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**EXPLANATION OF
STATE OF WISCONSIN
WB-11
RESIDENTIAL OFFER TO PURCHASE**

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EXPLANATION OF STATE OF WISCONSIN WB-11 RESIDENTIAL OFFER TO PURCHASE

GENERAL NOTES

This publication is intended to help you understand the WB-11 Residential Offer to Purchase (“the Offer”). It is a general discussion and cannot substitute for the assistance of a REALTOR® or an attorney. We recommend that you work with an experienced REALTOR® and/or a real estate attorney when buying or selling real estate.

This publication should be reviewed together with the “WB-11 Residential Offer to Purchase(“WB-11”).” Please have the Offer in hand before continuing.

BROKER IDENTIFICATION

Line 1

In a real estate transaction there are two parties - the seller and the buyer. Line 1 indicates whom the broker drafting the offer is working for. The broker may work for the seller (agent of the seller or seller agency), for the buyer (agent of buyer or buyer agency), or for both the seller and the buyer (dual agency).

A broker who is working *for* one party may still help the other party. A broker who works *with* and helps the buyer may work *for* the buyer (buyer agency), *for* the seller (seller agency) or *for* both (dual agency).

If the agent is working *for* you, you are a **client**. If the broker is working *for* the other party but is also working *with* you and helping you, you are a **customer**. Clients and customers have different rights. These differences are explained in the listing contract, in the buyer agency agreement, and in an agency disclosure document often entitled “Notice to Clients and Customers” or “Disclosure of Real Estate Agency.” It is important to understand the different duties owed to you if you are a client or if you are a customer. You may discuss these different duties with your REALTOR®.

GENERAL PROVISIONS

Lines 2 - 16

The Offer must identify the buyer(s). The buyers’ names should be printed exactly as they want their names to appear on the deed. Nicknames should not be used. Middle initials should be used. The buyers should consult an attorney about the different ways they can hold title to the property.

With residential property, the street address is usually enough to describe the property being purchased. For some properties the address is not enough and a “legal description” must be used. An example of this would be the sale of a house with an “extra lot.” Instead of using the street address, the legal description would identify both the lots and the block where the lots are located (for example, Lots 4 & 5, Block 89). After the property is identified in the Offer it is referred to as “the Property” throughout the balance of the Offer.

The price should be written like you would on a bank check. For example: “Sixty-eight thousand six hundred fifty and no/100 Dollars. (\$68,650.00).”

Sellers are not required to accept any offer, or even to respond to it - even if the price offered is more than the list price. Other Offer terms, other than price, may affect whether the seller is willing to accept the offer. For example, if a buyer can’t close for six months or isn’t paying any earnest money, the seller may want a higher price or may not be willing to accept the offer.

Earnest money is money paid by a buyer (held by the broker) that shows the seller that the buyer is a “serious buyer.” If the buyer decides to not buy the property or doesn’t make a serious, good faith effort to close the transaction, the seller may be able to keep the buyer’s earnest money. If the buyer’s contingencies cannot be met (for example, the buyer can’t get the financing described in the financing contingency) the buyer may be legally entitled to get the earnest money back. If the buyer and the seller get into a dispute over the earnest money, the buyer and seller must work it out or go to small claims court. The broker will not decide

who is entitled to the earnest money. See also lines 248-271 of the Offer.

Earnest money can be paid at the time the offer is written or after the offer is accepted by the seller, or both.

“Inclusions and Exclusions.” The offer describes the real estate being purchased. Real estate includes the land, the buildings and other improvements called fixtures. “Fixtures” are improvements that are attached to buildings or land (sidewalks, fences, a basketball backboard attached to the garage, kitchen cabinets, wall to wall carpeting, etc.) There is a list of some items that are considered fixtures at lines 124-133 of the offer. The offer assumes all fixtures are part of the property being purchased unless a fixture is listed as “not included” on lines 15-16 or elsewhere in the offer. Lines 11-14 allow the buyer to include personal property (furniture, appliances, lawnmowers, etc.) in the Offer. All fixtures listed on lines 124-133 are included in the offer unless excluded. It is also important to include or exclude items that may not clearly be personal property or fixtures (a bookshelf that may or may not be considered “built-in”).

The **Offer** determines what is included in the deal, not the seller’s property information sheets. Be sure the offer written for you includes and excludes the correct property.

