next day, after the deadline. Does the 14 days for the inspection contingency start the day after the first seller signed or the day after the second seller signed?

Line 17 of the WB-11 says that acceptance has occurred when all buyers and sellers have signed an identical copy of the offer. Binding acceptance requires the signatures of all parties plus delivery of the signed offer back to the buyer by the binding acceptance deadline.

The inspection contingency runs from the date of acceptance. In the described situation, that would be the day the last party, Mr. Seller, accepted the offer.

In the described scenario, however, there is another issue of greater importance. If Mr. Seller did not sign until the day after the acceptance deadline, then there is not a binding contract. There could not have been delivery of the fully signed offer back to the buyer by the deadline because Mr. Seller did not sign until the next day. To correct this deficiency, one party (the sellers or the buyers) may counter to the other party on the same terms and conditions as were in the original offer, allowing for ample time for signatures and timely delivery back.

A buyer submitted an offer to the seller who could not decide whether to accept it. After the acceptance deadline passed, the seller decided to accept the offer. The buyer's agent asked the listing agent to draft an amendment to extend the deadline by two days. How can the agent extend the deadline for binding acceptance?



Binding acceptance occurs when an accepted offer is delivered back to the other party on or before the stated deadline for acceptance. Once the acceptance deadline has passed, the seller cannot accept and deliver the offer back to the buyer to create a binding contract. However, either the buyer or the seller may initiate a counter-offer back to the other party that incorporates the original offer without any changes. This use of the WB-44 Counter-Offer form will create a new acceptance deadline for the parties to meet.

The offer from six buyers was countered and the counter-offer was accepted. However, because of the delay getting all buyer signatures, all signatures were not obtained and delivery did not occur until after the deadline for binding acceptance. How to proceed?

The binding acceptance provisions in the WB-11 state that binding acceptance occurs when all buyers and sellers have signed and delivered an identical copy of the offer (or counter-offer). The parties will need to correct the deadline problem with a counter-offer or a new offer (an amendment is also possible but the counter may be the best option). Note that signatures can be obtained in counter-parts – each buyer signs a separate identical copy of the offer or counter-offer, which ideally states that it is being signed in counterparts and gives the names of all of the parties.

A counter-offer was signed by the buyer and faxed back to the listing broker's office one day after the deadline. Can the seller entertain another offer before accepting the original offer?

It appears that the counter-offer is not binding because it was not delivered by the deadline set forth at line 34 of the WB-44. Thus, the seller could accept the new offer in primary position and counter back to the first buyer making that offer secondary.

Delivery of Documents and Written Notices

Unless the DRL-approved offer is modified to specify additional delivery methods or to delete one of the delivery methods included in the pre-printed offer to purchase language, the only methods of delivery that are legally effective are (1) mail or commercial delivery service, (2) personal delivery and (3) fax transmission. If the parties wish to use e-mail or e-commerce for the transaction, the offer should be modified accordingly.

Mail or Commercial Delivery

A document or written notice may be mailed provided all postage and fees are prepaid. A written notice that is received with postage due would not meet this standard. A document or written notice may also be delivered via a commercial delivery service such as UPS or Federal Express, provided that all fees are prepaid or properly charged to an account with the delivery service.

The offer permits each party to provide a delivery address. The sole purpose of this address is for use in addressing documents and written notices that are mailed or commercially delivered. This address has no effect for personal or fax deliveries. If there is no address provided, then mailing and commercial delivery cannot be used.

A document or written notice may be addressed either to the party or to the party's designated "recipient for delivery." A party may designate the licensee he or she is working with, or any other person, to serve as the recipient of his or her mailed or commercially delivered documents and written notices. If no recipient for delivery is given, any mailed documents must be addressed to the party.

Thus, a document or written notice that is mailed or commercially delivered must be: (1) sent to the party's designated delivery address, and (2) addressed to either the party or the party's designated "recipient for delivery."

If party S names agent X as his recipient for delivery and X's office address as the delivery address, a written notice may be addressed to either party S or agent X at agent X's office address. If it is addressed to party S at party S's home or business address, it has been addressed incorrectly and the delivery is not effective.

Personal Delivery

Personal delivery means that the document or written notice is personally given to either the party or the party's designated recipient for delivery, but only if an individual person has been designated. Leaving a written notice under the party's doormat at her home is not a sufficient personal delivery, at least not until the party comes home and finds the written notice. Leaving a document in the office mailbox of the party's agent who is the party's designated recipient for delivery is not a sufficient personal delivery, at least not until the agent picks up the mail at the office.

In order to be able to verify and document when personal delivery occurred, one individual should meet with the party and hand the document to the party. That individual can then confirm, in an affidavit if necessary, exactly when the delivery occurred. That ability is lost if the document is left for the party to find – there is no way to confirm when the party did pick up the document. This allows a party to avoid the document and delay the delivery time.

Thus, a document or written notice may be personally handed to party S or agent X (the party's designated recipient for delivery) when he or she answers the front door at home, walks down the street or works out at the health club. It generally does not matter where person is. What matters is that the person has been given the document or written notice.

If a brokerage firm is named as the designated recipient for delivery, there can be no personal delivery to that corporate or LLC recipient. The designated recipient for delivery is an appropriate recipient for personal delivery only when that recipient is an individual person.

Fax Transmission

The document or written notice is delivered via fax when it is transmitted to the fax number stated by the party in the contract. If the party designates the fax number of his or her attorney, the document or written notice must be transmitted to that number. It does not matter if the party is not there when the document is faxed. If the document is faxed to the party's office or home fax number when the party designated the attorney's fax number in the offer, it has been faxed incorrectly and the delivery is not effective.

REALTOR® Practice Tips: When an offer is being negotiated, make sure that as many delivery options as possible are specified for maximum flexibility. An agent drafting the offer for a buyer should ask the listing agent for the seller's contact information or it may come back to haunt that agent if a notice needs to be delivered to the seller and the agent doesn't have any delivery options other than personal delivery to the party.

Legal Hotline Questions and Answers – Delivery of Documents and Written Notices

Can the buyer use a real estate office address for delivery, or must the buyer indicate a specific person for delivery, like the agent working with the buyer in the transaction?

Pursuant to the terms of the WB-11, any designated recipient for delivery is named at line 27 or 29. Line 31 states that if an individual is named at line 27 or 29, personal delivery may be accomplished by getting the document to the designated individual. It is up to the brokers and their parties to determine whether they prefer to designate the company or the agent as the recipient for delivery. If the agent is named, personal delivery to the agent is possible. If the company is named, the company will be the addressee on mail and commercial deliveries only and cannot be the recipient for personal delivery.

Perfecting delivery of an offer or counter-offer. If the buyer is working with a subagent of the listing broker and the listing agent has an accepted counter-offer from the buyer in hand, does this constitute a valid delivery?

Because the language in the offer limits delivery to those methods specifically approved by the parties in the offer, personal delivery to an agent is not personal delivery to the party, unless the offer or an addendum states that personal delivery to an agent is an acceptable means of delivery. The state-approved forms do not automatically authorize personal delivery to an agent.

A listing broker designated his fax number for delivery to the seller. A faxed amendment was not picked up for two days after transmission to the broker's fax number. The amendment was not presented in time for acceptance. Was the broker acting competently?

