

New Oregon Realtors® Residential Sale Agreement - More Steps for Brokers

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I. Intro

Beginning early 2023, Oregon REALTORS® made available a new set of forms for use by the real estate broker community. For the last 20+ years, the residential real estate industry relied primarily on a single set of forms produced by the Oregon Real Estate Forms, LLC (“OREF”). The new Oregon REALTORS® forms differ from the standard OREF forms in many respects. Brokers using different forms should take care to understand the differences to best serve their clients. Over the last several months, as the recently appointed general counsel to the Portland Metropolitan Association of REALTORS®¹, I have been asked many times to explain the differences. While not comprehensive, the below article provides a high-level summary of just a couple key differences that brokers should keep in mind when using the new forms.

II. Waiver of Conditions and Defaults

A substantial difference between the standard OREF residential sale agreement and the new Oregon REALTORS® forms involves how the two forms deal with the non-occurrence of certain events during the course of a transaction. Most purchase and sale agreements involving real property contain two types of clauses: “contingencies” (also referred to as “conditions”) and “duties.” A contingency is defined as “an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due.” Restatement (Second) of Contracts §224 (1981). A contingency, once it is satisfied, triggers a duty to perform. If the contingency does not occur, that simply means that certain duties never come into existence (except under certain limited exceptions). Conversely, a duty is an obligation under a contract that exists without the need for something else to occur. A failure of a duty results in a default or breach of the contract by the non-performing party.

When a contingency fails to occur, the party for whom the contingency benefits can either waive it or do nothing. If the contingency is not waived, then the contract expires by its terms and neither party is liable to the other to complete the contract. A breach of a duty can also be waived. However, if not waived, the non-breaching party has the option to elect remedies for the breach, which may include monetary damages, specific performance, or other.

As discussed in more detail below, the new Oregon REALTORS® forms create new automatic “waivers” on the part of parties with respect to certain contingencies or breaches of duties. In short, the new Oregon REALTORS® forms create new steps that the parties (and by implication,

¹ PMAR is a member of OREF.

their brokers) must take to enforce a contingency or breach. These additional steps change how a real estate transaction typically will unfold, especially when certain actions are *not* taken. Accordingly, use of the new forms requires a strong understanding of the differences and the new requirements in order for a broker to ensure that his or her client maintain their rights throughout the transaction.

III. Financing Contingency

Under Section 5.2 of the standard OREF form residential sale agreement, if the financing contingency is not satisfied or expressly waived, the transaction expires on its own terms without further action of the parties or their brokers. Specifically, under the standard OREF form, if Buyer fails to obtain financing, Buyer must only “promptly” notify Seller. At that point, the parties have a specified period of time to either (i) terminate the transaction under mutually agreeable terms or (ii) renegotiate the terms of the sale to allow for the transaction to continue. If neither occurs, however, then the transaction is deemed to have terminated and all earnest money is returned to Buyer. In other words, if the financing contingency fails, no further action is required by the selling broker to ensure his or her client’s right to the earnest money because financing was a condition of the transaction.

Conversely, unlike the standard OREF form, the new Oregon REALTORS® purchase agreement flips the automatic result when the financing contingency fails. Specifically, the new Oregon REALTORS® form requires Buyer to provide notice of termination in order to enforce the contingency. First, the new Oregon REALTORS® form specifies that Buyer must notify Seller of the failed financing within two (2) days (as opposed to “promptly”), or else Buyer waives the financing contingency. Thus, a selling broker now must counsel its client that there is a very specific deadline that must be met. Second, the new Oregon REALTORS® form provides that if the parties fail to renegotiate the terms and Buyer fails to submit a notice of termination within two (2) additional days from the original notice, then Buyer is deemed to have waived the financing contingency. In other words, under the new forms, if Buyer (and by association its agent) fails to (i) submit the appropriate notice within the specified time period or (ii) fails to submit the proper termination notice within the specified time period, Buyer will lose its right to terminate the contract and retain the earnest money, even though the transaction failed due to lack of financing.

IV. Title Report Contingency

Under Section 9 of the standard OREF form, Seller provides Buyer with a title report and Buyer has five days to submit objections. After submission of Buyer’s objections, the obligation switches to Seller to remove the defects in title or provide reasonable assurances that such defects will be removed at closing. If Seller fails, the transaction automatically terminates because the title report condition is not satisfied, and Buyer is entitled to return of the earnest money. Neither Buyer nor the selling agent have any further obligations to secure its right to terminate the transaction and retain the earnest money once it submits the objections.

The new Oregon REALTORS® forms add an extra step (a new duty) that Buyer and his or her agent must take to enforce Buyer’s rights under this contingency. Said another way, the new Oregon REALTORS® forms include a pre-waiver of this contingency on the part of Buyer. The new Oregon REALTORS® forms have the same five days standard time frame for Buyer to submit objections to the tile report. However, if Seller fails to remove the defects in title or

provide reasonable assurances that such defects will be removed at closing within the specified time period, Buyer is obligated to send a notice of termination within two (2) days. If Buyer fails to send the notice of termination within the two (2) day deadline, Buyer waives its objection to the title report and accepts *all matters disclosed* on the report.

V. Earnest Money

Under Section 25 of the standard OREF form residential sale agreement, following acceptance of the offer, Buyer has an immediate obligation to provide the earnest money within the specified period of time after acceptance (typically three days). Deposit of the escrow funds is a “duty” -- meaning failure to deposit the earnest money to the escrow agent constitutes an immediate and material breach of the agreement, and Seller has a potential claim against Buyer for damages in the amount of the escrow deposit. And because it is a material breach, unless Seller expressly waives the failure, the transaction terminates on its own and Seller may also re-list the property. What this means for brokers is that, under the standard OREF form, neither the listing agent nor the selling agent have any role in the earnest money process, and thus no obligations to their clients (except for maybe physically delivering the deposit check to escrow). Either Buyer pays the deposit and the transaction proceeds, or Buyer fails to pay and is potentially liable to Seller for that deposit amount.

Under the new Oregon REALTORS® forms, Seller (and its agent) must take affirmative steps to enforce its rights in the event Buyer fails to deposit the earnest money on time. Seller must send a “Notice of Default” to Buyer, giving Buyer a period of time to “cure” the default by making the deposit. If Buyer fails to “cure,” only then does Seller have a claim to the earnest money. Alternatively, Seller may send a termination notice, terminating the transaction and relieving Buyer of any obligation to pay the earnest money. If Seller does neither, the contract is silent on what happens, leaving it to the parties to fight over who owes what to whom, and what happens to the agreement – for example, one possible interpretation of the Oregon REALTORS® form would be that Seller waives the right to require any earnest money if Seller did not send one of the two notices. In other words, under the new Oregon REALTORS® form, the listing broker must properly advise his or her client and submit the appropriate notices within the required timeframe after Buyer fails to make the deposit, or risk losing a claim to the earnest money.

VI. Conclusion

The differences between the two forms are numerous and will affect each transaction differently. The article above merely highlights in very general terms a few issues to be aware of. Brokers are advised to confer with their principal broker and, if appropriate, seek their own legal counsel when dealing with questions related to the new forms and the legal consequences.

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