WRA 03.11

Please Route to:

__ _____
__ _____
__ _____
__ _____
__ _____
__ _____
__ _____

Legal Update

A WRA Publication Exclusively for the Designated REALTOR®

Inside This Issue

Overcoming Residential Transactional Obstacles

Occasionally, when a transaction seems well on its way to a smooth closing, an exasperating problem throws a wrench into the proceedings. The WRA legal department has compiled a list of some of these common problem areas in residential transactions. Problem areas were selected for this *Legal Update* either because they are hot topics or because they are recurring headaches that continually cause problems for REALTORS. This issue includes a description of each problem area, a short summary of the applicable laws, and some suggested solutions and risk reduction measures. Each topic also includes WRA Legal Hotline questions and answers illustrating steps that may be taken to minimize or prevent the problem.

The first problem area addressed is licensee inspection and disclosure duties. That topic is followed by a discussion of buyers who have no funding at closing and the problems associated with short sales. Tips are included for making sure that a homebuyer begins looking for homeowner's insurance early to optimize his or her ability to successfully obtain insurance for the closing. Other problem areas that have long been thorns in the sides of REALTORS include difficulties with misrepresented lot locations, lines and areas; parties who unintentionally create LBP hazards when remodeling before or after closing; problems with tenant vacations and evictions during the sale of rental properties; and an old standby source of consternation – fixtures.

The discussion of these issues includes preventive measures that can be employed by a broker to help avoid these problems. Some of the risk reduction suggestions take brokers beyond what is legally required of licensees, but may be necessary to most effectively identify trouble early on and position the broker to best help the parties and protect the broker from liability.

Duty to Inspect and Disclose

One important area of concern that runs across all types of transactions is the duty to inspect and disclose material adverse facts. As reported in the July 2003 issue of the *Wisconsin REALTOR*, the area of greatest concern for 78 out of the 100 WRA brokers who answered a recent WRA survey is inspection and disclosure issues. Year in and year out, most lawsuits against brokers involve misrepresentation or a failure to disclose.

Wis. Admin. Code § RL 24.03(2)(d) establishes an agent's inspection standard of performance: "Licensees are not required to have the technical knowledge, skills or training possessed by competent third-party inspectors and investigators or real estate and related areas." Real estate licensees are marketing agents, not home inspectors. A real estate licensee's inspection duties are established in Wis. Admin. Code § RL 24.07(1):

Contacts

EDITORIAL STAFF

Author
Debbi Conrad

Production
Laura Connolly
Rick Staff
Tracy Rucka

ASSOCIATION MANAGEMENT

Chairman
Walter Hellyer

President
William E. Malkasian, CAE

ADDRESS/PHONE

The Wisconsin REALTORS® Association,
4801 Forest Run Road,
Suite 201, Madison,
WI 53704-7337
(608)241-2047
1-800-279-1972

LEGAL HOTLINE:

Ph (608) 242-2296
Fax (608) 242-2279
Web: www.wra.org

1. **Area to be Inspected.** § RL 24.07 (1) limits a licensee's inspection to the accessible areas of the structure and the immediately surrounding areas of the property. Licensees are not required to walk all of a one-acre lot or a forty-acre farm in order to practice competently.

2. **Vacant Land.** A licensee working with accessible vacant land shall conduct a reasonably competent and diligent inspection of the vacant land to detect observable material adverse facts.

3. **When a Listing Broker Must Inspect.** The listing broker must inspect before the listing contract is signed.

4. **Listing Broker's Inquiries of the Seller.** The listing broker must ask the seller to answer in writing questions about the condition of the structure, the mechanical systems, and other relevant aspects of the property before the listing is executed.

5. **Inspecting Mechanical Equipment.** Licensees are not required to operate mechanical equipment or open panels, doors or covers for access to mechanical systems. For example, a licensee does not need to operate the furnace or the dishwasher, or remove or open panels or covers from the air conditioner.

6. **Areas Not Easily Accessible.** Licensees are not expected to inspect areas accessible only by ladder, by crawling or other equivalent means, nor must licensees inspect areas when access involves an unreasonable risk of injury. Licensees are not required to move furniture, boxes or other property and do not have to climb ladders to inspect the roof or get on their hands and knees to enter a crawl space. Licensees do not have to inspect the back deck if the back yard is sheer ice or climb rickety old stairs to get a peek at the attic. When a safety problem is encountered, a licensee should keep a written record in the file and try to inspect later if the opportunity presents itself.

7. **Third Party Inspectors Not Required.** Licensees have no obligation to bring in third party inspectors or investigators. A licensee legally only needs to use the training and skills obtained as part of the licensure process in a diligent and reasonable manner to perform a competent inspection. If a potential problem is spotted, the licensee should make note of it and disclose it to the parties, but is not obligated to bring in experts as part of the inspection.

The WRA "Listing/Selling Visual Inspection" form is a due diligence tool for implementing licensee inspection and disclosure duties under § RL 24.07. Licensees are required to inspect a property and disclose material adverse facts and facts inconsistent with the seller's RECR or other disclosures. The form serves as a checklist and documents the fact that a competent and reasonably thorough inspection has been performed. It provides a record of observations to use when reviewing the RECR to look for inconsistencies, and when making written disclosures of material adverse facts. Detailed notes on the "Visual Inspection" form – for example, "boxes stacked against west basement wall" – will help licensees accurately remember what they saw and could not see in a property, and spot issues and concerns for their clients and customers who may address these items in their offers to purchase. Having an office policy that requires that licensees complete a "Visual Inspection" form for the file ensures maximum license law compliance for the benefit of the broker and associates, and facilitates quality services for the clients and customers. If licensees

are not willing to use this form, it may be effective to have agents sign a copy of the seller's RECR indicating that the RECR is "not inconsistent with agent inspection of accessible areas of property."

