

## BROKER RISK MANAGEMENT

### Advisory on the Proper Use of the Request for Repair Form

*(NOTE: This Advisory deals exclusively with the Request for Repairs (“RR”) form Rev 12/21.*

**Q.** We recently had a problem while negotiating the credits and repairs using the old Request for Repairs (“RR”) form. The Seller agreed to some of the Buyer’s Requests but not all and the Buyer accepted the Seller’s response. After the Seller started making repairs, additional issues were found and so another round of negotiations began. The Buyer submitted a new RR which the Seller never responded to and now the Buyer wants to cancel. The Buyer’s attorney has confirmed that the Buyer did not have a right to cancel because the Buyer signed the Contingency Removal (“CR”) removing all contingencies and sent it with the original RR which, once the Buyer accepted the Seller’s counterproposal, established that all contingencies had been removed. The Buyer’s attorney has also determined that the Buyer could not initiate any new requests for repairs because of the release language in the old one-page form. I got blamed for what the Attorney claimed was the premature removal of the Buyer’s contingencies.

Can this bad result happen with the new RR? Can you explain how to safely use the new RR form?

**A.** YES, the result you experienced when using the old RR form can still happen with the latest version. This week’s Tip will focus on how to use the RR as well as provide some recommendations for best practices to avoid problems.

**OVERVIEW:** There are 3 separate sections in the new 2-page form and each section has multiple options. Each option is preceded by a check box; if a box is not checked then the option does not apply. However, in several options there is space to fill in additional information (see for example, Buyer Request ¶1A and Seller Response ¶2). If any information is inserted into the blank lines in any of these options, failing to check the box will not automatically mean that the option does not apply; the absence of the check mark will either be construed as a “scrivener’s error” (a mistake made by the person filling out the form and the clear intent was that the box was to be checked) or that there is an ambiguity created by the preparer of the form, the interpretation of which will be construed against the maker.

**Bottom Line:** When filling out the form make certain that you check the boxes for the options that your client intends to include in the form and do not fill in any information with options where the box is not checked.

**SECTION I: The Terms of the Buyer’s Request:** Buyers should be advised to read the easy-to-miss **Note** in the introduction to ¶1 that the Seller has no obligation to respond to the Buyer’s requests (which is also in the **RPA ¶14B-2**).

**Paragraph 1. BUYER REQUEST (Check all that apply):** This paragraph gives the Buyer 4 options for requesting the Seller agree to change the terms of the original contract. The Buyer can request that the Seller make repairs, take other actions, pay for pest control work, reduce the purchase price and/or give credits. These choices are not mutually exclusive.

**¶1A:** This option enables Buyer to request that Seller take specified actions, such as repairs, “prior to final verification of condition.” There are 7 blank lines to specify exactly what the Buyer is requesting or a list of specified actions can be attached (if the box is checked); **do not** put some requests in the blank lines and some on a list – use one method or the other since the form states the requested items are “listed below **or**  on the attached list” (it does not allow use of both).

Repair requests should be written with as much detail as possible to identify (1) **who** is to physically make the repair (can the Seller do it or must the Seller hire a licensed professional); (2) **what** is the nature of the repair (preferably by referring to a specific disclosure or report attached to the RR) (3) **where** the problem is located; and (4) **how** the repair is to be made (is the Buyer willing to have the Seller simply repair a problem, such as patch a hole in the roof, or must something be replaced). Simply stating “repair the roof” is inadequate because it fails to cover all 4 of the points above. NOTE: Any Seller repairs must be made as specified in **¶15 Repairs.**

**¶1B:** This option enables Buyer to request that Seller pay for work that is detailed as Section 1 and/or Section 2 in a specified pest control report. The best approach is to attach the referenced Pest Control Report even though the RR includes

blank lines for the report date and who prepared it (there may be other pest control reports and the Parties will need to agree as to what is and what is not included within the agreed upon scope of work).

Seller's Agent should point out to Seller that if the Seller agrees to pay for Section 1 and/or Section 2 work that Seller is automatically obligated to provide the Buyer with a written pest control certification showing that the work is completed and that documentation must be Delivered to Buyer no later than 5 Days Prior to Close of Escrow.

**Note:** The Buyer's options in ¶1B are extremely limited and do not deal with typical pest control problems such as recommendations for inspection of inaccessible areas, who will be responsible for any Supplemental Report that may get issued once the repairs have been started and/or how fumigation is to be handled. If different treatment methods are specified in the Pest Control Report (or there is disagreement between inspectors as to what is needed) and the Buyer wants a specific method, such as fumigation, that type of request will need to be fully explained in ¶1A.

¶1C: This option enables Buyer to request that Seller credit the Buyer a designated amount at COE and there is a reminder that the credit must be disclosed to Buyer's lender; however, the total of all credits cannot exceed any lender limits.

Seller's Agents make sure Seller understands that the **Note** warns that this credit does not reduce or supersede any other agreed upon credits; in other words, it is a request for additional credits beyond what was previously agreed.

¶1D: This option enables Buyer to request that Seller modify the purchase price and it is usually used to reduce it.