When a broker agrees to use the broker's fax number as the destination for fax delivery to the seller, the broker accepts the responsibility to handle documents faxed to the broker on behalf of the seller in a timely and professional manner. In order to determine if the broker was acting competently in not picking up the fax for two days and then failing to present it in time for acceptance, a full analysis of the facts and circumstances would be required. However, if the analysis indicated that, given standards of competent practice in the marketplace, the delay in presenting the amendment was a result of negligent practice and did damage the parties, there may be some liability on the part of the broker who failed to timely process and present the faxed amendment.

The selling agent did not complete any of the blanks in the delivery area of the offer. Nothing was inserted, not even dashes. What effect does this have?

Because no number was provided for faxing and no address was provided for mailing, neither faxing nor mailing are available as methods of delivery. That leaves personal delivery as the only available method for delivery. No recipient for delivery was named, so personal delivery to the buyer is the only authorized method of delivery in this transaction.

Occupancy

The occupancy provision specifies that occupancy of "the entire property" will be given at closing, and that the property will be free of debris and personal property. Occupancy is given subject to the rights of any tenants.

REALTOR® Practice Tips: Be sure sellers understand that they cannot just leave their junk and trash behind. If the seller is not going to be completely out, with all debris removed, by the time of the closing, be sure to negotiate specific provisions making other arrangements in advance or the closing may become an ugly fight between angry, stressed-out parties.

Legal Hotline Questions and Answers – Occupancy

A broker just attended a closing and the sellers are still in the property; they said they have until midnight to get out. The DRL-approved offer says that occupancy of the entire premises shall be given to the buyer at the time of closing, but the seller's counter-offer states that occupancy is to be given the day of closing. The listing agent says this means the sellers have until midnight. Is that correct?

Per line 34 of this the WB-11, "Occupancy of the entire property shall be given to Buyer at time of closing unless otherwise provided in this Offer." Whether the statement in the counter-offer that occupancy is to be given the day of closing means midnight or not may require a court to ultimately resolve. At this point it may be best to assist the seller and the buyer to come to a reasonable agreement regarding occupancy.

A buyer purchased a property where a large ugly pile of smelly horse manure lay in the front yard. While it was never put in writing, the agents repeatedly discussed that the seller would remove the pile before closing. It was not removed, but the buyer closed anyway with the seller's assurance it would soon be gone. The manure pile remained so the buyer finally had it removed after trying to post a "free" sign, repeatedly calling the landscaper who was to take it like he had in the past and having the agents contact the seller, who by this time felt he no longer needed to be involved. Does the preprinted clause in the offer that says the seller is to remove all debris from the property apply to horse manure? Are verbal assurances enough to hold the seller to his representation?

Lines 34-36 of the WB-11 provide that the property shall be free of all debris and any extra property not belonging to tenant and not included in the sale. If the seller fails to remove all personal property from the premises prior to occupancy by the buyer, the listing or selling agent should contact the seller to see what should be done with the personal property. If the seller can't be reached and/or the personal property remains on the premises after closing, the buyer may contact an attorney for advice on how to properly dispose of the property and/or collect reimbursement of the buyer's costs for the removal and storage or disposal.

Rental Weatherization

The Rental Weatherization Program is designed to ensure that residential rental properties in Wisconsin meet minimum energy conservation standards. This Wisconsin Department of Commerce (DComm) program only applies to residential property that is being transferred (deed, land contract, etc.) and will be used as rental property after the sale.

The register of deeds will not record a property conveyance unless:

- Certificate of Compliance: A state-certified inspector (paid by the owner) has issued a certificate of compliance indicating that the property meets the weatherization standards. The certificate is valid for the life of the building.
- Stipulation: The buyer has filed a stipulation ($50) promising to bring the property into compliance with the weatherization code within one year after the transfer. The completed stipulation must be presented with the fee to DComm or a Commerce agent for validation before it can be recorded with the register of deeds.
- Waiver: The buyer has filed a waiver ($50) stating that the building will be demolished within two years.
- Exclusion: The property or transfer is excluded from weatherization code compliance. Excluded properties or transfers must be indicated on the Real Estate Transfer Return form by stating the proper exclusion code or the register of deeds will not record the conveyance. Exclusions include:
    - Owner-occupied buildings with no more than four dwelling units (W-1).
    - Properties that previously received a certificate of compliance that was recorded with the register of deeds (W-12).
    - Residential units that are not rented between Nov. 1 and March 31 of each year (includes summer homes, vacation homes and second homes) (W-4).
    - Mobile/manufactured homes, vacant land and nonresidential property (W-7).
    - Buildings with one or two living units constructed after December 1, 1978, and buildings with three or more living units constructed after April 15, 1976 (W-8).
    - Condominium units in buildings containing three or more dwelling units (W-13).

A more detailed list of excluded transfers can be found in section Wis. Admin. Code § Comm 67.04(32) and on the Real Estate Transfer Return form instructions. The penalty for noncompliance with the rental weatherization rules is generally $500 per dwelling unit. DComm or the local municipality can start a citation action (under Wis. Stat. § 778.25) requiring the owner to pay the specified forfeiture or appear in court. For additional information, contact the DComm Rental Weatherization office at 608-267-2240 or visit www.commerce.state.wi.us/SB/SB-RentalWeatherizationProgram.html.

If the property is not excluded and has not received a certificate of compliance, the parties must negotiate to determine who will be responsible for compliance. The parties may agree that the buyer will bring the property into compliance within one year after the transfer, in which case there needs to be a stipulation provided at closing.

REALTOR® Practice Tips: Be sure to determine the buyer's plans for after closing and, if the use will be rental, specify who will be responsible for rental weatherization compliance if the property does not meet one of the exclusions.

Legal Hotline Questions and Answers – Rental Weatherization

The property has a business on the first floor and apartments on the second floor. Must the parties comply with rental weatherization?

The rental weatherization code applies to mixed-use properties, such as apartments above a business, based on the percentage of the total floor area occupied by the apartments. If the building floor area is 50-percent-or-less residential, then just the residential units must comply with the code. If the building floor area is more than 50-percent residential, then the entire building must conform.

Is rental weatherization required if the buyer intends to fix and resell the property he is purchasing? He will not live in the property and will not rent the property.

The rental weatherization code applies to rehabs even though the property may be vacant during the period of renovation. It also applies to buildings purchased for resale. The buyer should sign a stipulation and if the property is sold to an owner/occupant within one year, the weatherization requirements will be waived.

A buyer is purchasing a small home for his daughter who will live there. The daughter's name will not be on the deed and she will not be paying rent. Is this home subject to rental weatherization?

Per DComm, if the property is not owner-occupied it will be subject to compliance with the rental weatherization code. There is no exemption for family members who are not named on the deed. Even though the owner does not receive cash, the owner derives a monetary benefit from this arrangement. Thus, this is still considered a rental unit for rental weatherization purposes.

Funding Concerns at Closing

As if scheduling a closing place and time on lines 43-44 on the WB-11 is not difficult enough in this fast-paced world, the parties and agents may need to take additional steps to try to assure that the necessary money will be at closing.

