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THE NEW ORR PROCESS - A Warranted Change

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

Dear NMAR Members,

I have the most wonderful and challenging job. For more than 15 years I have served as General Counsel ("GC") to the New Mexico Association of Realtors® ("NMAR"). In my capacity as GC, I have worked tirelessly to educate NMAR members, through the forms, through Legal Presentations, through videos and articles and by answering questioning on the NMAR Legal Hotline. I feel that I have been successful in this endeavor. Many of you have learned a new thing (or two) and many of you have taken what you've learned, and educated and mentored other NMAR members.

In my role as GC, and more specifically as advisor to the NMAR Forms Committee (an awesome group of individuals who have given countless hours of their volunteer time over the years for nothing more than a free lunch), I have had to deliver some difficult news: the benefits of adding yet another sentence or paragraph to the Residential Purchase Agreement to address a new law, a new issue, a new problematic practice; the need for a new information sheet on a topic causing problems for buyers and sellers; and the utility for a new form that tackles a complicated concept (yes, I'm talking about you - Buyer Sales Contingency Form, the Escalation Clause Form and the Appraisal Contingency Waiver Form). I have appreciated and considered critical comments as a result, but the proposed approaches remained prudent in my opinion and that of the Forms Committee. Whether my suggestions are well received, accepted begrudgingly or rejected by the Forms Committee or NMAR leadership, I will continue

to make them, because as NMAR's GC, it is my job to do what I can reasonably do to help you better understand the legal environment in which you conduct your business.

The latest in this long line of perhaps unpopular, yet appropriate changes, is the revision to the "ORW". As you all may recall, the word "Amendment" used to appear on this form and for good reason – it IS and ALWAYS WAS an amendment to the purchase agreement. Recall, the seller is not obligated to reduce the price, give a seller concession or DO REPAIRS to the property in order for the buyer to be obligated to buy. So, if any of the above is required, then that IS a change to the purchase agreement. A change to the purchase agreement is an amendment or an addendum (it matters not what you call it). If the buyer is getting a loan, said amendment or addendum MUST go to the buyer's lender, but, alas, that is reportedly not happening as it should.

What is the problem with the ORW not going to the lender? It's pretty simple: failure to provide an amendment to the purchase agreement to the lender in some cases may constitute "mortgage fraud." What is mortgage fraud? As defined by the Department of Justice, mortgage fraud refers to the deliberate act of misrepresenting or omitting

information that is used by a mortgage underwriter or lender to fund, purchase or insure a mortgage loan. A misrepresentation or omission may be in regards to a borrower's income, job status, intent to occupy the property or other loan application information, but it also may be in regards to the sale of the property or the property itself, such as the purchase

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price or characteristics of the property, including, but not limited to needed repairs to the property. As an example, how many times has a buyer in a transaction who was getting an FHA loan been told that repairs identified by an appraiser must be done before closing? The lender requires the repairs be done before closing because the lender will only make the loan if the property is in a certain condition at the time the loan is made. In other words, the condition of the home is of importance to the lender.

Mortgage fraud can be committed by borrowers, real estate brokers and yes, even "lenders". But wait! Isn't the "lender" the person making the decision to make the loan? Sometimes it is, but in most cases, it is not. In most cases, behind the lender sits an "underwriter". Remember that a mortgage is a security interest in the property that the lender acquires to mitigate the risk and cost of borrower's defaulting on the loan. The mortgage underwriter reviews the borrower's finances, the property and the sale and assesses the risk the lender assumes in loaning money to that borrower on that property. The underwriter wants ALL information that will assist them in making this difficult decision.

If you are ever told by a borrower or even a lender "don't send that addendum to the lender/underwriter", ask why. If the answer is "the underwriter won't care about that", then there is no harm in sending it. And if the underwriter does care about the addendum and it's not provided to the underwriter, well, now we are back to the issue of "mortgage fraud."

Which brings us to the reason we have changed the "ORW" forms and process. The new process consists of three new forms: the Buyer's Objection Form; the Response Form (that can be executed by either the seller or the buyer); and the Resolution Addendum. As you learned from the video released on these forms, the Objection Form and Response Forms are ONLY signed by the buyer OR the seller, never both. They don't amend

the purchase agreement because they are never signed by both buyer and seller. These forms are used in the negotiation process. When the buyer and seller have finished negotiating and come to an agreement, they memorialize that agreement on a Resolution Addendum and all

parties sign. The Resolution Addendum modifies the purchase agreement, whether it reduces the purchase price, provides for a seller concession or requires the seller to do certain repairs. Therefore, if the buyer is getting a loan, this addendum MUST go to the buyer's lender.

Will this disrupt deals and impact the lender's decision to lend? It could. This is why we warn at the top of every one of these forms in the process – the Objection Form, the Response Form and the Resolution Addendum – that the buyer should speak to their lender before entering into the Resolution Addendum.

In short, the new forms and process were ABSOLUTELY warranted. They educate NMAR members. They assist buyers, sellers and NMAR members in complying with the law, and they help REALTORS® perform at the top of their game. Embrace the change and rise to the occasion, as REALTORS® always do.

Respectfully yours, NMAR GC

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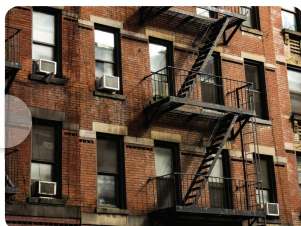


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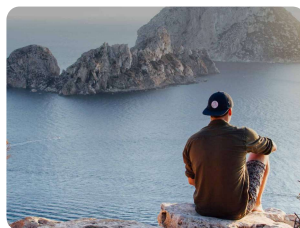
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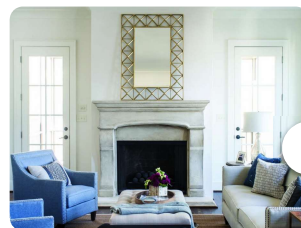
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