ACCEPTANCE / BINDING ACCEPTANCE

Lines 17 - 21

When all of the buyers and the sellers have signed the offer, it is “accepted.” The date of the last of the parties’ signatures is the date of acceptance. Many deadlines in the contract will run from this date. The offer becomes a binding contract if the seller **delivers** the offer back to the buyer by the deadline for binding acceptance stated in the offer.

If the seller wishes to change any of the terms of the buyer’s offer instead of accepting the offer as it was written, the seller will ordinarily give a counter-offer to the buyer. The counter-offer can be made after the deadline for binding acceptance.

DELIVERY OF DOCUMENTS AND WRITTEN NOTICES

Lines 22-33

The buyer and seller must agree how they will deliver documents and notices relating to the offer.

The Offer states 4 ways for the parties to communicate:

1. U.S. Mail
2. Commercial delivery service (UPS, etc)
3. Personal delivery
4. Fax transmission

For reasons of speed, cost and convenience, fax transmission has become a common method to deliver documents. A party may use his or her real estate agent’s fax number, but a party should first talk to the agent about how the office will handle faxes (will they record when the fax was received, will you get a copy, etc.).

Any one of the delivery methods can be deleted. For example, the parties may not want to use the mail because of the length of time a mailed document takes to get to the other party. With all methods, delivery is considered complete at the moment the document leaves the control of the party who is delivering it (depositing in mailbox, completed fax transmission, etc.)

OCCUPANCY

Lines 34 - 36

The right to occupy the property is usually considered the most important property owner’s right. The Offer provides that, unless there are tenants, occupancy will be given to the buyer at the time the transaction closes. If the parties all agree, the time of occupancy can be changed (see the Offer, page 5, lines 293-297). The buyer could let the seller occupy for a period of time after closing, or the seller could let the buyer occupy before closing. If the buyer and seller agree to one of these different occupancy arrangements, they should have a written occupancy agreement. These occupancy agreements can be very complicated, so the parties should consider talking to an attorney about the details of the agreement. All personal property that is not included in the sale, and all garbage and debris must be removed from the house, garage, and yard before the buyer takes occupancy. **Caution:** If tenants occupy any part of the property at the time the offer is made, the

purchase of the property does not affect the tenants' rights under their lease. The seller and the buyer may wish to have a special agreement that addresses how the seller should handle certain situations that might arise with the tenants before closing. For example, does the buyer want the seller to renew or not renew a tenant's lease that expires before closing?

LEASED PROPERTY

Lines 37-39

If tenants occupy the property, and their lease extends past the date set for closing, the buyer will assume the seller's rights and responsibilities as a landlord at the time of closing. Therefore, all of the terms of the seller's rental agreement with every tenant, whether the agreement is written or oral, should be carefully reviewed. All tenants' leases, applications, payment histories, etc. should be reviewed before the offer is written or a contingency should be added for this review. These and other rental property issues should be discussed with an attorney and may be addressed in a "rental property addenda" that is made part of the offer.

RENTAL WEATHERIZATION

Lines 40-42

Wisconsin law requires many residential properties that are tenant-occupied to meet "weatherization" standards at the time they are sold. These standards are intended to ensure that rental properties are well insulated and energy-efficient. There are several exemptions from these requirements. For example, the property might already have received a "Certificate of Compliance" for these weatherization requirements. Or, if the property has four or fewer rental units **and** if buyer will move into and live in one of the units within 60 days of closing, it is exempt.

If the property or transaction is not exempt, the buyer and seller must agree on who will be required to bring the property up to the standards. If the seller agrees to do this, then before closing the seller must:

1. Have the property inspected by a State-certified inspector to find out what work must be performed;
2. Do the work or hire a contractor to do it;
3. Have the property re-inspected by a State-certified inspector and obtain a Certificate of Compliance;
4. Bring the Certificate of Compliance to closing unless it can be recorded at the County Register of Deeds office before the closing.

If the buyer will be responsible for complying with the weatherization standards, he or she must sign a form called a stipulation. By signing the stipulation, the buyer promises the State that the buyer will bring the property into compliance (items 1 - 4 above) within the 12 months following closing.

PLACE OF CLOSING

Lines 43-44

Usually, the closing is held at the place that the buyer or the buyer's lender chooses. The transaction must close no later than the stated date unless the parties agree to close on a different date. If the buyer and seller agree to any change of the closing date, this agreement should be put in writing in an amendment to the offer.