- Make certain the buyer and seller understand the possible consequences to both parties if the buyer's loan proceeds have not been received by the scheduled closing time.
- Collect the names of lenders who have a track record of funding at closing and make this list available to buyers. While buyers may not select a lender solely on this basis, this information may be material to their decision, all other things being equal.
- Educate the lenders. Some lenders have been unpleasantly surprised to learn that their customers' loans were not funded on time. Do not hesitate to let the lender know when this happens because he or she may be able to help eliminate the problem. At a minimum, the agent may learn the source of the trouble and be ready to prevent that problem at the next closing.
- Contact the closing office to ask if they are aware of past funding problems with the lender in the specific transaction and schedule the closing accordingly. Scheduling closings early or late in the day may increase the chance of funding delays.
- Consider incorporating additional language into the offer to purchase. For example, "Buyer is obligated to have the total purchase price, including mortgage loan proceeds, available at the time of closing. Buyer agrees to determine when Buyer's loan proceeds will be funded to ensure that the funds will be available at the time of closing."
- The parties could agree in the offer to purchase to a liquidated damages provision – an agreed-upon dollar amount per hour/partial day/day that the buyer will pay if the mortgage funds are not available within X hours of the execution of the closing documents.

REALTOR® Practice Tips: When there is no money at closing, the real estate agents can consider amending the offer to extend the closing to a later date, closing in escrow if the funds are expected soon, drafting an Addendum O occupancy agreement if the delay may be significant, or getting the buyer to another lender.

Legal Hotline Questions and Answers – Closing Concerns

A seller is unable to get pay-off information for a closing that is scheduled for today. Is the seller legally obligated to close the property without the pay-off?

The seller may still be obligated to close if there is nothing in the offer to provide for such an eventuality. A title company could close the transaction in escrow and hold the payment until the pay-off is supplied. The seller should check with his attorney and the agents should not give legal advice.

The parties had an original closing date of October 14, but the seller had to travel out of state. The buyer and seller agreed to move the closing date to October 5 via an amendment. The amended closing date passed without a closing because the seller's lender did not provide a payoff. Do they still have a contract?

The contract remains in place even though it appears the seller may be in breach of contract by failing to perform a material obligation under the contract, i.e., not closing on October 5. The fact that the problem stemmed from a third party working on behalf of the seller does not excuse the seller's breach. Thus, the buyer could choose to exercise her rights under the default provisions of the contract. The cooperating agent should proceed as directed by buyer's legal counsel and remain ready to perform any tasks within the scope of the agent's authority.

The parties were supposed to have closed on an eight-unit property last Friday. The lender called the selling broker and buyer 24 hours prior to closing, saying that they had problems and couldn't have the paperwork ready for closing. The closing had already been extended once before. The seller had

completed an exhaustive list of repairs at the request of the buyer. Now they have no date when the lender will be ready to close. Can the seller sue for specific performance? Can the seller demand compensation for the repairs in exchange for signing an amendment to reschedule the closing again?

Essentially the seller has three options available per the default provisions of the contract: 1) keep the earnest money and not sue for damages, 2) sue for specific performance (which can be a time-consuming and costly process) or 3) sue for damages (which may require the seller to wait until he sells to another party before making a damages claim). The licensee should not answer any questions regarding the seller's legal rights under the contract and instead encourage the seller to discuss his options for legal recourse with an attorney.

Testing is Different From Inspection

A "test" is defined on lines 103-110 of the WB-11 as, "the taking of samples of materials such as soils, water, air or building materials from the Property and the laboratory or other analysis of these materials." The preprinted WB-11 does not contain any provisions calling for testing (except for the testing for leaking carbon monoxide, LP gas or natural gas referenced on lines 101-102). Accordingly, testing contingencies must be added to the offer if the buyer requires that testing be performed. Testing contingencies should specify the area or materials to be tested, the purpose of the test, any limitations on the testing and any obligations to restore the property afterwards. Testing provisions may also include the buyer's right to be present, if desired. Procedures such as radon testing and soil borings are tests.

The inspection contingency only authorizes inspections, not testing. The Inspection Contingency at line 305 reminds the parties that "This contingency only authorizes inspections, not testing."

If testing is conducted without proper authorization, the results are arguably not the basis for a notice of defects under the inspection contingency. Listing test results on a notice of defects may trigger a response from the seller's attorney contesting the validity of the notice.

REALTOR® Practice Tips: If the buyer wants any testing – the taking of samples for lab analysis – a separate testing contingency with clear, detailed provisions should be included in the offer. Test results and home inspection reports are not the same thing.

Legal Hotline Questions and Answers – Testing

Nowhere on the offer is there written anything about doing a radon test. The buyers decided at the last minute to do a radon test. The cooperating agent is asking the seller to extend the deadline for inspection so they can get radon test results back. The seller is not willing to do this. Is the buyer allowed to do the radon test as part of the inspection contingency?

No, if testing is not authorized in the offer to purchase, the buyer should not be permitted to do a radon test. Arguably, unauthorized testing constitutes trespass. The parties should review the terms of the offer and discuss the situation with legal counsel, as necessary, to address this situation.

The WB-11 offer to purchase submitted to the seller included a home inspection contingency and the accepted counter-offer states, "Offer contingent on Buyer's approval of termite, mold and radon testing." For unknown reasons, the buyer wants out of the contract. The buyer stated that all houses have some level of mold. He will do a mold test and withhold approval of the mold test to get out of the contract. Can the buyer do this?

Mold testing is predominantly performed to detect unsafe types and concentrations of mold, not just the presence of mold. Lines 105-106 of the WB-11 provide, "If the Buyer requires testing, testing contingencies must be specifically provided for at lines 180-186, 318-321 or in an addendum per line 316."

The listing agent should refer the sellers to an attorney to review the contract and advise them on their legal rights. The quoted provision from the counter-offer is very vague and has no details. It appears to be a "subject to satisfaction" type of provision without objective standards that may call into question the validity of the contract.

The seller received an offer to purchase drafted by a cooperating broker with lines 298-300 of the WB-11 Residential Offer to Purchase form completed as follows: "This Offer is contingent upon a Wisconsin-registered home inspector performing a home inspection of the Property, and an inspection, by a qualified independent inspector, of the septic, well and water test which discloses no defects as defined below." Is this an appropriate way to insert a testing contingency?

First of all, lines 298-305 of the WB-11 relate to inspections, not testing – see line 305: "Note: This contingency only authorizes inspections, not testing."

Secondly, lines 103-110 of the WB-11 address "testing" – reading in part, "Except as otherwise provided, Seller's authorization for inspections does not authorize Buyer to conduct testing of the Property. A 'test' is defined as the taking of samples of materials such as soils, water, air or building materials from the Property and the laboratory or other analysis of these materials. If the Buyer requires testing, testing contingencies must be specifically provided for at lines 180-186, 318-321 or in an addendum per line 316. Note: Any contingency authorizing such tests should

specify the areas of the Property to be tested, the purpose of the test (e.g., to determine if environmental contamination is present), any limitations on Buyer's testing and any other material terms of the contingency (e.g., Buyer's obligation to return the Property to its original condition)."

Lastly, it is not clear from the language inserted into lines 298-300 what the intent of the buyer is – is it to have an inspection of the septic (system?) as well as an inspection of the well and test of the water (what kind of test)? Or is it to have a test of the septic and the well and the water? Or is it to have a qualified independent inspector inspect the test(s) of the septic and the well and the water? Because the intent of the buyer is unclear due to the fact that several different interpretations of these words are possible, it is likely that a court would hold the provision unenforceable.

