QUERIN LAW LLC

Frequently Unasked Questions About the OREF Sale Agreement

What follows are a series of questions/issues about the OREF Sale Agreement that I do not hear much about. Perhaps everyone already has the answers. Anyway, here it goes:

1. **Why do some offers contain a buyer's name followed by "or assigns"? What are the repercussions to a seller when accepting such an offer?**

The Sale Agreement does not permit buyers to assign their interest to third parties without seller's written consent. Accepting an offer from a buyer "or his/her assigns", permits such assignments. While it also means the assignee is subject to the terms of the Sale Agreement, this introduces a new party into the transaction whose *bona fides* have not been vetted by the seller. Without more clarifying text it is unclear whether the original buyer is released of liability following the assignment.[1]

Moreover, there is, in my opinion, something unsettling with a buyer engaging in an arbitrage of the seller's property, perhaps at a higher price. For example: Seller accepts Buyer No. 1's offer of $500,000, but he assigns the contract to Buyer No. 2 for $50,000. This mean that Buyer No. 2 will have paid $50,000 for the right to close on the purchase for $500,000. This suggests that seller may have underpriced the property, or Buyer No. 2 may have overpaid for it.

What about financing? If that is involved, what does the seller know about Buyer No. 2's ability to obtain a loan?

And what if Buyer No. 2 does not close? Seller must start over, and in many cases, the only one who profited is Buyer No.1 who arbitraged the transaction.

In short, there are multiple issues that need to be considered before agreeing to such an arrangement.

2. **When a seller advertises in the RMLS™ that certain furniture and fixtures are included as part of the purchase price, is it necessary to also include those items in the Sale Agreement?[2]**

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[1] I agree that under the OREF Sale Agreement, the limit to a buyer's liability for nonperformance is loss of the earnest money deposit, but if the transaction is a flip, where work will be done on the home before resale, poor construction by Buyer No. 2 might come back to haunt the Buyer No. 1.

[2] **40. OFFER TO PURCHASE. Buyer has not relied upon any oral or written statements made by Seller or**

The Sale Agreement contains "merger" language, which essentially says there are no other written or oral agreements between seller and buyer except those contained within the four corners of that document.[3] So technically, the seller has not agreed to sell to buyer those items mentioned in the listing. If seller refuses because they were not a part of the Sale Agreement, the buyer's agent will likely end up paying for the property.

Where additional property is included as a part of the listing agreement, buyer agents should always list them by separate addendum and make it part of the Sale Agreement.

3. **In the section of the Sale Agreement dealing with all-cash transactions, there is a place for the buyer to enter the number of business days (five if not filled in) to provide the seller with "Verification" of "readily available funds". Besides cash, what are "readily available funds"? Can a seller terminate the transaction if he/she does not approve of the source of funds?**

In today's world, almost all other assets besides cash, even money market funds, can impose some delay. In other words, while non-cash assets may be "available" they may not be "readily available" depending upon the seller's time constraints.

Certainly, liquidating stock can entail delay. Same for liquidating 401K and IRA funds. Before engaging in a purchase transaction that depends upon liquidating non-cash assets, buyers should first find out what kind of delay is involved. They may want to set the process in motion even before making the offer.

While the seller can reject buyer's verification of funds, there is a requirement that the seller's rejection must be - in lawyer speak - "objectively reasonable". This means that seller's objection must be tied to an objective (rather than subjective) standard.

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any Agents that are not expressly contained in this Agreement. *** (Bold text in original.)

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For example, a seller would be hard-pressed to object to liquidating stock, an IRA or money market funds, simply because he or she believed they are inherently unreliable investments.

But if the world was experiencing a financial meltdown as we did on March 9, 12, and 16, 2020, when the Dow Jones Industrial Average crashed on concerns over Coronavirus, oil prices, and recession fears, a seller's rejection of their buyer's verification of funds due to delay concerns might be considered "objectively reasonable".

4. **In the inspection contingency portion of the Sale Agreement there is a place for the buyer to enter the number of business days (ten if not filled in) within which to provide the seller with notice of buyer's "unconditional termination", in which case, the transaction is terminated, and earnest money refunded. What is – and is not – "unconditional" notice of termination?**

The term "unconditional termination" has a long history. Before it was inserted into the Sale Agreement many years ago, some buyer agents tried to finesse the issue, because they did not want to make an outright termination, and instead keep their negotiating options open.

So, they crafted their post-inspection offers or counteroffers, as follows:

> Seller to reduce the sale price by $10,000 on account of necessary repairs per Buyer's professional inspection report. Seller shall have until 7:00 PM on _____, 2021 to agree to said reduction (the "Deadline"). If Seller does not accept said reduction by the Deadline, Buyer hereby gives Seller notice of the rejection of said report and terminates this transaction.

This notice of termination is clearly conditioned upon seller's refusal to agree to a reduction of the sale price. Such an offer or counteroffer today would not be regarded as an "unconditional termination".