Once the licensee has inspected a property, the licensee has the duty to disclose observable material adverse facts. Whether a particular fact is something that a licensee needs to disclose as an adverse material fact is a judgment that only the licensee can make after considering all of the facts and circumstances in the situation. In addition, a licensee who becomes aware of information suggesting the possibility of a material adverse fact must disclose that information to the parties, in writing, in a timely manner per § RL 24.07(3). Real estate licensees also are required under § RL 24.07(6) to disclose facts that are materially inconsistent with or materially contradictory to the seller's property condition statements (RECR) or to the report of a third party inspector or investigator. For further discussion of disclosure duties, see *Legal Update 02.07*, "Duty to Disclose," at www.wra.org/LU0207. A sample letter format for disclosing material adverse facts appears on page 9 of *Legal Update 02.12*, "2002 REALTOR Highlights," at www.wra.org/LU0212.

The Problem: Licensees who fail to inspect properties and make disclosures may end up being sued for misrepresentation or a failure to disclose. If a material adverse fact is discovered after acceptance of the offer, the buyer may rescind the transaction based upon a mutual mistake of fact and the seller can lose the sale. Complaints may be filed with the DRL for license law violations and with the local board for ethics complaints, and the rates for the broker's errors and omissions insurance may increase.

Solutions: Tips for limiting inspection and disclosure liability:

1. Make sure that the seller fills out a RECR or other seller disclosure form.
2. Complete and sign a WRA "Listing/Selling Visual Inspection" form for each listing and for each property showing where the buyer shows a high level of interest or plans to draft an offer. Licensees must inspect prior to or during each showing where they have access, so brokers should consider whether completion of a form should be required for every showing.
3. Brokers may require buyers to use professional inspectors whenever there is no RECR, problems were observed during the licensee's inspection or licensees are otherwise concerned that there may be property condition issues. REALTORS should always encourage parties to use other professionals such as inspectors, accountants and attorneys, whenever appropriate.
4. If property information is received from a third-party source, attribute the information to that source. For example, "According to the seller, the roof is three years old." Specifically attribute data used in data sheets and advertisements, such as acreage, square footage, and assessed values, to its source, and use general disclaimers. It is generally recommended that data sheets contain language to the effect that the stated information was provided by the seller or other third parties and has not been verified by the broker unless otherwise indicated.
5. When in doubt, disclose it! Disclose only the facts and avoid assumptions, inferences and predictions.

Legal Hotline Questions and Answers-Duty to Inspect

A buyer's agent inspected a property that is marketed as having central air and discovered that there is no central air. Does the agent have a duty to disclose this fact to the buyer?

If given access, the buyer's agent is required under § RL 24.07 to perform a reasonably competent and diligent inspection of the property. A buyer's agent, however, is not required to have the specialized knowledge and skills possessed by professional inspectors. If a reasonably competent and diligent licensee would note the absence of the central air unit, then arguably the buyer's agent should have discovered and disclosed this misrepresentation.

An agent is showing a home that had visible water damage to floors, etc. when it was for sale last year as a vacant new construction. The builder has since moved into the home, but is making no disclosures about the water damage despite the fact that some evidence of water damage still remains. How should the agent proceed?

Because the home has been occupied, the seller should be prepared to provide potential buyers with a RECR per Wis. Stat. Chapter 709. The agent has the obligation to conduct a reasonably competent and diligent inspection of the structure and surrounding area to detect observable material adverse facts per § RL 24.07(1)(a). If the agent's inspection reveals facts inconsistent with the seller/builder's RECR, such as remaining visible signs of water damage, the agent should promptly disclose this information to the parties in writing according to § RL 24.07(6).

If a bedroom doesn't have a heat register, is this an adverse fact that should be disclosed by the listing agent?

The agent has a duty to perform a reasonably competent and diligent inspection. The location or existence of heat registers is not always readily observable because heat registers are often hidden behind furniture or other personal property. Because licensees are not required to move personal property in order to inspect a property, it is not necessarily required to verify that each room has a heat register. If the listing agent has knowledge about the lack of a heat register, this fact should be disclosed.

Confirm Lender Funding for Closing

It used to be that everyone simply assumed that the funds promised in the buyer's loan commitment would be available at closing. In today's world, however, some buyers do not obtain loan commitments or they receive a document that refers to a loan but really is not an enforceable loan commitment.

The Problem: Everyone shows up ready to close, but the money is not there or the closing agent does not have good funds.

Solutions: The parties and the agents all have steps they can take to help assure that good funds will be on the table at closing.

