



# Mid-Year Modifications





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## Updates TO THE **GAR Forms**

The GAR Forms Committee now releases changes to its forms twice a year. While most changes are released at the beginning of the year, enough changes were made this mid-year to warrant discussing them.

### **{1} Exclusive Seller Brokerage Engagement Agreement (GAR Form F101) Revised**

#### **a. *Section on Hazardous Conditions on Property revised***

The Exclusive Seller Brokerage Engagement Agreement was revised to include a boldface disclosure letting sellers know that they owe a duty to keep their properties safe for agents and potential buyers and encouraging them to identify and correct any hazardous conditions in the property prior to it being shown. We have been seeing more claims from buyers injured while viewing properties who then sue the seller and the listing broker. Getting sellers to correct hazardous conditions protects the seller and the listing broker.

### **{2} Exclusive Buyer Brokerage Engagement Agreement (GAR Form F110) Revised**

#### **a. *Section on Being Able to Show Multiple Buyer Clients the Same Property revised***

In an era of limited inventory, it is inevitable that buyer agents end up showing multiple buyer clients the same properties. The language allowing for this was clarified in the Buyer Brokerage Engagement Agreement to allow buyer agents to do this without violating any duty to the other buyers with whom they are working.

### **b. *New Hazardous Condition Warning and Hold Harmless Agreement Added***

To help prevent buyers from being injured on properties they are viewing, a new disclaimer was added to the Exclusive Buyer Brokerage Engagement Agreement. The disclaimer warns buyers that there could be hazardous conditions on properties being viewed by buyers and urges buyers, buyers' representatives and buyers' family members to use extreme caution in viewing properties. In particular, the disclaimer alerts buyers to be careful on steps and step downs, and in poorly lit and dark areas, and to be on the lookout for loose handrails, and wet, slippery and uneven flooring. Hopefully, this disclaimer will help prevent injuries and claims.

In addition, language was added where the buyer agrees to hold the brokers harmless from all claims, injuries and damages arising out of the physical examination of all properties by the buyer and members of the buyer's family. Since the brokers do not inspect properties for hazardous conditions, it is logical that they not be legally liable for such injuries.

### **{3} Purchaser and Sale Agreement (GAR Form F201) Revised**

#### **a. *Purchase Price Section revised***

The purchase price section of the Purchase and Sale Agreement was modified so that the closing attorney determines the manner in which the U.S. dollars to purchase the property are delivered at closing. The closing attorney already specifies how the purchase price will be paid and this change simply conforms the Purchase and Sale Agreement to that practice.

#### **b. *Who May Object to the Proposed Disbursement of Earnest Money Expanded***

Under the old Purchase and Sale Agreement, when the holder of disputed earnest money sent out a ten (10) day letter with a proposed disbursement of the money, only the parties to the Agreement could object to the disbursement. This language was modified so that now objections can be made by any party, real estate licensee or any other person having knowledge of or an interest in the disbursement. The reality is that when there is an earnest money dispute, the REALTORS® working with the parties are often the ones submitting an objection to a proposed disbursement. This change now allows these REALTORS® and others with knowledge of the dispute to have their objection fully-considered.

### **c. *Section on Inspection Rights of Buyers Clarified***

The rights of the buyer to inspect the property were clarified in the mid-year revisions. Some REALTORS® and sellers mistakenly think that if the buyer does not have a Due Diligence Period in the contract, then the buyer cannot fully inspect the property. This misconception is hopefully dispelled by modifying the inspection language to state that the:

“Buyer and/or Buyer’s representatives shall have the continuing right through Closing to enter the Property at Buyer’s expense and at reasonable times to, among other things, and without limitation, conduct inspections, examinations, evaluations, appraisals, surveys and tests, meet contractors and vendors, measure for renovations, determine the condition of the Property and confirm that any agreed upon repairs have been made.”





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## AND THE **PRIZE** FOR THE WORST CONTRACT MISTAKE OF THE YEAR GOES TO ...