Technically, this means that the seller could ignore the offer or counteroffer as a non-compliant notice of termination, and when the buyer sought to terminate, refuse to release the earnest money deposit, and instead argue that the buyer was still in the transaction, had not given an unconditional termination within the required time, and now must either close or lose their deposit.

An unconditional notice of termination to the seller need only say:

> "Buyer hereby gives Seller notice of rejection of the professional inspection report and terminates this transaction."

There is always a risk of argument where the buyer attempts to explain the reason for their termination. Once an explanation of the reason for the rejection is made, it invites the charge that the rejection is not in good faith. That is why it is best not to explain the basis for the rejection. Nowhere in the seller property disclosure statutes does it require an explanation.

5. **In the financing portion of the Sale Agreement, it requires that the buyer's "completed loan application" must consist of: (1) Buyer's name(s); (2) Buyer's income(s); (3) Buyer's social security number(s); (4) Property address; (5) An estimate of the value of the Property; and (6) Loan amount sought. What difference does the property address make? And what happens if I do not include the address in the application?**

This goes back to the TILA-RESPA Integrated Disclosure Rule ("TRID") of 2015. Mortgage bankers and brokers are required to issue a Loan Estimate[4] within three business days of receipt of a loan application. However, what triggers the 3-business day period is the requirement that all six of the elements must be included. This is technically what is meant by a "completed loan application".

[4] Formerly known as a "Good Faith Estimate". The reason for eliminating the words "good faith" from the estimate mystifies me. It sends an odd message. Per the CFPB website here: "The form provides you with important information, including the estimated interest rate, monthly payment, and total closing costs for the loan. The Loan Estimate also gives you information about the estimated costs of taxes and insurance, and how the interest rate and payments may change in the future. In addition, the form indicates if the loan has special features that you will want to be aware of, like penalties for paying off the loan early (a prepayment penalty) or increases to the mortgage loan balance even if payments are made on time (negative amortization). If your loan has a negative amortization feature, it appears in the description of the loan product."

Certainly, the lender will respond with a Loan Estimate, but since it is not "completed" the 3-day requirement does not apply.

For listing agents this is an important issue, since they want the buyer to submit the application with the required 3-business days,[5] but they also want to know that the lender is required to meet the 3-business day requirement.

Moreover, TRID imposes further time limitations: The buyer is required to respond to the lender's delivery of the loan estimate within not more than ten business days, and if he/she fails to do so, the Loan Estimate is no longer binding on the lender.

Thus, in those situations in which the lender is unable to make the lending decision before the closing date deadline in the Sale Agreement, a buyer's compliance, or noncompliance with the TRID timelines may be the reason – and bears examining when the earnest money deposit is in dispute.

6. **At the Definitions/Instructions section of the Sale Agreement, it provides that a "business day" means "Monday through Friday, *except recognized state and/or federal holidays*." (Emphasis added.) Oregon does not recognize Columbus Day as a state holiday anymore. Does that mean it is a "business day" under the OREF Sale Agreement? And what about the day *after* Thanksgiving? I have seen some Oregon state websites say that in addition to Thanksgiving, Friday is also a holiday. So, what state and/or federal holidays are "recognized" – and by whom? Is the Friday after Thanksgiving now a recognized holiday?**

If one compares the list of Oregon holidays recognized at ORS 187.010 (Legal Holidays) with federal holidays listed in 5 U.S. Code 6103 (Holidays), they are exactly the same – except Oregon, in a woke rebuff to European explorers, decided that Columbus Day would no longer be a state holiday. But since Columbus Day is still a federally recognized holiday, that means under the OREF Sale Agreement, it is *not* a "business day". So that issue is resolved. If the federal government wanted to risk insulting every

[5] Three is the default if the space is left blank.

Italian American, it could follow Oregon and 13 other states[6] by not recognizing Columbus Day as a national holiday. In that case, Columbus Day would indeed, be a business day under the current Definitions/Instructions section of the Sale Agreement.

But what about the day after Thanksgiving, also known as "Black Friday"? The 2-day Thanksgiving holiday theme can be found on all sorts of Oregon websites, such as the Oregon DEQ, the Oregon Department of Administrative Services, and all sorts of unofficial "office holiday" and "public holiday" websites – which just adds to the confusion.

The answer is that while apparently every ***state employee*** takes two days off, Oregon does not recognize the day after Thanksgiving as a holiday under ORS 187.010. Many companies, large and small do close on the day after Thanksgiving, but that is the result of union and government contracts, or by employer choice. It is ***not*** statutorily mandated.

So, what is the take-away for Oregon Realtors®? First, if a contingency, or other performance period, should fall over Thanksgiving ***and*** the following day, both agents should try to reach agreement *in advance*, on whether the second day will also count as a business day. If there is no discussion, it most certainly will be treated as a "business day" since that is what ORS 187.010 says. And if both brokers never discuss it, Murphy's Law says they may not end up on the same page.

[6] Alabama, Alaska, Hawaii, Idaho, Maine, Michigan, Minnesota, New Mexico, North Carolina, Oklahoma, Oregon, South Dakota, Vermont, and Wisconsin – plus the District of Columbia.