- **Seller:** The seller can take advantage of the provisions in the offer and require that the buyer provide proof of loan application. The seller can go beyond that and add provisions to the offer that require that the lender provide confirmation of loan application, that require that the lender be a financial institution authorized by the Department of Financial Institutions (DFI) to do business in Wisconsin, and that make the buyer responsible to make sure the money is at closing. For instance, the offer may include a provision that states, "Buyer agrees to determine how and when buyer's loan proceeds will be funded and is obligated to have the total purchase price, including mortgage loan proceeds, available at the time of closing." The seller may also want to include a liquidated damages provision that requires the buyer to pay a per diem fee for each day the closing is delayed by the buyer's failure to produce the funds needed to close.
- **Buyer:** The buyer can get a legitimate loan commitment from a DFI-authorized lender and confirm how the lender will fund the loan.
- **Cooperative Agents:** Cooperative agents can try to educate the buyer about the risks that may be involved when working with some of the lenders in today's marketplace. If the buyer provides a loan commitment but no funds are available at closing, the buyer is still obligated to close and will be in breach of contract if he or she does not close. The buyer at that point may lose their earnest money and be sued. It is sometimes difficult to know how reliable an Internet lender or a lender tapped by a mortgage broker may or may not be, so the buyer may want to check on the stability of the lender, or seek the loan through an established lender or a local financial institution.
- **Listing Agent:** The listing agent can try to find out who the lender is, and what funding policies it observes. Brokers should not schedule back-to-back closings where the proceeds from one closing are needed for the purchase price in the following closing-there will be a chain reaction if there are no funds at the first closing and it is delayed or it fails.
- **Closing Agent:** The closing or settlement agent is obligated by law to have "good funds" at closing. Wis. Stat. § 708.10 was enacted in 1996 to protect the consumer against the nightmare of a closing where the funds are never delivered. When a lender closes through a closing or settlement agent (title company, for example), the lender must provide good funds in the form of a wire transfer, a cashier's check, a check from the lender or a lender affiliate, or an account transfer from the lender's own account to the closing agent's account within the same financial institution. The lender may not require or permit the buyer to close unless such good funds are delivered before or immediately upon completion of the loan settlement.
- **Real Estate Agents:** 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 and perhaps drafting an Addendum O occupancy agreement, and getting the buyer to another lender.

In these situations, it is also important to be wary of falling into a fraudulent transaction. In their efforts to protect the parties and salvage the transaction, agents must be careful to not draft any documents that are untrue or fraudulent. For additional information about preventing and reacting to mortgage fraud, see www.wra.org/fraud.

Legal Hotline Questions and Answers-No Funding

Re: Financing contingency. A loan commitment was made based upon both buyers' incomes and delivered to the seller. One week before closing, one of the buyers lost his job. What are the ramifications?

Generally, the lender will make the loan commitment subject to the buyer's employment. If the buyer is no longer employed, the lender will not be obligated to fund the transaction. The lender's denial of funding

does not relieve the buyer from their obligation to purchase the property from the seller. The buyer should try to find alternative financing, ask if the lender will fund based upon the remaining buyer's income or find new employment which will meet the lender's criteria for the loan commitment.

Before submitting an offer on a duplex, the buyer talked to his mortgage broker about refinancing another property and using the proceeds to buy the duplex. Based upon the mortgage broker's verbal approval, the buyer drafted an offer and the seller accepted it. The transaction is scheduled to close tomorrow and now the mortgage broker says there are no funds because the buyer's loan to income ratio does not meet lender's criteria.

The agent may refer the buyer to alternative lenders to try for financing to meet his contractual obligations. If the buyer is unable to obtain financing and close the transaction, the buyer may request an amendment changing the closing date, ask for a cancellation agreement and mutual release, or otherwise amend the offer to restructure the deal. The parties should be referred to the default provisions of the offer to purchase and legal counsel as necessary.

Whether the mortgage brokers' refusal to fund the transaction constitutes a fact the agent needs to disclose as an adverse material fact is a judgment that only the agent can make after considering all of the facts and circumstances in the situation. See www.wra.org/LU0207 for further discussion of licensee disclosure duties.

The agent, the buyer or the seller, may consider filing a complaint regarding the actions of the mortgage broker. Department of Financial Institutions information for filing complaints is available at www.wdfi.org/fi/mortbank/mbapp.htm.

Short Sales

A "short sale" is the term most commonly used in the real estate industry to refer to a situation where the proceeds from the sale will not be enough to satisfy all of the liens on the property and to pay all of the closing expenses, possibly including the broker's commission. These transactions may involve scenarios where the seller is filing bankruptcy or where the mortgagee is foreclosing on the property. Other times the total of all of the liens on the property exceeds the value of the property or what the property can bring on the market. When there are many liens on the property, the different lien holders sometimes will negotiate with the owner and agree to take an amount less than the full amount owed rather than suffer the expense and delay of a foreclosure or other litigation. When there is no more room to negotiate with lien holders, either the seller must bring cash to the table or ask others, like the real estate brokers, to accept reduced compensation for their services.

The Problem: Dealing with short sale situations is precarious because there are many pitfalls that may result in no closing or a closing that does not include the payment of the real estate commission. If the seller cannot negotiate reduced payoffs with lien holders, the parties may ask the real estate agents to reduce or postpone their commissions in order to reduce the seller's shortage. REALTORS may be surprised in later stages of the transaction to learn of additional liens that the owner had not originally disclosed, or new liens may appear for the first time. REALTORS may be confronted with sticky decisions regarding when certain facts must be disclosed to the parties as materials adverse facts.

Solutions: In order to intelligently list exceptions to the seller's title warranty in the offer to purchase, respond to the questions asked in the title insurance company's standard owner's affidavit, and provide documentation to remove standard exceptions from the title insurance policy, the seller and listing broker should be familiar with whatever potential liens and encumbrances may exist on the listed property as early as possible. In a short sale, it is critical to know what liens are outstanding and how much money will be needed to clear those liens from title. To this end, listing brokers may wish to use the "Listing Questionnaire Regarding Title Issues" when listing properties to prompt the seller to identify potential title issues that would not be evident from simply examining recorded documents. This questionnaire appears on page 13 of *Legal Update 03.09*, "Warranties in the Offer to Purchase," www.wra.org/LU0309.