It may be difficult to select a closing date because the buyer and the seller often have very different needs. For example, buyers may wish to put the closing off for several months to give them time to sell their current residences, or sellers may be looking for quick sales because they have job transfers.

CLOSING PRORATIONS

Lines 45-52

The seller and buyer each will be responsible to pay their share of the bills that will come due after closing (property taxes, water bills, natural gas bills, etc.). After closing, the buyer will get a bill that includes usage before and after the closing. Therefore, costs such as taxes and water and sewer charges are "prorated," or divided between the buyer and the seller on an estimated basis. The seller pays the buyer the estimated amount the seller owes on the bill at closing, as shown on the closing statement. Each side takes some risk that the actual charges will be different than the estimated charges used to calculate at the closing pro-

rations. If the seller or a broker knows of unusual circumstances that affect the estimates (a tax reassessment, the passing of a school bond issue, unusually high water usage) this should be disclosed to the buyer. A new proration formula which takes into account the unusual circumstances can then be put into the Offer.

PROPERTY CONDITION PROVISIONS

Lines 53-81

In Wisconsin, the seller of a residence is asked to make many representations regarding what they **know** about problems related to the property they are selling. These representations are not warranties. The representations are made in two places:

1. The seller's Real Estate Condition Report
2. Lines 59-81 of the Offer.

Sometimes the seller will not make any property condition representations (an as-is sale), but most buyers want to know what the seller knows about any problems with the property before making an offer.

A buyer who receives a Real Estate Condition Report should review it closely. If the buyer does not receive the report until after the offer has been submitted, and if any of the defects listed in the report have not been disclosed before, the buyer may be able to rescind the transaction. If the buyer submits an offer after receiving the report, the buyer does not have any rescission rights based on what is disclosed in the report. The buyer should take the information in the report into account when making an offer.

Buyers and sellers should closely review the representations at lines 60 to 81. Unless the offer is modified or countered, the seller is stating to the buyer that seller knows of no such matters affecting the property. While this list does not include all matters that could adversely affect a property, there is a "catch-all" provision at lines 80 to 81. If a seller knows of any matter that a reasonable person would think is a significant defect, even if it does not fit into one of the other categories, the seller should disclose such information. This can be done at line 57 or in a counter-offer.

REAL ESTATE CONDITION REPORT

Lines 82-91

A seller must provide written disclosures regarding matters the seller knows about and which adversely affect the property. This is done on a separate form called a Real Estate Condition Report. Sellers should complete this report when a listing is entered into. By statute, if the seller does not provide this report to a buyer within 10 days after an offer is accepted, the buyer may rescind or undo the offer (if rescission is done within 2 business days).

The statements made in the Real Estate Condition Report are not warranties - they are statements of things the seller has notice or knowledge of. Buyers should strongly consider obtaining an expert inspection of the property. See the "Inspection Contingency" at lines 298-315.

PROPERTY DIMENSIONS AND SURVEYS

Lines 92-96

If the boundaries or size of the lot, or the square footage of the home, or the dimensions of the rooms are important to a buyer, the buyer should personally verify this information. The information provided by the seller or broker is likely to be an estimate. Many buyers wish to know the total square footage of the home they're buying, but there are different formulas used to make this calculation. If room dimensions or the square footage of the home are important to the buyer, the buyer should measure the rooms or the building or have someone measure them.

Buyers should not assume that things such as fences, tree lines or utility poles are on the boundaries of the lot. If there is any doubt about the location of the boundaries or the dimensions of the lot, the buyer should obtain a survey. The seller may have a survey map, but an older survey may not show all features such as new improvements (fences, sheds, driveways) or easements.

INSPECTIONS

Lines 97-102

This section sets the ground rules for any inspections the buyer is authorized to perform (see lines 298-315).

1. The buyer must **notify** the seller a reasonable time in advance of when the inspection will take place.
2. The seller must **allow** the inspector **access** to all areas the buyer has included in inspection contingen-

cies in the offer (see lines 298-300).

3. The buyer must **provide** the seller and listing broker with a copy of any **written report** made by the inspector.
4. If anything is moved or removed in order to complete the inspection, it must be **restored** to its pre-inspection condition.
5. Except for testing for leaking carbon monoxide or natural gas, the right to inspect includes only the right to **observe** the property. Testing for such things as lead-based paint, radon, or soil contamination is not permitted under an “inspection” contingency.