**Paragraph 2. Attached Reports:** Although not required, the best practice is to attach the reports that are the basis for any of the requests in Paragraph 1 and, after checking each box, fill in the full name of the report.

**Paragraph 3. FHA or VA:** If the contract includes FHA or VA financing and the lender requires that the Seller take specific actions, such as pay for repairs or other expenses, then those requirements should be specified. Preferably any documentation provided by the Buyer's lender that details those requirements should be attached to the RR.

**Paragraph 4.** If the Seller agrees to the Buyer's Requests or the Buyer accepts Seller's partial agreement (as specified in Section 2) by signing in Section 3, then the RR form obligates the Buyer to take both of the following two actions:

¶4A: The default is to remove the Investigation of Property Contingency in its entirety which can be modified by checking a box and specifying any exceptions (note the blank line is rather short); OR attaching a Signed CR form (which will better clarify what aspects of the Investigation Contingency the Buyer is or is not willing to remove) and

¶4B: **The Buyer releases the Seller of all claims regarding the disclosed condition of the Property.** NOTE: It is not clear in this Release that it only applies to conditions disclosed before the date of the RR; this is potentially dangerous for Buyers but Sellers should not rely too heavily on this Release since it does not comply with Civil Code Section 1542 and thus claims for unknown conditions are probably not released.

If the Buyer prefers to wait to see what action the Seller takes before committing to remove any or all contingencies, then the Buyer can include in ¶1A the following statement: **Paragraphs 4A and 4B of this Request for Repairs are stricken.**

**Paragraph 5. EXPIRATION:** This new provision enables Buyers to set a time limit on how long the Seller has to respond to the RR. Since the Seller is not obligated to respond, this provision enables Buyers to have some certainty as to the status of their Request for Repair. If the Seller responds after the time limit and the Buyer is willing to accept the Seller's late response, the best practice is to use the Amendment form ("AEA") to specify what the Parties are agreeing to do now that the time limit has expired.

**Paragraph 6. Effect of Buyer Request:** This new provision (which is repeated in Sections II and III) makes it clear that if the Parties use the RR form that any prior RR cannot be accepted.

**SECTION II: SELLER RESPONSE.** The introductory Note explains that if the Seller does not agree to FHA/VA lender required repairs that the lender will not fund the loan. The risk for the Seller to refuse the lender requests is that if the Buyer still has a financing contingency in place, the Buyer may cancel.

The Seller has 5 optional responses to the Buyer's request **but must only check 1 box:**

1. Seller agrees to all of the Buyer's Requests (if this option is chosen, Section III is not needed);
2. Seller agrees to all of the Buyer's Requests but lists the Requests that are not accepted (but with this option the Seller may withdraw the partial agreement if the Buyer does not accept within the specified time frame);
3. Seller may use the **RRRR** form to respond (if this option is chosen, Section III should not be used);
4. Seller does not agree to all of the Buyer's Requests but Seller responds by providing an **AEA** form (if this option is chosen, Section III should not be used); OR
5. Seller does not agree to any of the Buyer's Requests (if this option is chosen, Section III is not needed).

**SECTION III: BUYER RESPONSE TO SELLER PARTIAL AGREEMENT.** Buyer is reminded NOT to sign this section until after the Seller has responded in Section II and is only needed if the Seller partially agrees with Buyer's requests in option 2 above. Buyer has only 2 options with respect to the Seller's partial agreement: (1) Buyer accepts the partial agreement or (2) Buyer does not accept the partial agreement. If the second option is chosen, the RR states that the Buyer can then withdraw the current RR and submit a new RR (do not attempt to use an altered version of a prior form) but there are other options:

- (a) cancel the transaction by exercising the Investigation Contingency in good faith, assuming it has not been removed;
- (b) proceed with the transaction by waiving or removing their contingency(ies);
- (c) ask for more time to deal with the contingency(ies); or
- (d) do nothing, if the Seller has not issued a Notice to Buyer to Perform to remove the contingencies.

This section has another warning for FHA/VA Buyers regarding the effect of the Seller not agreeing to the lender required repairs and the Buyer's risk if they have already removed their financing contingency.

#### **PRACTICE TIPS**

1. Agents must carefully review all sections and paragraphs of the RR with their clients before the clients sign anything. Make sure that you understand how each section of the form works so that the form can be explained to your client.
2. **CAUTION: Buyer should not automatically remove all contingencies simply because the Seller has agreed to make certain repairs and should not attach a Contingency Removal form with the RR.** At the very least, Buyers should be encouraged to exclude from the removal of the Investigation Contingency "investigating the adequacy and sufficiency of agreed Seller's repairs" and/or anything the Buyer needs. The Final Verification of Condition enables the Buyer to confirm repairs were made but it does not give Buyer a right to cancel if the Buyer is dissatisfied with the repairs.
3. Buyers need to understand that Sellers are not obligated to respond to the RR and at the expiration of the time period for the RR (§5A) there is no agreement with the Seller to do any or all of the requests. At that point in time, Agents should advise their Buyer that they need to decide what course of action (see Section III above) to take with open contingencies.

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