In addition, the listing broker may also want to order a search and hold with the title company to see what liens appear of record. While this certainly is not within a real estate broker's job description, it is better to try to get a full picture of what the broker is dealing with up front and try to head off disaster down the line. While the "Listing Questionnaire Regarding Title Issues" and the title search may come up with the same list of liens, they may be very different. Sellers in financial straits may not reveal or remember all that is going on and thus may overlook disclosing one or more liens. The seller also may be unaware of some items in the title report like procedural glitches in court proceedings affecting title or information appearing on an official map. Some of property conditions in the questionnaire, such as unrecorded easements or burial grounds, will likely not appear of record. It is well worth the trouble for a listing broker

to protect him or herself and the parties by trying to spot and eliminate problems early on instead of having the transaction derail after much time and money has been spent and when angry parties are more apt to sue instead of negotiate.

In transactions where bankruptcy or foreclosure is imminent, the listing broker may need to decide if and when it will be necessary to disclose these circumstances to the other parties. Whether the possibility of foreclosure or bankruptcy constitutes facts the broker needs to disclose as material adverse facts is a judgment that only the broker can make after considering all of the facts and circumstances in the situation.

For example, a sale can still close after the sheriff's sale, as long as it closes before the court confirms the sheriff's sale. Accordingly, a foreclosure may not need to be disclosed if the buyer can close before judicial confirmation of the sheriff's sale. On the other hand, a bankruptcy may cause the property to come under the control of the bankruptcy trustee and thus require immediate disclosure.

Although disclosure may not initially need to be made based on the information available at the commencement of the transaction, facts and circumstances may change resulting in the broker's obligation to make prompt written disclosures. If the broker comes to the point when he or she knows that the sellers will not able to meet their obligations under the contract, then the issue constitutes an adverse material fact. § RL 24.07(2) requires brokers to promptly disclose material adverse facts in writing to all parties to the transaction, even if the broker's client would direct the broker not to disclose. Failing to disclose these circumstances may lead to broker liability.

See *Legal Update 99.05*, "Mortgage Foreclosures," at www.wra.org/LU9905 for more information about real estate foreclosures, and *Legal Update 99.09*, "Bankruptcy Issues," at www.wra.org/LU9909 for a discussion of bankruptcy issues.

Legal Hotline Questions and Answers – Short Sales

When the listing broker for a property had the title company run a search and hold, he learned that unless the house is sold at list price or more, the seller will not have enough money to cover closing costs, including commission. If the seller receives an accepted offer at less than list price, is the listing broker legally obligated to pay the co-broke commission to the cooperating broker?

Unless there is a prior agreement with the cooperating broker, the listing broker will remain responsible to pay the full amount of the co-broke commission upon a successful closing of the transaction. The listing broker and the cooperating broker may try to negotiate a written agreement for a reduced commission, but the cooperating broker is not obligated to agree to such a decrease.

The listed property is set to soon close. The listing broker had the title company do a search and hold and discovered three mortgages. Two or three additional judgments have also been found, so the sale will require an additional $8,000 to clear title. The listing broker has prepared an amendment to increase the sales price.

The listing broker will need to disclose to the buyers that the sellers may not be able to give clear title. This is a material adverse fact that must be promptly disclosed in writing. The buyers can then decide whether they want to sign or not sign the amendment.

The seller is having financial problems and there is not enough money for closing. The seller has negotiated settlements with IRS and the Wisconsin Department of Revenue. The second mortgage holder is demanding $5,000 before they will sign off. The seller does not have $5,000 and is looking at the real estate commission to cover it. Are real estate brokers obligated under law to proceed with a closing where the brokers are not being paid? Are brokers obligated to cut their commissions to get the transaction to close?

The listing broker's right to commission is based upon the terms and conditions of the listing contract, and is due and payable in full at the earlier of closing or the date set for closing, unless otherwise agreed to in writing. See lines 60-61 of the WB-1 Residential Listing Contract – Exclusive Right to Sell.

Broker commissions generally are included on the closing statement, but there is no legal requirement for the payment of commission at closing or for commissions to appear on the closing statement. If the seller fails to pay the listing broker's commission at the time of closing, the seller will be in breach of contract but may still proceed to consummate the sale with the buyer.

The listing broker cannot obstruct the closing because the commission will not be paid. Licensees cannot put their personal interests ahead of the parties' interest in closing the transaction in disregard of their fiduciary duties to the seller/client. Although the seller may try to renegotiate the amount or timing of the listing broker's commission, the listing broker is not required to comply. The broker must proceed with the closing but is not required to reduce his commission in order to make the transaction close.

The cooperating broker's right to commission is determined by the terms of the MLS offer of compensation. The listing broker may not uni-

laterally change the amount of the cooperating broker's commission. The MLS rules do allow, under certain circumstances, for a listing broker to be excused from paying the cooperating broker in cases where commission cannot be collected from the seller. This is a determination made by an arbitration hearing panel after hearing all the facts and circumstances in the case.

Buyers Should Get Homeowners Insurance Early

Timing is the most critical factor when it comes to successfully securing homeowner's insurance for a consumer's new home. Real estate and insurance industry professionals agree that homebuyers must begin the process of contacting an insurance agent as early as possible. Real estate licensees should develop working relationships with local insurance agents so that they stand ready to refer buyers who need insurance contacts.

