



Buyers' Brokers - Don't Get Caught Having to Write Earnest Money Checks (Coming Summer/Early Fall 2023)

Ashley Strauss-Martin
New Mexico Association of REALTORS® General Counsel

A new provision will be added to NMAR Form 2104 – the Residential Re-Sale Purchase Agreement (“Agreement” or “Form 2104”) **in the late summer/early fall** that will provide a stiff penalty should the buyer **or the buyer's broker** send an inspection report to the seller when the seller has not specifically requested the report. We begin the multi-step notification process now, in hopes that buyers' brokers are prepared and won't find themselves having to write earnest money checks to their buyers.

Many years ago, Form 2104 provided that the buyer would send the inspection reports over if the buyer terminated the Agreement due to inspections or objected to inspections. As a result, inspection reports were being passed around quite liberally, not just from buyers to sellers, but from sellers to new buyers (when the deal with the original buyer fell apart and the seller was left with the original buyer's inspection report). Inspectors took issue with this, some going as far as to threaten lawsuits based on copyright infringement against buyers, sellers, brokers and even an MLS. Simultaneous with this was a shift in the way some sellers viewed inspections of their property. Yes, the seller would allow the buyers to conduct inspections, but some sellers did not feel that together with that came the buyer's “right” to tell the seller everything the buyer (or their inspector) believed to be “wrong” with the seller's home.

As a result of all of this, several years ago, NMAR changed its approach to inspection reports – reports would never be provided upon a buyer's termination

unless requested in writing by the seller and only the relevant sections of the report would be provided if the buyer was objecting, again unless the seller requested the entire report in writing. Despite this having been added several years ago, buyers' brokers (not buyers) continue to send inspection reports to sellers even when the sellers have not request them. One could hypothesize that this is being done for one of two reasons: either because these buyers' brokers are not familiar with the Agreement or because these buyers' brokers have chosen to ignore the Agreement to gain some perceived advantage for their buyers. Either reason is problematic.

As currently written, if the buyer terminates based on inspections on or before the Objection Deadline or objects by the Objection Deadline, but the parties cannot resolve the buyer's objections, the buyer is entitled to a full earnest money refund. **However, coming this summer/early fall, Form 2104 will be amended to provide that if the buyer or the buyer's broker sends the report to the seller without the seller requesting the report, it will constitute a WAIVER of the buyer's inspection contingency.** This means that if even if the buyer timely terminates or objects, if the buyer does not proceed to Closing due to inspections, the buyer will be in breach of contract and at a minimum, the seller will be entitled to the buyer's earnest money. **In the event it was the buyer's broker who sent the report or directed someone else to send the**

1 In this latest revision of 2104, an additional provision was added that says the buyer will NOT send the report or the section of the report if the buyer is only requesting monetary concessions (price reduction or seller concessions), again, unless the seller makes a written request for the report.

report, then it will be the buyer's broker who will likely owe the buyer their lost earnest money.

Broker Duties – Duty to Disclose Adverse Material Facts

One of the broker duties promulgated by the NMREC requires brokers to disclose Adverse Material Facts (“AMF”). If a seller was to file a complaint with the NMREC claiming the buyer's broker violated several broker duties in ignoring the purchase agreement and sending the entire report when the seller did not request it, the buyer's broker may argue that the seller's direction in Form 2104 was to the buyer and not the buyer's broker and/or that the AMF Broker Duty disclosure provision requires the buyer's broker to inform the seller of all the things wrong with his or her house. However, this logic is [arguably] flawed for several reasons.

First, to argue that the seller was only directing the *buyer* in the Agreement, not the *buyer's broker*, begs the question, “why would a seller wish to prohibit a buyer from providing the report and yet still wish to receive it from the buyer's broker?” From a seller's perspective, it is not likely who delivered the report that is of relevance, but rather, the fact *that it was delivered*. If, for one moment, a buyer's broker thought “The seller didn't direct **me** not to send the report; he only directed **the buyer**,” then given the language in the Agreement, the duty of

reasonable care and professionalism (duties owed to the seller by the buyer's broker) [arguably] demands that the buyer's broker ask the seller the following question BEFORE SENDING THE REPORT to the seller: “*Do you want me to send the report? I know you told the buyer not to send it, but did that pertain to me as well?*”

Second, as to the seller's right NOT to receive the report from the buyer's broker, courts have consistently held that the beneficiary of a statutory (or in this case, regulatory) benefit has the right to waive that benefit. In this case, the requirement that a broker act in compliance with Broker Duties is for the benefit of the consumers. As such, the consumers have the right to waive those benefits. The seller is made aware of their rights when the broker discloses Broker Duties, both before the seller signs the Listing Agreement AND again before the seller signs the Purchase Agreement. The seller then knowingly and voluntarily waives the right to learn of AMFs regarding his or her property by contracting with the buyer NOT to provide the report UNLESS the seller asks for the report in writing.

Third, the BUYER'S report is NOT the buyer BROKER'S report to share. The report belongs to the buyer and the only way the buyer's broker should be sharing the buyer's report with ANYONE is with the buyer's permission. Is the buyer's broker asking his/her buyer if the buyer wishes for the broker to send the report to the seller in conflict with the clear language in the Agreement? If the answer is NO, then that is a problem. The buyer's broker knows the buyer agreed NOT to send the report. The buyer's broker directly ignores

² In *Moss Theatres, Inc. v. Turner* (94 NM 742 1980), the court held that “the doctrine of waiver is generally applicable to all the rights and privileges to which a person is legally entitled, including those conferred by statute unless otherwise prohibited by specific statutory provisions” and “that one may waive a right given by contract or advantage of law intended for his benefit.”

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the seller and buyer's written agreement and sends the buyer's report over to the seller without the buyer's authority. Is that not a breach of the broker's duties of reasonable care and professionalism?

Lastly, you cannot look at the duty to disclose AMFs in a vacuum. To say that the broker must disclose AMFs to a seller (ONE broker duty) in contradiction to the Agreement and without the buyer's authority gives more weight to ONE broker duty than to several other broker duties. Those other duties include the duty of reasonable care and professionalism as mentioned above, but more on point, the duty for the buyer's broker to actively participate in assisting their customer/client **"in complying with the terms and conditions of the contract and with the finalization of the transaction"**. When the buyer's broker takes it upon him/herself to send the report to the seller in direct conflict with the Agreement and WITHOUT the buyer's permission, [arguably], the buyer's broker is NOT assisting the buyer in complying with the "terms and conditions of the contract".

In conclusion, in order for a factfinder to determine that a broker is OBLIGATED to send the report because of the AMF disclosure requirement under Broker Duties, regardless of what the Agreement says about doing so, the factfinder must: 1) ignore the seller's right to waive the rule that benefits him/her, a right well-established in New Mexico law; 2) allow the buyer's broker to take ownership of a report that does not belong to the buyer's

broker and to sanction the buyer's broker's sharing of the report without the buyer's authority; and 3) give more importance to the AMF disclosure broker duty over other broker duties. Could this happen? Possibility, but do you really want to take that chance? Further, when the discussed revision is made to the Agreement in summer/early fall 2023, a buyer's broker who sends the report without the seller requesting it also exposes him or herself to having to pay damages to the buyer for the broker's actions.

This change will not take place until summer/ early fall, so don't panic. If you have not done so already, familiarize yourself with the inspection report provisions of the Agreement and follow the Agreement. It really is that simple. For those of you reading this article, this new provision when added will neither come as a shock, nor leave you writing earnest money checks to your buyers.

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