Financing Contingency

Under Wisconsin law, a financing contingency must be drafted with specificity. If a financing contingency lacks sufficient definiteness for a court to determine the terms of financing, then the entire agreement is deemed unenforceable. Therefore, a financing contingency clause should include, at a minimum, the following: (1) the principal amount of the loan (dollar amount or percentage of purchase price/appraised value), (2) the maximum rate of interest, (3) the minimum term of the loan, (4) the specific financing program (i.e., conventional bridge loan) and (5) whether the interest rate is fixed or will vary. According to the Wisconsin Supreme Court, an offer to purchase will be void for indefiniteness if the financing contingency is not drafted with sufficient detail. See *Gerruth Realty Co. v. Pire*, 17 Wis. 2d 89, 115 N.W.2d 557 (1962).

The Loan Commitment section of the Financing Commitment on lines 149-179 of the WB-11 provides that if the buyer qualifies for the financing described in the financing contingency or for any other financing acceptable to the buyer, the buyer will deliver a copy of the written loan commitment to the seller or the seller's agent by the deadline specified in the financing contingency. This means that if the buyer obtains a loan commitment that is different from what is described in the financing contingency but is still acceptable to the buyer, the buyer may use that loan commitment to satisfy the financing contingency.

Some lenders and licensees have delivered loan commitments to the seller without first determining whether the commitment is in fact acceptable to the buyer. Hence the bold-faced, capitalized warning to lenders and licensees about checking with the buyer before delivering loan commitments to sellers at lines 167-170: **"Buyer's delivery of a copy of any written loan commitment shall satisfy the buyer's financing contingency unless accompanied by a notice of unacceptability. CAUTION: NEITHER BUYER, LENDER OR AGENTS OF BUYER OR SELLER SHOULD DELIVER A LOAN COMMITMENT TO SELLER WITHOUT BUYER'S PRIOR APPROVAL OR UNLESS ACCOMPANIED BY A NOTICE OF UNACCEPTABILITY."**

The notice of unacceptability functions in a manner similar to a notice of defects in the inspection contingency. If the buyer reviews the loan commitment and finds that it is not acceptable, the loan commitment alone should not be submitted to the seller because that would satisfy the financing contingency. If the buyer is dissatisfied with the loan commitment, it may be submitted to the seller along with a notice of unacceptability to help demonstrate to the seller that the financing specified in the contingency is not available.

The term "loan commitment" is not defined in the offer. As such, it may be difficult to assert that any document that says it is a loan commitment, and that is issued by a lender that agrees to provide the loan described in the commitment to the buyer, is not in fact a loan commitment. All loan commitments have conditions or contingencies of some sort, ranging from a condition that insurance binders be produced at closing, to a contingency for an appraisal, to a contingency for the sale of buyer's home. Nowhere in the offer does it say that a written loan commitment cannot contain any conditions or contingencies or that the commitment cannot contain certain kinds of conditions and contingencies. Any party wishing to define "loan commitment" may do so in the Additional Provisions section or in an addendum to the offer.

The Seller Termination Rights subsection provides, "If Buyer does not make timely delivery of said commitment, Seller may terminate this Offer if Seller delivers a written notice of termination to Buyer prior to Seller's actual receipt of a copy of Buyer's written loan commitment." A seller desiring to terminate the offer based on a buyer's failure to timely produce a written loan commitment should act promptly and give the buyer a written termination notice before the buyer produces a commitment. The offer is not terminated if the seller receives a loan commitment (without a notice of unacceptability) after the financing contingency deadline but before the seller delivers a notice of termination to the buyer.

REALTOR® Practice Tips: Agents should make sure that the financing contingency is completed in requisite detail and then assist with and closely monitor the buyer's loan application efforts. Deadlines should be closely watched so that the parties may perform in a timely manner.

Legal Hotline Questions and Answers – Financing Contingency

The offer on a home had 100-percent financing. The seller did not like that, so in a counter-offer he changed the financing to require 10 percent down. Can the seller change the buyer's financing contingency terms?

The seller may change the terms and conditions of the financing contingency because the terms of the offer, including that contingency, are determined by negotiation. The seller may counter the terms of the financing contingency because if the buyer is unable to obtain the described funding, the seller may elect to self-finance at those terms.

Note, however, that the buyer may still obtain a loan commitment letter and financing upon any terms that are acceptable to the buyer. Even if the terms of the contingency are changed, the seller is not per se dictating the terms of the financing that the buyer ultimately must obtain.

The buyer was quoted a certain loan interest rate when he wrote the offer. The agent working with the buyer built in a bit of a buffer, so the financing contingency was written for a 30-year conventional mortgage at 6.5 percent. When it got closer to closing and the buyer tried to lock in a rate, that financing was unavailable and the buyer was quoted a much higher rate. Therefore, the buyer wanted to withdraw from the offer. The seller is saying that the buyer must provide more than one letter of financing unavailability. Is one sufficient?

The standard language in the offer to purchase, at line 175 relative to the financing contingency, refers to "lender(s)' rejection letter(s)." When the issue is whether the financing described in the offer is available, one rejection letter arguably does not demonstrate a lack of availability.

There is a financing contingency in place. The buyers submitted a signed loan commitment letter to the listing agent and then later discovered the property had not appraised out and the bank won't make the loan. There is no appraisal contingency and the loan commitment makes no reference to this. Can the buyer get out of the contract?

No, if the buyer accepts financing and submits the loan commitment to the seller, even if the commitment were subject to an appraisal, the buyer has fulfilled the financing contingency requirement and has assumed the risk of the property appraising out.

The buyer may request an appraisal contingency in a transaction to assure the subject property will appraise at a certain value. This contingency would be included in the offer for the protection of the buyer, knowing they need a certain value to complete the transaction. If the buyer uses a separate appraisal contingency and receives a loan commitment subject to an appraisal, the separate appraisal contingency is not waived by submitting the loan commitment. If there is no separate appraisal contingency and the buyer submits a loan commitment to the seller subject to an appraisal, the buyer is assuming the risk that the property will appraise out at the mortgage company's required value. If the property does not appraise at that value, a buyer without a separate appraisal contingency would be in breach of contract if he or she did not close due to the appraisal value. If an independent appraisal contingency were used, the buyer would be protected by the contingency and would not be in breach of contract if the property did not appraise at the value required in the appraisal contingency (even if a loan commitment subject to an appraisal had previously been submitted to the seller).

Unauthorized Practice of Law

Lines 244-246 of the WB-11: BROKERS MAY PROVIDE A GENERAL EXPLANATION OF THE PROVISIONS OF THE OFFER BUT ARE PROHIBITED BY LAW FROM GIVING ADVICE OR OPINIONS CONCERNING YOUR LEGAL RIGHTS UNDER THIS OFFER OR HOW TITLE SHOULD BE TAKEN

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AT CLOSING. AN ATTORNEY SHOULD BE CONSULTED IF LEGAL ADVICE IS NEEDED.

Wis. Admin. Code § RL 24.06 provides that "Licensees shall not engage in activities that constitute the unauthorized practice of law," and that "Licensees shall not discourage any person from retaining an attorney."

Not only should licensees be careful to not give legal advice and to encourage the parties to call their attorneys if they have legal questions, some contract provisions should not be drafted by real estate licensees. Sometimes advanced technical or legal expertise is required to successfully reflect the position of one or more parties to a contract. Provisions such as environmental liability waivers and complex title warranties, or agreements such as letters of intent or rights of first refusal should be handled by an attorney.

REALTOR® Practice Tips: Make sure that licensees do not draft complex legal provisions or agreements. Provisions dictating legal liability, responsibility for environmental contaminants and other issues outside the purview of licensed real estate practice should be left to the lawyers.