The Problem: Too many homebuyers and real estate agents fall into the old habit of waiting until the last minute to obtain homeowner's insurance. Today's insurers may consider the buyer's credit or insurance score and claims history of the property as well as the property condition when evaluating insurance availability and rates. These factors may make homeowner's insurance coverage very expensive or extremely hard to find. Without homeowner's insurance, the lender will not loan the money for the purchase. As a result, closings may be delayed or cancelled.

Solutions: A homeowner's insurance checklist for buyers:

1. Get a copy of your credit report and correct any errors, because your credit information is used to compute your credit score or insurance score, which may be used by insurers when making insurance policy decisions.
2. Ask your insurance agent about property conditions and other roadblocks that might impede the buyer's ability to insure the home at a reasonable premium, and ask for a copy of a homeowner's insurance application form before you look at houses. Generally, insurance companies will be sensitive about 60-amp service, fuses, water damage, mold, vicious dogs and other prior claims.
3. Get your credit or insurance score, available from sources such as Fair Isaac (www.myfico.com) or Choice Trust (www.choicetrust.com).
4. Obtain your claims history (Comprehensive Loss Underwriting Exchange or CLUE report) from Choice Trust (www.choicetrust.com) and correct any errors in your claims history.
5. Obtain a copy of the seller's CLUE report. This will help your insurance agent estimate the costs of insurance on the property and the likelihood of obtaining a policy. Ask the seller for his or her CLUE report before you write an offer to purchase or put a contingency in the offer to purchase if the seller won't voluntarily provide this information.
6. Use your own insurer (and insurance agent) or use the insurance company now insuring the home you are buying.
7. It will likely be less expensive and insurance may be more readily available if the buyer insures his or her home and automobile with the same insurer.

Listing brokers should make sure that sellers get a copy of their CLUE report when the property is listed and encourage them to repair any remaining damage. In fact, listing brokers may consider making this a mandatory step when listing homes since it is an effective risk management measure for the broker.

For further information about homeowner's insurance, visit the WRA REALTOR Resource page for Wisconsin homeowner's insurance at www.wra.org/insurance.

Legal Hotline Questions and Answers-Homeowner's Insurance

Are fuses an insurance problem or is it more of a problem to have less than 100 amp electrical service? A home inspector told a broker that fuses could be a problem when getting insurance.

With 60-amp electric systems, modern appliances may overwhelm the system – a microwave could blow out the system. While 60 amps might be adequate for now, it will become insufficient in the future as the owners have more modern appliances. The use of fuses instead of circuit breakers is potentially dangerous because the fuse box can be tampered with, i.e. pennies instead of fuses inserted in the fuse box, etc. Most fire losses are electrical so the incorrect use of fuses is a safety issue.

A buyer requested a CLUE report in the offer to purchase. When the seller called their insurance company they said the CLUE report was unnecessary. How to proceed?

When entering into the listing, the seller should be told that buyers might request CLUE reports. Although the seller's insurance company may not use CLUE reports, potential buyers' insurers may use this information when making homeowner's insurance underwriting decisions. If the offer to purchase requires a CLUE report, one will need to be provided.

Lot Location and Size

Buyers understandably want to see the boundaries of the property and know the size of the property that they are purchasing.

The Problem: Licensees are sometimes too eager to show a buyer a lot line or corner when they are not 100% certain of their information. Other times they repeat information they received from the seller or some other third party source without qualifying the information by attributing its source. When there are mistakes regarding lot lines or lot sizes, buyers may end up suing for substantial damages and/or rescission of the transaction and filing disciplinary complaints with the DRL. The title policy won't cover these problems if the buyer was shown the wrong lot or boundary line or was given the wrong parcel size.

Solutions: REALTORS should never walk the parcel or lot lines with a buyer and should caution sellers that they will be legally liable to the buyer if they show them the wrong boundary or lot lines. This is an issue that requires the expertise and precision of a surveyor. Buyers should be encouraged to require a survey map any time there is any question about lot lines, dimensions or area.

A buyer may request a survey map by using the "Map of the Property" provision in the WRA Addendum A. This provision allows the parties to select the desired map features by striking out prelisted features and writing in additional map features that will be helpful to the parties, rather than picking a boundary map, a mortgage inspection map or a survey map. The parties are cautioned to consider the cost and the real need for the various map features before selecting them, but at the same time, it should be emphasized that the best protection for the parties (and the brokers) will come from a survey map. The offer is contingent upon the provision of a map with the selected features, which shows no significant encroachments or information that is materially inconsistent with any prior representations, by the stated deadline. The buyer may want to consider engaging the surveyor and obtaining the map him or herself, and having the seller pay for it. That way the buyer has more control over the workings of the contingency.

Legal Hotline Questions and Answers-Lot Location

Re: Lot line and frontage issue. The seller had a survey done a while ago and then sold off some of the property, but no new survey was done for the transaction. The listing agent showed the buyers the approximate lot lines while showing the property. The spec sheet said there was 315 feet of frontage. The buyers had a new survey done that shows only 285 feet of frontage.

A Wisconsin licensee can be found liable to a buyer for inaccurate statements made by the broker which appear to the buyer to have been made from the broker's own personal knowledge. In Wisconsin, the law provides that an inexperienced buyer should be entitled to rely on the factual statements made by a professional. Accordingly, when a broker receives data from the seller, the city treasurer's office, or another third party and restates the information in the MLS data sheet or in other advertising as if it were fact, the broker may be responsible for the accuracy of the information. Accordingly, REALTORS are recommended to specifically attribute data used in advertisements – such as acreage, square footage, and assessed values – to its source, and/or use general disclaimers. Disclaimers may not, however, provide certain and absolute protection in all cases.