TESTING

Lines 103-110

A buyer may be concerned with more than can be learned from a standard “home inspection” and may wish to test for environmental hazards such as lead-based paint, radon, toxic mold, asbestos, soil or water contamination, etc. The buyer only has the right to do those tests if the offer contains testing contingencies. The offer form, however, does not have any standard “testing” contingency. Because of this many brokers use addenda that include testing contingencies. These testing contingencies should clearly state what will be tested for, in what area of the property, if the property is damaged by the test who is responsible for repairs, etc. A seller is not required to permit any sort of testing which has not been authorized in the offer. An exception to this is lead paint testing which the seller must allow in most residential properties built before 1978.

PRE-CLOSING INSPECTION

Lines 111-114

Regardless of whether the buyer has had inspections or tests done, the buyer has the right to view the property again within 3 days before closing. There are two purposes for this inspection:

1. To be sure the property has been maintained in the condition it was in at the time of the offer and that any damage which occurred since then has been repaired, and
2. If the seller agreed to repair defects, to make sure that such repairs were correctly performed.

PROPERTY DAMAGE BETWEEN ACCEPTANCE AND CLOSING

Lines 115-123

If the property is damaged by fire or a tornado or other causes after the offer is accepted, the seller should immediately obtain an estimate of the cost to repair the damage. If this cost is 5% of the sale price or less, the seller must repair the damage and restore the property to the condition it was in on the day of the offer.

If the damage exceeds 5% of the sale price, the seller must notify the buyer of this fact. The buyer may then elect to proceed with the offer or to rescind (cancel) it. If the buyer elects to proceed, the buyer is entitled to the seller’s insurance proceeds plus a credit against the purchase price equal to the seller’s insurance deductible. Before proceeding with the offer, the buyer will want to find out whether the seller has insurance and how much the insurance company is willing to pay.

FIXTURES

Lines 124-133

Please review the discussion under “General Provisions” regarding **inclusions and exclusions**. The “Fixtures” section of the offer identifies those items of property which are considered part of the property and are included in the sale unless the buyer and seller exclude them. The items listed are merely examples. There may be an item which is not listed but which falls under the definition of a fixture. Sellers should exclude any items they wish to take with them that may appear to a buyer to be part of the property.

A common problem area is **rented water softeners** and filtering systems. Buyers usually have no way of knowing that the seller doesn’t own them and doesn’t intend to include them in the sale. Under the offer’s standard language, **satellite dishes** and component parts also are fixtures and are part of the sale unless excluded from the offer.

Buyers should not rely on marketing information they receive before the offer is written even if it says what items of personal property will be included in the sale. If the buyer wants to include things like appliances in

the purchase price, they must be listed at lines 13-14. If they are not listed in the offer and are not fixtures, the seller will assume the buyer does not want the items and will expect to take them before closing.

TIME IS OF THE ESSENCE

Lines 135 - 139

Between acceptance and closing there are many things that must happen by a deadline stated in the offer. The deadline may be a calendar date (such as closing) or a certain number of days from another event such as “acceptance.” Once an offer has been accepted, it is wise to make a list of all the deadlines that must be met. Do not assume that missing deadlines will be allowed. Failure to meet a deadline may entitle the other party to terminate the offer.

Unless the “Time is of the Essence” provision is modified or deleted, all deadlines must absolutely be completed by the exact deadline stated in the offer. A day or two late will not be good enough. If a deadline is approaching and a party is not sure that the deadline can be met, the party should talk to the broker or an attorney about drafting an amendment to extend the deadline in writing. Parties should never rely on verbal extensions. Be certain to get the extension amendment signed by all parties before the deadline has passed.

If “Time is of the Essence” is not used for some deadlines, there will be more flexibility in meeting the deadline dates - these deadlines must be met within a reasonable time. Any missed deadlines should be extended by amendment or an attorney should be consulted to determine exactly when the deadline must be met.

DATES AND DEADLINES

Lines 140 - 148

This section establishes the rules for calculating the exact moment in time when a deadline expires. Most contingency deadlines are calculated as a certain number of days from “acceptance.” Review lines 331 and 333 of the offer, or, if there was a counter-offer that was accepted, line 42, to determine the date of acceptance. In calculating the deadline, do not count the day acceptance occurred. For example, if line 331 indicates that the seller “accepted” your offer on July 1st, and the financing contingency is to be fulfilled “within 30 days of acceptance,” then the deadline is July 31st at midnight.