Legal Hotline Questions and Answers – Unauthorized Practice of Law

An offer was received on a property where there is adjacent farmland available for sale. The buyer wrote the offer subject to his father getting a right of first refusal from the seller on the adjacent property. Is this proper procedure?

An offer to purchase may be drafted with contingencies that meet the intent of the parties to the transaction. Any contingency used should be drafted with specificity to assure it will be enforceable between the buyer and seller. The agent may refer the father and seller to legal counsel to draft the right of first refusal. Only an attorney, not a REALTOR®, may draft a separate, freestanding right of first refusal agreement.

The investor wants a broker to provide a letter of intent to submit to the developer. May the broker draft this?

A letter of intent (LOI) is an agreement to agree in the future. An LOI must make it very clear that the parties are simply expressing interest and do not intend to become bound until a contract is signed in the future. If the LOI is simply an agreement to negotiate further in the future, the document should expressly state that the parties are not bound until a formal contract is executed. Although under Wisconsin law, an understanding and intent to reach an agreement in the future is not legally enforceable, an LOI can easily become a legal contract or create legal obligations that the parties may not have contemplated if the LOI is not carefully drafted. Accordingly, legal counsel should always handle the preparation of an LOI.

The listed property had an oil tank removed. There was contamination, but the seller now has a letter from the Department of Natural Resources (DNR) closing the case. The seller knows there is still some contamination, but the DNR concluded it's not enough to warrant further remediation. If the seller sells the property is the seller liable after the sale for any contamination that occurs after closing?

The seller should be referred to appropriate experts specializing in environmental spills and remediation. The parties will need assistance to evaluate the condition of the property, assess the potential legal and environmental risks and then determine if an acceptable allocation of risk can be arrived at by negotiation. Both state and federal law regulate the area of environmental contamination and liability. Due to the legal complexity, attorneys specializing in environmental law should advise the parties on how to proceed with the transaction. A real estate licensee should refrain from making any legal determinations about liability or remediation and from drafting any provisions addressing those concerns.

Earnest Money Issues

An offer to purchase does not need earnest money to become a binding contract provided that this is acceptable to the seller. When there is earnest money, as is the case in most transactions, it will be held in the listing broker's trust account. The buyer is to pay the earnest money directly to the listing broker and not to the cooperating broker in all cases where there is a listing broker. REALTORS® using the WB-11 offer form in cooperative transactions must advise the buyer to pay his or her earnest money directly to the listing broker. The buyer's agent will hold the earnest money in his or her trust account if the property is not listed, and the seller will hold the earnest money if there are no brokers involved in the transaction.

The WB-11 offer form cautions at lines 250-251: "Should persons other than a broker hold earnest money, an escrow agreement should be drafted by the Parties or an attorney." For example, if the earnest money is going to be held by a title company or in a joint bank account for the parties so that the buyer may receive interest on his or her earnest money, the parties should have an escrow agreement governing the disposition of that earnest money. This agreement, however, cannot be drafted by the real estate licensees in the transaction per Wis. Admin. Code § RL 18.06.

In cases where an offer is not accepted, the earnest money will be returned to the person who paid the earnest money, but only after the earnest money check has cleared the listing broker's trust account if the earnest money was paid by a

check that was deposited in the listing broker's trust account. When a buyer becomes impatient for the return of his or her earnest money, the broker may point to the provision on lines 252-253 of the WB-11 and remind the buyer that the broker needs to wait for the check to clear before the money may be returned.

When there is earnest money in the listing broker's trust account, the transaction is not going to move forward and the parties cannot agree how the earnest money should be disbursed, a road map of potential actions for the listing broker and the parties is laid out in the offer to purchase. Pursuant to lines 254-262 of the WB-11 Residential Offer to Purchase, the listing broker does nothing with the earnest money for 60 days after the scheduled closing date unless the parties reach a written agreement for the disbursement of the earnest money. The listing broker may wish to write a memorandum or letter to the buyer and seller and their respective attorneys, if any, pointing out lines 254-262 and explaining that this is how the earnest money disbursement must be handled. It is then up to the parties to work out their differences by negotiation or by going to small claims court.

After the 60 days have passed, the listing broker may choose to initiate a small claims action or seek an impartial attorney's written opinion as to who should receive the earnest money. The listing broker may deduct up to $250 from the earnest money for the legal fees involved in either of these alternatives. The listing broker also may continue to do nothing and allow the parties to resolve the earnest money dispute themselves or through their attorneys.

REALTOR® Practice Tips: It may seem obvious who is entitled to the earnest money in many failed transactions, and the parties may pressure the broker to disburse the money in these situations. However, only if a broker follows the RL 18 rules will he or she be deemed to have properly disbursed trust funds in accordance with license law.

Legal Hotline Questions and Answers – Earnest Money Issues

The offer on the property had a home sale contingency. The deadline has expired and the buyers are not extending it. The buyers want the earnest money returned. A cancellation agreement and mutual release (CAMR) was submitted to the seller and he refuses to sign it. He said he wants to keep the earnest money. The listing agent told him that she cannot release the earnest money to him as it legally belongs to the buyers because their contingencies have not been met. The listing agent told him to contact an attorney, but he refuses to do so. Is the listing agent correct?

The disbursement of trust funds, from a real estate trust account is controlled by rules found in Wis. Admin. Code § RL 18.09 (1) and (2). § 18.09 (1) sets up the bases upon which a broker may disburse the funds. These include agreement of the parties either in the form of a CAMR (WB 45) or the provisions dealing with earnest money in an accepted offer. § 18.09 (2) establishes procedures for notice before disbursement if the matter is in dispute. Disbursement of the funds, unless accompanied by a CAMR, does not affect the rights of the parties against one another under the offer.

Pursuant to lines 254-262 of the WB-11 Residential Offer to Purchase form, the listing broker is to do nothing with the earnest money for 60 days after the scheduled closing date unless the parties reach a written agreement for the disbursement of the earnest money. The listing agent may wish to write a memorandum or letter to the buyer and seller and their respective attorneys, if any, pointing out lines 254-262 and explaining that this is how the earnest money disbursement must be handled. It is then up to the parties to work out their differences by negotiation or by going to small claims court.

After the 60 days have passed, the listing broker may choose to initiate a small claims action or seek an impartial attorney's written opinion as to who should receive the earnest money. The listing broker may deduct up to $250 from the earnest money for the legal fees involved in either of these alternatives. The listing broker also may continue to do nothing and allow the parties to find a way to resolve the earnest money dispute themselves or through their attorneys.

The offer is accepted and the earnest money was paid. The loan commitment deadline was two days ago and the seller and the listing broker have not received anything. Because the buyers are now late in performance, are the sellers entitled to keep the earnest money should the deal fall apart?

First of all, the sellers should review lines 171-172 of the WB-11 regarding the sellers' right to terminate the offer. As to the sellers' entitlement to the earnest money, this becomes a question of whether or not the buyers are in breach of their duties under the contract, including the duty to act in good faith and with due diligence. If it is determined legally that they are in breach, retention of the earnest money is one of the remedies that the sellers could elect. If the sellers are considering making a claim to the earnest money, they should first be directed to consult with legal counsel to assure they are knowledgeable as to all of their possible rights and remedies.