A seller represented that his property had 17 acres, more or less. There was a survey contingency in the offer. The survey shows that there are only 12 acres. The seller is insisting that the phrase "more or less" allows this.

If the seller knew that the acreage was incorrect and misrepresented the acreage, then the buyer would appear to have a potential claim for misrepresentation. The basic elements in misrepresentation are: (1) the defendant must make a material factual representation, (2) the representation is not true, and (3) the plaintiff must believe the representation is true and reasonably rely on the representation to his or her detriment. If there was misrepresentation, the buyer generally is able to seek rescission of the contract as the remedy.

This may be a situation of a mutual mistake of fact. When both parties are mistaken as to a basic factual assumption on which the contract was made and the mistake has a material effect on their performances, the contract is voidable by the party adversely affected. Under this theory, both parties must have been mistaken. A mistake by only one of the parties makes a contract voidable only if the party who causes the mistake has reason to know the other party is proceeding based on that mistake. The mistake must be based upon a past or present fact.

See page 9 of *Legal Update 98.12* (www.wra.org/Legal/Legal_Updates/1998/lu9812.asp) for further discussion of these contract issues.

Removing Lead-Based Paint

Lead is highly toxic. Exposure to it can be dangerous, especially for children who are six years old or younger. Lead-based paint (LBP) is a hazard if it is peeling, chipping, chalking or cracking. Even LBP that appears to be undisturbed can be a problem if it is on surfaces that chil-

dren chew or that get a lot of wear and tear. These areas include windows and windowsills, doors and doorframes, stairs, railings, banisters, porches and fences. Even surfaces that have been covered with new paint or another covering can expose older LBP layers when they become cracked or chipped. The older a home is, the more likely it is to contain LBP.

When dealing with LBP, it is important to never dry scrape or sand most lead-painted surfaces. It is better to wet scrape areas by misting the surface with water before and during scraping. Dry scraping should be limited to areas that cannot get wet, such as those around electrical outlets. Measures should be taken to control lead dust during work on lead-painted surfaces, including using a wet sponge or a mister to dampen and wipe down surfaces.

The Problem: Sellers and buyers may decide to scrape peeling, cracking or chipping paint and repaint the surface in order to prepare the house for sale or to decorate a new house that was just purchased. Unfortunately, dry scraping LBP can create serious health hazards, especially for young children. There have been cases where homeowners have unintentionally poisoned their own children by virtue of the lead dust and paint chips generated during home remodeling projects.

Solutions: Owners and landlords who try to remove LBP hazards from their properties should use state-certified personnel and are required to do so if the work is classified as lead hazard abatement work. Owners can call the DHFS Asbestos and Lead Program office at (608) 261-6876, to learn if their project requires certified abatement workers and to obtain listings of certified personnel.

Property owners can legally undertake some limited LBP jobs. They can repaint LBP surfaces and repair friction surfaces on windows and doors, provided they first learn about LBP hazards and lead-safe work practices. However, property owners doing work involving surfaces covered with LBP must be extremely careful to not create lead hazards when doing maintenance or remodeling work. REALTORS can help homeowners find out how to safely work with LBP surfaces. Free copies of the following booklets may be obtained from the National Lead Information Center by calling (800) 424-LEAD or by going online to the listed sites:

- "Lead Paint Safety: A Field Guide for Painting, Home Maintenance and Renovation Work" at www.epa.gov/opptintr/lead/nlicdocs.htm#disclose or www.hud.gov/lea/LBPguide.pdf;
- "Lead in Your Home: A Parent's Reference Guide" at www.epa.gov/lead/leadrev.pdf; and
- "Reducing Lead Hazards When Remodeling Your Home" at www.hud.gov/lea/rrpamph.pdf.

Most of these publications may also be downloaded and printed from www.epa.gov/opptintr/lead/leadpbed.htm#Brochures. REALTORS can make copies of these publications and the contact information for the list of certified lead contractors – (608) 261-6876 or www.dhfs.state.wi.us/dph_boh/lead/ContactList/index.htm – and give it to buyers and sellers. It may prevent someone from unintentionally turning a remodeling project into a room full of lead dust, and thus avert a tragedy.

When helping parties find professional LBP inspectors and contractors, REALTORS should avoid recommending or endorsing a particular expert, because a "recommendation" may result in liability, and should not accompany the inspector through the house, because this may imply that the REALTOR is supervising the inspector. The party should personally pick and directly hire any LBP contractor.

If a REALTOR is aware that an owner, contractor or other person has dry-scraped or removed LBP without observing lead-safe precautions, that information must be disclosed as a material adverse fact. The creation of lead chips and lead dust is a hazard, the extent of which can only be measured by testing. The parties must have the opportunity to test and protect themselves and their families from any LBP hazards.

For additional information and links to state and federal LBP resources, go to the Lead Based Paint REALTOR resource page at www.wra.org/LBP. This resource emphasizes the importance of REALTORS recognizing the complexity of the LBP issue and how it impacts them in their business. This resource page includes *Legal Updates* relating to this topic, Wisconsin LBP litigation and legislation, Wisconsin and federal LBP statutes and rules regarding disclosure and renovations, and training and certification information for LBP personnel. Also included are the lead certification requirements, DHFS lead section contact information, links to a national list of certified LBP contractors, and information from the EPA site that explains some of the procedures certified persons follow.