Unless otherwise specified, a deadline for a certain date will run through midnight of the last day. Midnight is the last moment of the day. If the parties prefer deadlines that end when people can be reached, such as 5:00 p.m., this must be stated in the offer.

FINANCING CONTINGENCY

Lines 149 - 179

Obtaining a loan is probably the key event in the success of most residential real estate transactions. Most buyers include a financing contingency which provides that they legally do not have to close if they cannot obtain a loan commitment.

The financing contingency does not require that the buyer actually obtain the loan - that doesn’t happen until the transaction closes. Instead, the buyer seeks to obtain a loan commitment on the terms stated in the financing contingency or on other terms that are acceptable to the buyer.

A loan **commitment** is an agreement by a lender to lend money. In practice, the loan commitment itself has many conditions and requirements that the buyer must meet before the lender is obligated to make the loan. Before the buyer delivers a loan commitment to the seller, the buyer should make sure that the loan terms are satisfactory and that the buyer can satisfy the lender’s requirements.

A financing contingency must contain very specific information regarding the terms of the loan the buyer will seek. A binding contract can only be established where all the basic elements of the financing are stated, so all of the “blanks” in the financing contingency should be filled in. If a buyer does not know exactly what loan terms are currently available, the buyer may state the least favorable terms that are acceptable to the buyer. The buyer still will be free to apply for the best financing available after acceptance.

LOAN COMMITMENT: Unless otherwise agreed, the buyer is responsible for the costs of obtaining financing. The seller is entitled to ask for some evidence that the buyer is proceeding promptly to obtain the loan. If the seller asks, the buyer must supply evidence of applying for the loan.

CAUTION: **Delivery** of the buyer’s loan commitment to the seller satisfies the financing contingency. This

means that the buyer will become legally bound to close, unless there are other contingencies in the offer that have not been satisfied. Therefore, a loan commitment should not be delivered to the seller if it has terms and conditions less favorable than those stated in the financing contingency and are not acceptable to the buyer, or if it has conditions that the buyer cannot meet. The buyer can deliver the loan commitment to the seller to prove that the buyer has tried to get financing, but this should be done only if the buyer also delivers a written notice stating that the commitment is unacceptable.

SELLER TERMINATION RIGHTS: If the buyer fails to deliver a loan commitment by the deadline in the financing contingency, the contract does not automatically terminate. The seller may then terminate the contract by delivering a written termination notice to the buyer. However, if the buyer gets a written loan commitment into the seller's hands before the seller delivers the termination notice to the buyer, the contract is not terminated even though the loan commitment was late. If the buyer cannot get a loan commitment by the deadline, the parties may choose to 1) terminate the contract, 2) extend the deadline for obtaining a loan commitment, or 3) just wait to see what happens.

FINANCING UNAVAILABILITY: If a buyer is unable to obtain a loan commitment, the buyer must deliver written notice to the seller stating that fact. The seller may keep the buyer legally bound by offering to finance the buyer's purchase on the terms and conditions stated in the financing contingency. Unless the buyer's financing contingency names a specific source of the funds (such as "First United National Bank of Appleton"), the seller then has 10 days to decide whether the seller wants to finance the buyer's purchase. The seller is permitted to obtain information regarding the buyer's creditworthiness before making this decision.

ADDITIONAL PROVISIONS / CONTINGENCIES

Lines 180 - 186

The offer form is long, but it does not include all of the contract language which the buyer and seller may need in a transaction. The blank lines can be used to add a contingency or other language as needed. Any offer language that does not meet a party's needs can be changed or stricken during drafting.

While real estate agents are required to use most portions of the form, the use of some portions is optional, such as the contingencies on page 5. A contingency in an offer describes an event that must occur before a party is legally obligated to close the real estate transaction.

TITLE EVIDENCE

Lines 188 - 218

In Wisconsin, when a seller gives title to the property to a buyer at closing, there are many items that affect the buyer's title. All titles are subject to local zoning ordinances, utility easements, property taxes which are not paid until the end of the year, etc. The purpose of reviewing title and getting title insurance is to make sure that there are not any items affecting the buyer's title that shouldn't be there, for example judgments, unpaid mortgages or other claims by neighbors or the government.

Title evidence is a very difficult area to understand. If a title problem arises, expert advice should be obtained. Representatives of the title insurance company can be helpful in explaining title problems, but cannot give you legal advice.