The offer to purchase a home was written on May 19 and accepted on May 20. Contingencies are for home inspection, pre-approval and financing. The buyers removed the inspection contingency on May 31. The buyer was pre-approved by the lender. The buyer is retiring, so there

is a contingency for documentation of retirement income. On June 22 the buyer indicated that she would not have the retirement income she expected and thus cannot afford the house. The lender has issued a denial letter based on what she told them.

The seller is in an assisted-living facility and obviously feels damaged and would like to keep the earnest money. How can the seller keep the earnest money and dissolve the buyer's interest in the house? The buyers have signed a CAMR requesting the earnest money. Should the seller sign her own CAMR requesting that she receive the earnest money? How should she proceed so as to sell the house while keeping the earnest money dispute separate?

The buyer wants out of the offer, and may not be acting in good faith, but if the buyer is legitimately protected by any of the contingencies in the offer, the buyer may take advantage of the contingency for her benefit.

It is up to the buyer and the seller whether or not to sign a CAMR. Once signed by both parties, the CAMR terminates the offer and disburses the earnest money. The buyer and seller may negotiate for the disbursement of the earnest money to one party or it may be split by mutual agreement.

Once the CAMR is fully executed, neither party may be able to bring an action against the other for damages. Before signing the CAMR, the seller should discuss her rights with an attorney.

Until such time as there is a fully executed CAMR, or the seller's attorney gives her an opinion, any other offers should be accepted only in secondary position to avoid two primary offers.

Sale of Buyer's Property Contingency

A buyer generally may unilaterally remove or waive the sale of buyer's property contingency, but does not have the right to unilaterally remove the bump clause, which is for the benefit of the seller.

Sellers may be more comfortable with a sale of buyer's property contingency if they have confirmation that the property is marketable, if the buyer is required to list the property or if the buyer is required to accept any offer on the property meeting minimum requirements, including price. These types of restrictions may be difficult to implement and will work better if any such restrictions are specified in detail. A buyer, on the other hand, may not be comfortable with the seller having a hand in the sale of the buyer's home through the contract.

REALTOR® Practice Tips: The subject to sale provision actually makes the offer contingent upon both the sale (obtain an accepted offer) and closing of the sale of the buyer's property. Some agents are inclined to modify the offer if the buyers have an offer on their property, but this is generally unnecessary because the offer will still be subject to the closing. The buyer is still subject to being bumped either way.

Legal Hotline Questions and Answers – Sale of Buyer's Property Contingency

The primary offer is subject to the sale of the buyer's property and has a bump clause. A second buyer is offering substantially more money. The first buyer has waived her subject to sale provision to prevent the seller from "bumping" her offer. Is that the result?

Under contract law, a party may only waive those provisions of a contract that benefit that party. The buyer's waiver of the sale of buyer's property contingency does not affect the seller's rights under the bump clause. Because the bump notice provision in the primary offer (the continued marketing provision on lines 282-286) benefits the seller and not the buyer, the buyer cannot waive the bump provision without the seller's concurrence. This was one of the reasons the DRL Forms Council separated the continued marketing provision from the sale of buyer's property contingency.

The buyers' offer was contingent on the sale and closing of the buyers' home. Closing was extended for 45 days. The buyers have since gotten a promotion and prices have come down, so they no longer want to buy the home. The sellers do not want to cancel the offer. If the buyers get an offer that closes after the closing date on the extension, are they bound to still purchase that home?

No, the contingency is not satisfied unless the sale of the buyers' property closes by the deadline. However, the buyers must be very careful. If this contingency fails because they fail to exercise good faith and due diligence in carrying out the contingency by trying to sell their home on a timely basis, the sellers may be able to sue them.

Bump Clause – Continued Marketing

The section at lines 282-285 of the WB-11 offer labeled "Continued Marketing" contains the bump clause. The parenthetical instructions on lines 284-286 prompt the parties regarding additional provisions or contingencies that the primary buyer may be required to remove if he or she receives a bump notice and wants to keep the primary offer in place. In addition to having to remove the sale of buyer's property contingency upon the receipt of a bump notice, the offer may be completed to require the buyer to pay additional earnest money, remove all other contingencies in the offer, provide a loan commitment or provide evidence of a bridge loan.

REALTOR® Practice Tips: The parties may modify various features of the bump clause provision to best fit their circumstances. Typical modification may include the time period, the definition of actual receipt, the delivery methods used and use of the bump clause with other offer provisions.

Legal Hotline Questions and Answers – Bump Clause

When is the seller required to give the primary buyer a bump notice?

The seller is not required to give a bump notice if he or she wants to continue the transaction with the primary buyer. It is within the seller's discretion to decide whether to trigger the bump clause in the primary offer if a secondary offer is accepted. The seller may not only decide whether to trigger the bump, but also when to do so. Note that there is no time limit given in the contingency. This means the seller is free to wait before giving the primary buyer notice. He or she may wish to wait for the secondary buyer, for example, to sell his or her own property or obtain financing, before bumping the primary offer.

If, on the other hand, the seller wants the possibility of elevating the secondary offer into primary position, the seller will have to give the primary buyer a written bump notice. The seller may deliver the notice with a CAMR in case the primary buyer does not waive the contingency. The seller may elevate the secondary offer to primary position once the buyer signs and returns the CAMR.

Can a secondary offer that has a sale of buyer's property contingency be used to bump a primary offer that is subject to the sale of buyer's property?

Yes, if the secondary offer is a bona fide offer to purchase, the seller may deliver a written bump notice to the primary buyer. A bona fide offer is a legitimate offer from a serious third-party buyer, not a phony offer artificially created for the sole purpose of bumping the existing primary offer.

In the sale of buyer's property contingency and the continued marketing provision on lines 278-286 of the WB-11, line 282 states that "If Seller accepts a bona fide secondary offer, Seller may give written notice to the Buyer of acceptance." The word "may" means that it is within seller's discretion whether or not he or she will trigger the bump clause in the primary offer if a secondary offer is accepted. It does not matter whether the accepted secondary offer contains a sale of buyer's property contingency, a bump clause, a financing contingency or other contingencies – it only needs to be an accepted offer.

If a buyer gives a notice to the seller advising that he or she has sold the buyer's home but the buyer wants to keep the contingency in place to cover the closing of the home, can the seller still give a bump notice if the seller accepts a bona fide secondary offer to purchase?

The sale of buyer's property contingency contains two components: (1) the sale and (2) closing of the buyer's property. Although the buyer can inform the seller that he or she has an accepted offer to purchase, this notice does not unilaterally transform the contingency into a closing contingency, nor does it remove the entire contingency. Such a change would require an amendment to the offer signed by both parties.

If the buyer gives notice that the buyer has an accepted offer on the buyer's property and the seller then accepts a secondary offer, the seller may still deliver a bump notice to the primary buyer. The buyer would then have to remove the entire sale of buyer's property contingency and any other items included at lines 283-284 of the WB-11 if the buyer wanted to prevent the buyer's offer from becoming null and void.

What is actual receipt with respect to the 72-hour bump clause in an offer? When it is actually in the hands of the buyer, when it is deposited in U.S. mail or when it is delivered to the selling agent?

"Receipt" typically connotes a change in possession or custody; accordingly, "actual receipt" generally means that the buyer must have the written notice in hand, regardless of whether it came by personal delivery, mail or fax.