Legal Hotline Questions and Answers – LBP

A listed home built before 1978 has peeling and chipping paint on the interior and exterior. There is no offer yet. What should the listing agent advise the seller to do about the paint? Should the seller scrape and repaint the house? Should the seller have a LBP inspection or assessment?

The seller must disclose LBP information on Addendum S or some

other LBP disclosure form. The listing agent may give the seller a general overview of LBP issues, including a copy of the EPA brochure "Protect Your Family From Lead in Your Home," and a copy of the Addendum S to prepare the seller for the completion of the transaction. Although the seller may choose to test for LBP, the seller is not required to do so if the property is not a rental property. If the seller chooses to do any remodeling, repainting or renovating, proper LBP precautions must be followed. The seller may be referred to www.wra.org/LBP, www.epa.gov, www.leadsafeusa.com, a certified LBP contractor or his attorney for further LBP information.

Some financing programs require the sellers or buyers to scrape and repaint. How should that be handled?

When helping parties find professional LBP inspectors and contractors, REALTORS should avoid recommending or endorsing a particular expert, because a "recommendation" may result in liability. Give the party the DHFS list of credentialed LBP contractors (www.dhfs.state.wi.us/dph_boh/lead/ContactList/index.htm) to work with. Let the party deal directly and do the hiring and the supervision of the contractor, again to avoid unintended liability. Real estate agents must recognize that it is not a part of their duties to hire contractors for the parties.

Rental Transactions Addendum (Addendum R) Issues

The WRA Addendum R to the Offer to Purchase – Rental Properties is a form designed when residential rental properties are being sold. It may be used with a residential or commercial offer to purchase, regardless of the number of units involved. Addendum R addresses rental property sales issues such as leases, rents, security deposits, personal property inventory, tenant defaults, evictions and vacancies occurring between the date of the offer and closing.

The Problem: All sorts of difficulties can arise in rental properties between the time the offer is written and the closing. Tenants may not pay their rents, abandon and/or damage their units or terminate their tenancies, which leaves the seller with less income, potential claims on security deposits, possible repair costs and vacant units. This is usually not what the buyer expects to walk into. The buyer typically expects to buy a rental property where the units are occupied by tenants who behave well and pay their rent on time. If these issues are not addressed in the offer to purchase, disputes may arise and the parties will have no rules to guide them. The buyer may decide he or she is no longer interested or wants a price reduction.

Solutions: REALTORS should always consider using the WRA Addendum R or a comparable addenda whenever a transaction involves the sale of a rental property.

Addendum R to the Offer to Purchase — Rental Properties

The Addendum R includes a personal property schedule that inventories installed appliances and equipment on the property. The personal property section also includes a representation that the listed personal property is in good working order at the time of the offer and will be in good working order at closing, when title to the personal property will be transferred by a bill of sale for the total value stated by the parties in Addendum R.

Addendum R also includes a rent schedule that summarizes the current lease/tenancy terms, rents, security deposits and delinquencies. The seller promises to deliver complete copies of all current leases and lease applications to the buyer by the stated deadline. The buyer has a time frame within which he or she may disapprove the leases and/or applications and render the offer null and void.

The indemnification section of Addendum R indicates that seller will, at closing, assign all interest, right and title to all then-current leases to the buyer who will assume all duties, responsibilities and liabilities as landlord under the outstanding leases, consistent with Wis. Stat. § 704.09. More importantly, the buyer agrees to indemnify the seller and hold the seller harmless from any loss or claim first arising on or after the day of closing, as recommended in the "Leased Property" section of the WB-1 Residential Listing Contract. Sellers remain liable under their leases following the sale of the property unless released by the tenants, so buyer indemnification is a valuable backstop for sellers. The WRA also has an "Assignment of Leases and Security Deposits" form that may be used to implement these assignments and indemnifications at closing.

In Addendum R, the seller confirms his or her agreement to assign all security deposits and prepaid rents at closing. The parties also agree to prorate rent at closing, and the seller agrees to give buyer copies of all relevant tenant records at closing. The addendum also allows one of the parties agrees to assume responsibility for notifying the tenants of the change in ownership.

The "Change in Status" provision requires the seller to give the buyer prompt notice if any tenant terminates his or her tenancy, materially breaches the rental agreement, or has a rent default lasting more than a stated number of days. For example, the seller must notify the buyer if a tenant gives notice to terminate a month-to-month tenancy or abandons a unit.

Unless otherwise agreed, the seller also undertakes to give notices of default to delinquent tenants, evict tenants who do not cure their defaults, sue evicted tenants for rent and damages in excess of the security deposit, repair damaged units and re-rent vacant units. In Addendum R's "Eviction" provision, either the buyer or seller assumes responsibility for continuing, after closing, any eviction commenced before closing, and for beginning legal action against tenants who received default notices before closing and who have not cured their defaults or vacated the premises.

Addendum R also includes an optional provision permitting the buyer to designate particular units that the buyer wishes to have vacant after closing or at a specified time for the buyer's own occupancy, remodeling or other purposes. The seller must take whatever steps are legally possible to remove any tenants in those units. For example, a seller should give proper notice to terminate a month-to-month tenancy so that the unit will be empty by closing.

The other Addendum R optional provision gives the buyer the option to void the offer if a given number of units which were rented on the date of the offer are vacant at closing. This provision is helpful for a buyer who wants to buy an ongoing business where the units continue to be rented and generate income.