The seller is obligated to deliver a **warranty deed** to the buyer (unless otherwise agreed). The **deed** is the document that the seller uses to transfer title to the property to the buyer in a real estate transaction. The seller also warrants that "clear title" has been transferred; that, in simplest terms, there are no liens against the property when the buyer receives the deed to the property. There are **exceptions** to such warranties. For example, the seller can't control utility easements; the gas or electric company has the right to place and maintain its lines on the property.

Buyers should be sure that they investigate all title items (often called "liens and encumbrances") to make sure they don't prohibit any of the buyer's plans, especially if the buyer plans on changing the manner in which the property will be used.

The Seller must order, pay for, and provide to the buyer a commitment for title insurance. Wisconsin does not have a system where the government oversees or guarantees title to real estate. Instead, private "title" companies search the government records to determine the current status of title to the property being sold. The

title company then issues a commitment in which it agrees that it will insure the buyer against unforeseen title “defects” if the steps listed in the commitment are followed. The commitment is an important guide for the buyers and their attorney.

The seller must be sure that the title commitment is delivered to the buyer not less than **3 business days** before closing. This allows the buyer a small amount of time to review the commitment to see if there are matters affecting the title that are objectionable.

The title commitment will contain an “**Effective Date.**” The title company is indicating that in reviewing the title records, they did not search the records after the “Effective Date” and they will not insure the buyer against matters appearing after this date. This is why the buyer may want to ask for an additional type of insurance called “**Gap**” coverage. When the title company issues Gap coverage it is agreeing that it will insure the buyer against matters affecting title up until the time the deed the buyer receives from the seller is recorded.

If the title commitment indicates matters that are not acceptable, you must notify the seller of your objections. The seller will then have 15 days to resolve the problem. If this 15 days extends past the closing date, the closing is automatically extended for this purpose.

SPECIAL ASSESSMENTS: Property owners pay real estate taxes. When there is a municipal project which specially benefits particular properties (installing new sidewalks), the property owners may also have to pay a separate tax called a special assessment.

If work on the project has started, and/or the local municipality has passed a final resolution ordering the work that will be paid for with special assessments (**a levy**), it is assumed that the purchase price reflects this improvement and that the seller should pay the assessment. For example, the property is more appealing and valuable if the street was recently re-paved. If the special assessment has not been levied and the work has not started, then the offer assumes that the assessment should be paid by the buyer when the bill comes due after closing.

DELIVERY / RECEIPT

Lines 219 - 227

(Refer to lines 22 - 33 on page 1 of the offer) This section regulates the delivery of documents and notices.

1. When there are two or more buyers, or two or more sellers, delivery of a document or notice to just one of them is considered a completed delivery.

If one party has delivered a notice or waiver to the other party, the first party cannot later withdraw it unless the other party agrees, in writing, that it will be disregarded. A party can withdraw an offer before it is accepted, but a written notice that has been delivered to the other party cannot be undone or withdrawn.

DEFAULT

Lines 228 - 246

All parties have the obligation to proceed diligently and in good faith to carry out all of the provisions in the contract. If a party does not perform his or her obligations under the contract, the other party may consider this to be a breach of contract or a default. The results can be very serious.

A party who believes a breach or default has occurred should:

1. **Carefully review the contract** and the documents related to it. (offer, counter-offer, addenda, Real Estate Condition Report, amendments to the offer, etc.) to see if the documents support this belief, and
2. **Seek legal advice.** Real estate agents **cannot give legal advice.** An attorney can review the documents, investigate the facts, give an opinion about whether there is a breach, and discuss potential remedies and the time and expenses involved in pursuing such remedies.

Some of the potential legal remedies available to the buyer and seller include:

1. Asking the courts to make the buyer buy, or make the seller sell, the property (specific performance).
2. Allowing the seller to keep the buyer’s earnest money (liquidated damages).

3. Asking the courts to make the other party pay money for the losses resulting from the breach (actual damages).

EARNEST MONEY

Lines 247 - 271

This section deals primarily with what will happen to the earnest money if the transaction does not close and the parties fail to agree on how the money should be disbursed. The contract assumes that a real estate broker is holding the earnest money in the broker's trust account.