The language used in the continued marketing provision on line 286 requires actual receipt of the notice. Although the delivery of documents provisions apply with respect to how the written bump notice gets to the buyer, the delivery standards do not define actual receipt, which is a separate and different standard altogether. It is perfectly appropriate to modify this provision, for example, to run the deadline from delivery of the bump notice. However, if this is done, it would clearly be necessary to provide substantially more time to respond than the most commonly used 72 hours. Seven to 10 days would be reasonable to account for mailing over weekends, and a longer period would be required if the mailing occurred over a holiday period.

Secondary Offers

The secondary offer provision is a discretionary provision which leaves the seller free to choose among all secondary offers when it is time to give a secondary buyer notice that his or her offer has become primary. There may be one primary offer and a pool of secondary offers.

Lines 288-289 provide that, "Unless otherwise provided, Seller is not obligated to give Buyer notice [of becoming primary] prior to any deadline, nor is any particular secondary buyer given the right to be made primary ahead of other secondary buyers." This provision should help make it clear to secondary buyers that they have no priority rights and that secondary buyers do not have any particular ranking.

REALTOR® Practice Tips: The seller may only have one primary offer, but may accept multiple secondary offers. It is the seller's prerogative whether and when he

chooses to elevate a secondary offer into primary position.

Legal Hotline Questions and Answers – Secondary Offers

Can a seller renegotiate an offer with a primary buyer once a secondary offer has been accepted?

Unless the seller has agreed in the secondary offer not to negotiate with the first buyer, the seller and the primary buyer may amend the terms of the primary offer. The secondary buyer's rights arise solely from the language of the secondary offer. The seller ordinarily determines what happens before the primary offer becomes null and void and before the seller gives the secondary buyer notice that the secondary offer has become primary. The seller, thus, has the opportunity to renegotiate with the first buyer and continue with the renegotiated first offer as primary if the seller desires.

A broker has a property listed that had two offers on it – one primary and one secondary. Both offers had home sale contingencies. The primary offer has died, but the secondary offer is still in secondary position. It looks like the listing broker will be getting another offer in today without a home sale contingency. If no notice has been given to the secondary offer to make it primary, can the sellers accept the new offer as primary?

Pursuant to the terms of the WB-11, the seller is not required to make the secondary offer primary upon the cancellation of the primary offer. The listing broker should make the sellers aware that if they do not elevate the secondary offer into primary position, the buyer may withdraw the secondary offer if the time specified on line 291 of that offer has passed. If the sellers have not elevated the secondary offer and have obtained a CAMR on the primary offer, the sellers may accept the new offer as primary.

Pre-Closing Occupancy

The pre/post closing occupancy provision on lines 293-297 of the WB-11 is an optional provision. The WRA's Addendum O is not a mandatory DRL form, but has been designed for use in conjunction with this provision.

REALTORS® may wish to caution sellers that risks are involved in permitting buyers to occupy before closing. Despite all of the preventive provisions in Addendum O, the fact remains that if the buyer is allowed to occupy the property and the offer does not close, it may be a struggle to get the buyer out. The seller may have to commence eviction proceedings. Additionally, there is the risk that buyers in such circumstances may damage the property, again perhaps forcing the seller to go to court to seek damages. Certainly most buyers do not behave in this manner, but the risk is always present.

REALTOR® Practice Tips: While the optional provision in the offer allows buyers to occupy the property before closing and allows sellers to occupy the property after closing, these provisions should be used with a great deal of caution. The parties should confer with their attorneys before agreeing to these occupancies.

Legal Hotline Questions and Answers – Pre-Closing Occupancy

The Addendum O insurance provision on lines 17-19 is difficult to complete due to problems with the availability and adequacy of insurance. How should REALTORS® address this concern?

The WRA's Addendum O has been prepared to assist buyers and sellers who are contemplating an occupancy agreement. The insurance provisions are a key component of the addendum, but because of the changing insurance market, it is difficult to know what insurance may be available in any given situation. Before agreeing to the terms and conditions of the addendum, the buyers and sellers should consult with their insurance providers to determine what coverage is realistically available and modify the addendum to best meet their needs in the transaction.

A broker listed his own property and allowed the buyer to take pre-closing occupancy on April 16, when he paid a portion of the month's rent plus the next month's. The closing is to be June 28, but he did not pay June rent. An Addendum O was signed. The broker issued him a notice yesterday stating he had 72 hours to vacate the property or he will pursue legal action. How does he enforce the 72 hours?

According to the WRA Addendum O, the occupancy agreement does not create a landlord and tenant relationship. The buyer pays an occupancy charge, not rent. If the buyer does not vacate according to the terms and conditions of the contract and occupancy agreement, the broker may proceed to small claims for eviction proceedings. In addition, the default provisions at lines 228-246 of the WB-11 provide the parties with a variety of remedies if one party defaults.

Inspection Contingency

The inspection contingency provides for a home inspection by a Wisconsin-registered home inspector. State law requires that all home inspectors be registered with the DRL. The contingency has been designed so that the parties may also require a second concurrent inspection by a qualified inspector of a particular feature or component which may be designated in the blank line included in the contingency. For example, the parties may provide for an inspection of the roof by a roofing contractor along with the home inspection by a Wisconsin-registered home inspector. The buyer shall order the inspection and be responsible for all costs of inspection, unless the contingency is modified to provide otherwise.

The use of "entire premises" on lines 299-300 of the home inspection contingency may lead to ambiguity in the implementation of the contingency. "Entire premises" connotes an inspection that is typically beyond what a home inspector inspects. For example, "entire premises" could be considered by a buyer to include the house, the land, soils, trees, plantings, outbuildings and anything on the home or the parcel. This generally is beyond the expertise of any one contractor or home inspector and may require an army of experts to complete.

What Is a Defect?

A defect is defined on lines 311-314 of the WB-11 as a structural, mechanical or other condition that would have a significant adverse effect on the value of the property; that would significantly impair the health or safety of future occupants of the property; or that if not repaired, removed or replaced, would significantly shorten or have a significant adverse effect on the normal life of the property. Whether any item listed in the home inspector's report is a defect is a legal determination made by applying this definition to the facts on a case-by-case decision. An attorney – not a real estate licensee – may give an opinion whether a particular condition is a defect, but only a court can make the ultimate determination. Obviously, it is preferable for the parties to mutually agree whether condition is or is not a defect rather than taking the issue to court.

Notice of Defects

The notice of defects generally should be viewed as the buyer's last resort because giving a notice of defects puts the offer at risk. The buyer risks losing the deal by giving the seller an ultimatum – a notice effectively says, "Make these repairs or I won't close."

The buyer must understand that giving a notice of defects is a serious step. If there is no right to cure, the offer will become null and void if the notice of defects is timely delivered. If the seller has the right to cure, the seller may choose, in his or her discretion, whether to cure the listed defects or let the offer become null and void. If the seller has another more desirable offer, one may assume that the seller will let the offer die. Accordingly, the buyer may not wish to give a notice of defects unless the defects are "deal breakers" which must be fixed if the buyer is to continue with the offer. Giving the seller a notice of defects puts the power to decide the fate of the offer in the seller's hands.

REALTORS® must be certain to be very clear when they are giving a notice of defects. A notice of defects may be prepared on the WB-41 Notice Relating to Offer to Purchase. This notice should specify, "This is a notice of defects." The defects reported in the inspection report to which the buyer objects are then listed in the notice. The notice must be accompanied by a copy of the inspection report and must be delivered to the seller and the listing broker by the deadline specified on line 301 of the offer.