It seems that every year, a mistake is made in preparing contracts that circulate through some part of the REALTOR® community. For 2023, the mistake is the use of a terrible special stipulation that merely states:

**“BUYER AGREES TO PAY \$5,000 OVER THE APPRAISED PRICE OF THE PROPERTY.”**

Unfortunately, we have had dozens of disputes arise from the use of this special stipulation. All of them occur when the appraised value of the property is significantly less than the purchase price. Special stipulations control the main body of the contract. Knowing that, let's say that the contract price is \$700,000, the house then appraises at \$600,000 and the dreaded special stipulation is included in the contract. Have the parties just agreed to a purchase price of \$605,000? While we do not yet have a judicial ruling on this, a good argument can be made that the answer to this question is yes.

Now, some REALTORS® have argued that it is simply an offer and the seller is not bound to sell at that price. Others have argued that the contract with that stipulation does not even create an enforceable contract. The problem with these arguments is that courts generally try to enforce contracts, and why include such a special stipulation if it was not intended to create an enforceable contract? Regardless of the price at which you think the property must be sold, every REALTOR® should hopefully realize the legal fights that can arise from the use of this terribly written special stipulation. So, how do you revise the special stipulation to avoid this mess? The answer is to add a price floor and price ceiling to the special stipulation below which the seller does not have to sell the property and above which the buyer does not have to buy the property. Here's an example of such a special stipulation.

**“BUYER AGREES TO PURCHASE THE PROPERTY FOR \$5,000 OVER ITS APPRAISED PRICE, BUT NOTWITHSTANDING THE ABOVE, THE PURCHASE PRICE PAID BY THE BUYER SHALL NOT BE MORE THAN \$ \_\_\_\_\_ NOR LESS THAN \$ \_\_\_\_\_.”**

This added language protects the seller against having to sell at a lower price than the seller ever intended. The special stipulation also protects the buyer by establishing a price ceiling. The above stipulation works and can be used when appropriate. The first stipulation does not work and should not be used.

**d. *Purchase and Sale Agreement Clarified to Confirm That the Brokers Have No Duty to Inspect the Property***

Language was added to the Purchase and Sale Agreement to clarify that the brokers have no duty to inspect the property for defects, hazardous conditions, repairs or any other matter. When defects are discovered in a house after closing or someone is injured in a house, claims are regularly brought against the brokers argu-

within the three (3) day timeframe previously given to make this decision.

Changes are always being made to GAR Forms to address new issues that arise in our businesses and to constantly try to improve our Forms. When REALTORS® run into issues or challenges with our Forms, they should alert the Forms Committee.

## Language was added to the Purchase and Sale Agreement to clarify that the brokers have no duty to inspect the property for defects, hazardous conditions, repairs or other matter.

ing that they should have inspected the house for defects and hazardous conditions and disclosed the same to the buyers. The addition of this language should help prevent such claims.

### **{4} Temporary Occupancy Agreement for Seller After Closing Exhibit (GAR Form F219) Revised**

The Temporary Occupancy Agreement has been significantly strengthened in the last year to allow the buyer to collect damages if the seller does not move out on time. In the mid-year revisions, this language was strengthened even further to allow the buyer to recover their actual attorney's fees reasonably incurred resulting from the seller's wrongful failure to vacate.

### **{5} VA Loan Contingency Exhibit (GAR Form F410) Revised**

The VA Loan Contingency was revised so that any re-inspection fee is paid for by the seller in addition to any Seller's contribution at closing.

### **{6} Agreement of Closing Attorney to Serve as Holder of Earnest Money (GAR Form F511) Revised**

The Agreement of Closing Attorney to Serve as Holder of Earnest Money Exhibit was modified so that the attorney now has five (5) business days from the date of receiving the entire contract to decide whether or not to hold the earnest money. This change was made because so many closing attorneys were not responding



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