If the offer does not close, the broker disburses or pays the earnest money as directed by a written agreement of the buyer and seller, or as ordered by the court. All earnest money disputes in 1-4 family residential transactions are decided in small claims court. The broker is not permitted to make a decision about who is legally entitled to the money. It is up to the seller and the buyer to find a way to settle the dispute. The broker can take no action regarding the earnest money during the 60 days after the transaction was to close. After the 60 days, the broker may:

1. Hire a lawyer to review the facts and determine which party should have the money after the 60 days has passed. After the lawyer makes this determination:
 - a. The broker can take up to \$250 out of the earnest money to pay for the lawyer's fees, and
 - b. The broker must give 30 days advance notice by certified mail of its intent to send the money to the party selected by the lawyer. This gives a party who disagrees with the lawyer's decision an opportunity to start a small claims lawsuit. The broker will then either deposit the money with the court or hold it until the suit is resolved.
2. Start a lawsuit naming the buyer and the seller and asking the small claims court to resolve the dispute.
3. Continue to do nothing, leaving the resolution of the dispute to the parties and their attorneys.

Even if the party who disagrees with the lawyer's decision does not start a lawsuit within the 30 days, they may still do so later. The lawyer does not determine who is **legally entitled** to the money. The lawyer's decision merely changes the **location** of the money. Of course, if a lawsuit is successful, it is typically easier to collect the money from the broker than from the other party.

ENTIRE CONTRACT

Lines 272 - 274

In this section the parties agree that everything that has been represented or agreed to is stated in the contract. For example, if the buyer was given an information sheet before making the offer which said "Washer and Dryer included," the washer and dryer are not included in the sale unless the contract says so. If you believe you have reached an agreement on a particular point, be sure it is written in the contract.

SALE OF BUYER'S PROPERTY CONTINGENCY

Lines 278 - 281

Many buyers do not have enough money to complete the purchase of a new home until they have sold their current home. These buyers generally include a contingency for the "sale of buyer's property" in their offer.

The real estate industry often makes a distinction between the "sale" and the "closing" of real estate. A "sale" is the obtaining of a valid accepted offer on the buyer's current home. The contingency specifies that the offer is contingent upon both the sale (accepted offer) and the closing of the buyer's current home.

If a buyer has made a diligent attempt to sell, and close the sale, of his current residence and is not able to by the date specified at line 280, the buyer is not obligated to buy the new property.

Many buyers are upset when a seller accepts their offer, but continues to advertise and show the property. However, just because a seller has accepted one buyer's offer to purchase does not mean that the seller must stop marketing his property. The seller is free to ask for other offers.

CONTINUED MARKETING

Lines 282 - 284

Unless this clause is marked “N/A” or expressly deleted from the contract, it automatically is a part of the contract when the “Sale of Buyer’s Property Contingency” has been agreed to. In the real estate industry, this is often called a “bump” clause. When a seller accepts a bona fide offer from a second buyer, this clause permits the seller to notify the first buyer of this fact and require the first buyer to waive his “Sale of Buyer’s Property” contingency and perform other specified tasks or lose his interest in the property. It essentially permits a seller who has found another buyer to “bump” the first buyer out of the transaction if the first buyer cannot meet the requirements stated in the offer.

The seller is not obligated to use this bump clause. The second offer may be for a lower price than the first offer or there may be other reasons that the seller may not wish to give the “bump” notice to the first buyer. (See “Secondary Offer” clause at lines 287 -292.) The seller may be willing to wait a while longer to see if the first buyer is successful in selling the first buyer’s current residence. The seller could, however, change his mind and issue the “bump” notice at any time.

If the first buyer receives a “bump” notice from the seller, the buyer will have a specific number of hours (typically, 48 - 96) in which to **deliver** to the seller a written waiver of his “Sale of Property” contingency and complete any other requirements specified at lines 283 and 284. Because the buyer must make some difficult decisions in a short time, the time period does not commence until the buyer’s “actual receipt” of the seller’s bump notice. It would make no sense, for example, if the buyer had 48 hours from the seller’s **delivery** of the notice because, in most contracts, delivery can be made by dropping the document in the mailbox. The time period might expire before the buyer receives the notice.

SECONDARY OFFER

Lines 287 -292

When a seller already has an accepted offer with the “primary” buyer, the seller must be certain that any new contract entered into states that it is “secondary” - not binding on the seller unless the seller takes action to move the secondary offer into “primary” position. This clause fulfills that purpose.

The seller may “elevate” a secondary buyer into primary position merely by giving written notice to the “secondary” buyer. A secondary buyer is “locked-in” and cannot withdraw their offer for the number of days entered at lines 291 - 292. This is done to give the seller an opportunity to “bump” the primary buyer and not lose both buyers. A seller would not want to issue a “bump” notice, have the secondary buyer issue a notice of withdrawal, and then also lose the primary buyer.

