

2009 REVISIONS TO OREF FORMS

By

Phillip C. Querin, Partner

Davis Wright Tremaine

Oregon Real Estate Forms, LLC Legal Counsel

The following summary addresses the changes made to various OREF forms that will become available in January 2009. Some changes were stylistic and grammatical, and will not be discussed here as they do not materially affect Realtor[®] practice. The primary focus of the discussion below will be on the substantive changes which may bear on Realtor[®] practice, the reason for the changes, and their risk management impact, if any. *This summary should **not** be relied upon in lieu of a thorough review of the documents and provisions by each individual broker, principal broker and sole proprietor. In all cases, licensees are encouraged to secure competent legal advice on the use of any form through their company attorney.*

Professional Inspection Addendum (Form #058)

Since Section 23 of the Sale Agreement has now added language regarding home warranty programs, OREF saw no need to also include it in this form, and accordingly removed it. By having the same reference in both documents, OREF felt that it compounded the risk that a buyer might select a home warranty program in one form and not the other. Accordingly, for those licensees used to seeing reference to the home warranty program in the Professional Inspection Addendum (Form #58), it has been moved to Section 23 of the Sale Agreement.

Back-Up Offer Addendum (Form #009)

As most Realtors[®] know and understand, once a first-position transaction closes, any remaining back-up buyer offers terminate, the transaction is over, and the earnest money is refunded to the back-up buyer(s). However, upon a review of last year's form OREF decided that sometimes – just to be on the safe side – we should state the obvious, which is what we have done in this form. Accordingly, Form #009 now provides that upon close of escrow by the first position buyer, the back-up offer "...shall *automatically terminate*...(and) all earnest money, if any, shall be promptly refunded to Buyer..." (Emphasis added.)

Promissory Note (Form #060)

The promissory note was changed for clarification purposes and to make the parties' selection consistent with the terms of the Sale Agreement. At Section 1 of the note, OREF created three (3) boxes – only one of which is to be selected – allowing the parties to designate, upon redemption,

where the funds are to be delivered: the Real Estate Firm Trust Account; the Seller(s), or the Escrow/Title Company.

Short Sale Form. (Form #027)

The Short Sale Form (with accompanying summary) is one of the two brand new forms offered by OREF this year. As most Realtors® remember, when short sales first started appearing, the industry's initial reaction was that they would be short-lived, so very few protocols were developed in handling them. Each company had its own view of the process and each lender had its own approach to handling them. The result was a widespread failure to develop a consistent approach from company to company and from lender to lender. Since many real estate transactions are cooperative transactions, short sales between two different companies could become quite cumbersome depending upon the forms used and each principal broker's approach. This difficulty was compounded by the lack of lender cooperation – at least in the early months of this phenomenon.

OREF's difficulty in fashioning a short sale form was that it depended upon recent anecdotal information from within the industry, which, as it turned out, was oftentimes hearsay, misunderstanding, or overreactions to poor lender treatment. It was also becoming apparent that some agents and/or their clients, were misusing the short sale situation in a manner that might be considered illegal (e.g. failing to disclose or submit more attractive offers to lenders, solely for the purpose of getting their pending offer accepted by the lender). The result was that the original OREF short sale form went through a couple of textual changes designed to rectify or prevent the opportunity for confusion, abuse or speculation in the fast-changing short sale market that in some areas was becoming the predominant method of selling properties which were dropping in value. Then, in 2008, the Oregon Legislature passed the Foreclosure Consultant law, which necessitated new protections in the form. It now appears that the OREF Short Sale form (together with the summary piece that is intended to go with it for informational purposes), has become a useful tool for Realtors® in various parts of the state. However, Realtors® are encouraged to recommend professional help to their clients before consummating a short sale transaction. Because OREF has written so much about it, we suggest those Realtors® who would like more information on the intent and use of the form go to the following links <http://www.orefonline.com/news/articles/primeronshortsales.pdf>, and <http://www.orefonline.com/news/articles/shortsalespartII.pdf>.

Lease-Option Forms (Form #085)

For the same reason the short sale form was developed, so was the Lease Option form. Although, the form had been available through OREF for several years, it did not receive much use. However, with the tightening of credit markets, and sellers' needs to sell their homes for a variety of reasons, the

use of lease-options once again came into vogue.¹ Similar to the OREF short sale form, we developed an informational piece designed to explain to both sellers and buyers, the nature of the transaction and the risks involved. As in the case of the short sale transaction, Realtors® are urged to recommend that their clients secure professional help before finalizing a lease-option transaction. OREF has an article on the lease-option transaction which will prove helpful in explaining how to successfully represent a client in a lease option transaction.

See <http://www.orefonline.com/news/articles/lease-optionarticle.pdf>.

¹ Lease-options had previously been used with some frequency in the early 1980's when interest rates were so high that buyers could not afford to finance home purchases through institutional lenders. In an effort to move the home, some sellers engaged in what became known as "creative financing" techniques whereby they devised methods to transfer possession of the home – say under a lease – and give the tenant an opportunity to buy once interest rates went back down to reasonable levels.