The seller then decides whether he or she will repair the listed defects in a good and workmanlike manner. If the seller agrees to cure the defects, the seller must deliver a notice to the buyer advising of the seller's election to cure the defects. This notice must be delivered within 10 days of the seller's receipt of the notice of defects and inspection report.

The notice of defects does not give the seller directions about how to perform the repairs – if that is desired, an amendment will be required. The seller must agree if anything but the good and workmanlike standard on line 308 of the contingency is going to be imposed.

Line 303 of the WB-11 warns all parties and licensees: "Caution: A proposed amendment will not satisfy this notice requirement." A licensee drafting a notice of defects should always use a WB-41 notice form.

Use of Amendments

Either party can usually take advantage of the option of negotiating a resolution to the buyer's repair concerns. Negotiation takes the parties out of the standard, all-or-nothing notice of defects process and gives the parties a way to reach a mutually acceptable resolution tailored by the parties instead of being imposed by the standard inspection contingency provisions.

An amendment to negotiate a solution to the buyer's property condition concerns may be proposed using the WB-40 "Amendment to Offer to Purchase." Such an amendment may state: "This is not a notice of defects. Seller agrees to (perform the following repairs) and/or (give the following credit at closing) and/or (establish the following repair escrow)." The proposals should include details, time frames, costs, materials, contractors, consultants, etc. The seller would then have the option to accept or reject the buyer's proposed amendment, or propose a different amendment back to the buyer.

REALTORS® must be aware that if a proposed amendment is given instead of a notice of defects, the deadline for giving a notice of defects is still running. This means that if no notice of defects is given and the seller will not accept the proposed amendment, the buyer will have accepted the property as is. That is why the deadline for acceptance of a proposed amendment should be earlier than the deadline for the buyer giving a notice of defects. This will give the buyer the option of giving a notice of defects if the seller does not agree to the amendment proposal.

If the buyer has already submitted a notice of defects and now wants to propose a different way to handle the situation, the amendment should indicate, "The right to cure provisions at lines 306-310 of the offer are deleted and the buyer's notice of defects is withdrawn."

Withdrawal of Notice of Defects

The buyer cannot unilaterally withdraw the notice of defects. A notice of defects can be withdrawn only with the consent of the seller. The way to withdraw a notice of defects is with an amendment stating that the parties agree that the notice of defects is withdrawn.

REALTOR® Practice Tips: The single most important thing when drafting an inspection contingency is to give the parties enough time to accomplish the inspection, review the report and take part in back-and-forth negotiations before the buyer decides whether to give a notice of defects. Give the parties as long as possible to accomplish this critical phase of the home sale process.

REALTOR® Practice Tips: A notice of defects goes on a WB-41 Notice Relating to Offer to Purchase. It is extremely helpful if it is prepared to identify what it is – "this is a notice of defects." The notice of defects simply lists the defects the buyer objects to. A notice of defects does not specify the repair details (that would require an amendment). A copy of the inspection report(s) must accompany a notice of defects. This means the whole inspection report, not just the summary pages.

REALTOR® Practice Tips: A party cannot unilaterally withdraw a notice once it has been delivered to the other party. A notice is withdrawn by agreement of both parties, typically expressed in a WB-40 Amendment to Offer to Purchase.

Legal Hotline Questions and Answers – Inspection Contingency

The deadline for the home inspection has expired (seller has right to cure). The buyer and seller attempted to negotiate through amendments but did not reach an agreement, and the buyer has not delivered a notice of defects. Does the buyer forfeit the right to cure the defects? If so, what happens to the buyer's earnest money?

As indicated in the WB-11, an inspection contingency will be deemed satisfied unless the buyer, within the specified number of days, delivers to the seller (1) a copy of the home inspector's written report and (2) a written notice listing the defects identified in the inspection report, to which the buyer objects. In other words, if the buyer fails to perform these tasks within the specified time frame, the inspection contingency is considered satisfied. If the buyer fails to deliver a notice of defects, accompanied by a copy of the inspection report, by the deadline, the buyer will have accepted the property as is (absent any amendment negotiated between the parties that alters this result). If the seller is not willing to enter into a CMAR, and the buyer wishes to walk away from the transaction and attempt to recover the earnest money, then the agent should encourage the buyer to consult with an attorney.

When working with the home inspection contingency on a residential offer to purchase, does a buyer have the ability to send a notice of defects that dictates how the work should be completed?

The home inspection contingency in the WB-11 provides that the buyer may give a notice listing the defects identified in the inspection report to which the buyer objects. It is not appropriate for the buyer to dictate how the seller will cure in a notice of defects. If the buyer wishes to negotiate a certain method for repairing a defect, an amendment is the appropriate tool. The buyer also cannot list an item on a notice of defects if he had actual knowledge or notice about the nature and extent of the item before signing the offer. The seller's obligations to cure are outlined in the WB-11 on lines 306-310.

The estate paid for a home inspection on the listed property and this information was provided to the buyers with an accepted offer. The buyers want to have a relative, who is an inspector for the city of Milwaukee, inspect the home. The broker has requested information about the licensure and credentials of the inspector, but has received nothing. The seller will allow the inspection, but there is a concern if additional defects were to be found.

Although engineers, architects or other inspectors may, pursuant to their expertise, perform a home inspection, the buyer cannot use their report as the basis for a notice of defects unless the offer to purchase is modified to authorize that inspector for the home inspection contingency. The DRL-approved offer to purchase requires the buyer to use a Wisconsin-registered home inspector. If a buyer knows, in advance of drafting the offer, that another type of inspector will be used, that should be specified in the contingency. Lines 97-102 provide access only to inspectors when the inspection is needed to meet a contingency in the offer. Therefore, the broker should not allow the inspector access to the property unless the offer to purchase has been modified to authorize this inspector.

The home inspection showed the roof was at the end of its life. The buyer submitted a notice to the seller indicating that the closing of the offer was contingent on the repair, at the seller's expense, of a list of items that included the roof. The seller proposed an amendment to the buyer stating that he will only pay half of the cost of the roof replacement. The buyer does not want to pay half. Since the buyer submitted

a notice, does her notice cancel the offer and get her earnest money back?

According to the terms and conditions of the home inspection contingency, the buyer may give a notice of defects if the home inspection report includes defects as defined in the offer to purchase. The notice of defects should only list the items to which the buyer objects. The notice cannot be used to create a new contingency. The buyer may not, by notice, demand certain repairs; an amendment must be used for such negotiation between the buyer and seller.

The home inspection contingency provides that if the buyer gave an adequate notice of defects, a seller, with a right to cure, must decide whether to cure the defects in a good and workmanlike manner or allow the offer to become null and void. If the seller does not deliver a written notice of the seller's election to cure the listed items, the offer becomes null and void. The home inspection contingency, with a seller's right to cure, does not give the buyer the power to cancel the contract.

The seller has 10 days in which to respond to a buyer's notice of defects, and the seller may negotiate with the buyer with an exchange of proposed amendments during this time frame. The seller may also want to consult with roofing specialists to determine if the old roof is a defect, as defined in the offer, and, if so, what would be required to cure in a good and workmanlike manner. If the seller does not give the buyer notice of the seller's election to cure within the 10 days, the offer will become null and void.

A broker can suggest different actions that a party might pursue but cannot give a party legal advice. A licensee should refer a party to his or her attorney if the party wants legal advice. For more information, see *Legal Update* 04.08 "Effective Home Inspections," online at www.wra.org/LU0408, which discusses home inspectors, home inspections and the home inspection contingency.

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