The seller may accept more than one “secondary” offer. In this situation, all offers that are not “primary” are considered secondary. Unless this clause is modified to say so, the seller may pick any of the secondary offers and make it primary if the original primary offer is terminated. No particular secondary offer has priority over any other. There is no priority for a secondary buyer who got his offer accepted before the other secondary buyers, or for a secondary buyer who has offered a higher price.

PRE/POST CLOSING OCCUPANCY

Lines 293 - 297

Typically, the seller does not permit the buyer to occupy the property before closing and the buyer does not permit the seller to occupy the property after closing. This clause provides the bare minimum necessary to create an occupancy agreement when such an arrangement is necessary. It states who will occupy the property, for how long, and for how much money. The clause warns the parties to “Consider a special agreement regarding occupancy escrow, insurance, utilities, maintenance, keys, etc.”

The real estate agent should have a form that deals with various occupancy issues.

INSPECTION CONTINGENCY

Lines 298 - 315

This contingency calls for a home inspection by a Wisconsin registered home inspector. Wisconsin registered home inspectors are required by law to have a certain level of expertise and to conduct their inspections and make their reports according to certain rules. If such an inspector notes a defect, there is a level of reliability

in their conclusion.

The contingency provision can also be completed to provide for a second inspection of a particular item by a qualified independent inspector, for example an experienced roofer will inspect the roof.

A buyer must consider:

1. What type of inspection the buyer wants
2. Whether the buyer will reserve the right to have any particular items specially inspected
3. How long the buyer will have to conduct the inspections and decide what to do
4. Whether the seller will have the right to “**cure**” (repair) defects

A buyer may not:

1. Claim that an item is a **defect** unless it has been noted in the home inspector’s written report
2. Claim that an item is a defect, even if it is mentioned in the inspection report, unless it fits the definition of a defect at lines 311 - 315.
3. Claim that an item is a defect if the buyer had **notice or knowledge** of the nature and extent of the defect before the buyer signed the offer to purchase.

RIGHT TO CURE / NO RIGHT TO CURE

If the buyer and seller agree the seller will **not** have the **right to cure** defects, these rules apply:

1. If a defect is appropriately noted by the buyer’s inspector, and
2. If the item is a defect as defined in the contract, and
3. If the defect was not disclosed to or known by the buyer before the buyer made his offer, and
4. If the defect is objected to by the buyer,

Then the buyer may **deliver** to the seller, and to the listing broker if the property is listed, a copy of the inspection report and a written **notice** listing the defects to which the buyer objects, no later than the deadline specified at line 301. This notice is called a notice of defects. If the buyer takes this step, the contract becomes null and void and is cancelled.

Many buyers who become aware of defects remain interested in the property and don’t wish to cancel the contract. The buyer in this situation may propose a different solution. The buyer may propose an amendment to the offer which calls for the seller to repair the defect in a specific manner, or which calls simply for the seller to credit the buyer with a sum of money so the buyer can later do the repair. (Buyers should consult with their lender about how such a credit, if agreed to, may impact the amount of money they can borrow - a lender often views such a credit as a reduction in the purchase price.) The seller is not required to agree to the proposed amendment. The buyer will lose the protections of the inspection contingency if no notice of defects is given and seller does not agree to the amendment.

If the seller has the **right to cure** defects, all of the above-stated rules apply except: The buyer’s delivery of a notice of defects will not cancel the contract. Instead, it transfers control of the situation to the seller. The seller has 10 days from **receipt** of the buyer’s notice of defects to decide whether to repair or “cure” the listed defects. During this 10 days the seller may obtain estimates of repair costs and/or seek new buyers who will not be as concerned with the defects. If the seller takes no action within the 10 days, the contract is deemed cancelled. Or, if the seller has decided not to cure the defects, the seller may give the buyer a notice stating that the seller will not cure or repair the defects. This will cancel the offer.

If the seller elects to cure the defects, seller must:

1. deliver a written notice to the buyer, within 10 days after receipt of the buyer’s notice of defects, stating that the seller will repair the defects
2. have the defects repaired in a “**good and workmanlike**” manner

3. deliver to the buyer, no less than 3 days prior to closing, a detailed written report describing what work was performed

The buyer can inspect the property within 3 days before closing to confirm that the repair work was fully and adequately completed. (See lines 111 - 114.)