Legal Hotline Questions and Answers-Addendum R

The sale of a duplex is supposed to close this afternoon. The owner did not disclose to the buyer that a tenant was vacating one of the units. The buyer was under the assumption it was going to be rented. The parties used the WRA's Addendum R with the offer, but struck out the provision regarding newly vacant units. Does the seller owe the buyer one month's rent? The seller claims that the tenant used their security deposit as the last month's rent. Does the seller owe the buyer the security deposit?

Both the terms of the offer to purchase and Addendum R require that the security deposit be assigned to the buyer at closing. The seller appears to be in breach of the Addendum R provisions for failing to give the buyer immediate notice of the tenancy termination and for failing to attempt to re-rent the vacant unit.

The seller is responsible to collect rent prior to closing, per Addendum R. If the buyer receives the security deposit at closing, he then becomes responsible for returning the security deposit and/or giving the tenant a notice of withholding within 21 days of the tenant's surrender of the premises. The seller and buyer may agree to assign the claim for the one month's delinquent rent to the buyer.

A buyer is purchasing a duplex where there is a tenant in each unit. One tenant has given notice that he is leaving. The seller indicated that the other unit, which the buyer plans to occupy per the Addendum R, has a tenant on a month-to-month basis. Notice to vacate has been given to this tenant, who is an attorney. The tenant refuses to leave, saying he had a verbal agreement to stay until next spring.

The dispute seems to be over what happened at the end of the tenant's prior six-month written lease. Either there was a verbal lease, as claimed by the tenant and as described in Wis. Stat. § 704.01(1), or this was a holdover under Wis. Stat. § 704.25 that created a month-to-month tenancy. Per the Addendum R provisions, it is the seller's (and the seller's attorney's) responsibility to straighten out this matter and get the tenant out as promised in the offer and in Addendum R. The buyer may wish to confer with his attorney because the buyer should not close until this is satisfactorily resolved in writing and because the buyer may have some monetary damages to consider if the closing and occupancy do not occur in a timely manner.

At the time a buyer wrote an offer on a duplex, a tenant who had a one-year lease occupied one unit and the other unit was vacant. The buyer found out that the seller had signed a new one-year lease for the vacant unit. Can the seller do this? What is the buyer's recourse?

This is an issue that is not addressed by the offer to purchase or Addendum R. Any buyers who are purchasing rental property and intend that a unit that is vacant at the time of the offer remain vacant should include a provision in the offer requiring that the unit remain vacant. Sellers must be expressly notified if a buyer intends to occupy a unit and made contractually obligated to leave it vacant.

Fixtures

As a general rule, a fixture is an item of property that under certain circumstances may be treated legally as personal property but which has become so attached to the land or buildings, or is used in such close association with the 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, it is 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 personal property included in the sale this would have to be written into the offer. The listing contract really only expresses what 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, MLS or office data sheet only reflect what property is available and the offer establishes the parties' agreement about personal property.

The Problem: The parties may close the transaction only to discover that there is a misunderstanding over whether an appliance, invisible fence or some other item was being sold with the home or being taken by the seller. Often times the agents end up contributing to the purchase of an appliance or other item to appease the parties and conclude the closing.

Solutions: 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 before any offer is accepted. This sounds simplistic but it is the only way to prevent these disputes. If a disagreement is discovered after the offer is accepted, the agents can try to negotiate a resolution.

Legal Hotline Questions and Answers-Fixtures

A buyer's offer said that a 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 unit 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.

Conclusion

REALTORS must be constantly vigilant to avoid liability exposure. Oftentimes the best protection comes from prevention. Employing the risk-reduction measures outlined in this *Update* gives brokers a start in limiting risk and liability exposure.

Subscribe

This *Legal Update* and other *Updates* beginning with 92.01 can be found in the members-only legal section of the WRA Web site at: http://www.wra.org.

A subscription to the *Legal Update* is included in all association Designated REALTOR® dues. Designated REALTORS® receive a monthly publication package including the *Legal Update*, and other industry-related materials.

REALTORS® and Affiliate members may subscribe to the Designated REALTOR® publication package for $30 annually. Non-member subscription rate for the package is $130 annually. Member subscription price for the *Legal Update* is $25, non-member price is $75. Each subscription includes 12 monthly issues.

Contact the Wisconsin REALTORS® Association to subscribe:

4801 Forest Run Road,
Suite 201, Madison,
WI, 53704-7337

(608) 241-2047
1-800-279-1972
www.wra.org

CRS Council of Residential Specialists

REALTOR®

Join the most qualified referral network in residential real estate

It's tough to build a name in real estate. But when you earn the Certified Residential Specialist Designation (CRS), your name becomes synonymous with professional and reliable service. It also gets listed in the CRS Membership Referral Directory, which is sent to nearly 40,000 successful agents in almost every U.S. city and several international ones. And that means tremendous referral opportunities for you!

CRS also offers an online referral tracking system and the CRS 210 Course: Building an Exceptional Customer Service Referral Business. At CRS, we understand the value of referrals. Find out more about the value of CRS!

800.462.8841 www.crs.com

Pearl will be there for you.

For 50 years, Pearl & Associates, Ltd. has been providing reliable insurance coverage. We currently insure over 100,000 real estate professionals throughout the U.S. Our Exclusively Marketed & Administered Real Pro™ Errors & Omissions Program is Endorsed by Wisconsin REALTORS® Association. When a problem arises, Pearl will be there to catch you. Contact us at:

1.800.289.8170 **www.pearlins.com**

Pearl & Associates, Ltd.

Real Pro®
Your Real Estate Insurance Solution

WISCONSIN REALTORS® ASSOCIATION
REALTOR®