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## INSPECTIONS

**Question:** Under the inspection contingency, if the inspection recommends a further evaluation by a specialist, does the buyer have to notify the seller of their election to obtain the further evaluation recommended by the inspector? Does the buyer have to give notice of disapproval of the original inspection within the original deadline or can the buyer reply to both inspection reports after the further evaluation is done?

**Answer:** The buyers must give notice of disapproval of the original inspection (if they want the sellers to correct any conditions noted by the first inspector), along with notice of their election to obtain the further evaluation by the specialist, within the original 10-day period.

**Question:** If the parties have agreed to a "walk-away" inspection (NWMLS Form 35, option 1A) and the buyers disapprove the inspection, can we refund the earnest money without a mutual rescission agreement?

**Answer:** Before disbursing earnest money to either party, we must determine whether a dispute exists. Even under the NWMLS Form 35, option 1A, there are possible grounds on which the sellers could object to a refund of the earnest money (e.g., buyers did not obtain an inspection at all, buyers' notice of disapproval was not given timely, buyers acted in bad faith in disapproving the inspection report without a good faith reason because they found another house, buyers' notice of disapproval was deficient because it was not in writing or signed). Because we are not able to determine conclusively whether the buyers are entitled to a refund of the earnest money by simply reviewing the agreement, we must give the sellers an opportunity to object to the refund, unless all parties have signed a mutual rescission agreement.

**Question:** What is the liability of a home inspector who misses material defects during a home inspection?

**Answer:** Home inspectors are liable for undisclosed defects, if the inspector was negligent in failing to discover and reveal the defect. "Negligence" is a failure to exercise that degree of care and skill commonly possessed and used by one's peers. In other words, the defect must be one that a reasonably competent and careful inspector would have discovered. The buyers have the burden of proving the inspector's negligence through expert testimony of other inspectors concerning prevailing practices in the home inspection business.

**Question:** Under the John L. Scott Inspection Contingency, the buyers gave notice of disapproval along with an alternative proposal for a cash credit in lieu of the repairs. The seller responded with an addendum that "Buyer waives inspection contingency and accepts the property in "as is" condition -- Seller agrees to reduce the purchase price to \$XXX. This counteroffer expires at noon tomorrow." What are the buyers' options?

**Answer:** The seller's "counteroffer" is in effect an offer to modify the contract. The sellers can impose a deadline on that offer. However, the buyers are entitled to the agreed 3 day period within which to elect to terminate the agreement. If they want to accept the sellers' offer to reduce the price, they must accept by noon.

**Question:** Under the inspection contingency (JLS Form 35), when does the additional five days start to run for further evaluation or testing recommended by the buyers' inspector?

**Answer:** Although admittedly not as clear as it should be, assume the additional five days for further evaluation or testing begins from the time of the original notice of disapproval, rather than the expiration of the 10-day period, to be on the safe side. In order to preserve their rights, the buyers must within the

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original 10-day period (1) give their notice of disapproval as to any items in the original inspection report they want corrected and (2) notify the seller of their election to obtain the further evaluation.

**Question:** Can the purchaser withdraw from a transaction without liability where the purchaser is not satisfied with the overall quality of the house after an inspection, but the seller has agreed to make all the corrections requested by the purchaser, as recommended by the inspector?

**Answer:** No. So long as the seller makes all corrections in accordance with the inspector's recommendations, the purchaser is bound by the agreement.

**Question:** Can we give to subsequent buyers a copy of an inspection report obtained by previous buyers who backed-out of their deal? Who owns the report?

**Answer:** The inspection report is owned by the inspector who prepared it. The inspector grants to his or her customer a limited license to use and copy the report for the purposes specified in the report. An unauthorized use or copying of the report is an infringement on the inspector's intellectual property rights and is actionable. However, it is the tangible manifestation of the information (*i.e.* the report itself) that is protected -- not the *contents* of the report. Therefore, anyone can use the information contained in the report without violating the inspector's rights, but cannot make copies of the report for subsequent buyers without the inspector's permission. In addition, even if the inspector permitted us to give a copy of the report to subsequent buyers, those buyers probably would not have any recourse against the inspector for undisclosed defects that the inspector should have detected, since the subsequent buyers had no privity of contract with the inspector. The subsequent buyers should obtain their own inspection, even if the same inspector is hired.

**Question:** Can we publish a list of "recommended" and "not recommended" inspectors based on the experience of our Sales Associates?

**Answer:** You can distribute such a list to your Sales Associates and clients only, but *not* to competitors (due to group boycott antitrust concerns). Include the following disclaimer on the list:

"Home buyers have the right to select their own inspector(s). The above recommendations are based solely on Broker's experience with the inspectors listed and do not constitute a guarantee by Broker or its Sales Associates. With respect to any inspector considered, we encourage you to (a) review the scope and cost of the inspector's services, (b) obtain other references from the inspector, and (c) ask about the inspector's training, experience, liability insurance, professional affiliations, and other qualifications."

**Question:** The sellers have offered to make some, but not all, of the corrections identified in the buyers' notice of disapproval of the inspection report. Can the sellers require the buyers to respond within 24 hours, when the purchase and sale agreement gives the buyers 3 business days within which to elect to terminate the agreement?

**Answer:** No, the buyers are entitled to the agreed time period within which to decide whether to terminate the agreement. However, since the sellers' response to the buyers' notice of disapproval is in substance an offer to modify the contract, the sellers can impose a unilateral time limit for the buyers' acceptance of the sellers' offer. In other words, the buyers have 3 business days to terminate the agreement, but only 24 hours to accept the sellers' offer to make some of the corrections, if that is their preference.

**Question:** Can the purchasers disapprove an inspection report on the basis of items previously disclosed by the sellers in the seller disclosure statement, at which time the purchasers raised no objection?

**Answer:** The purchasers' *statutory* rights under the seller disclosure law and their *contractual* rights under the inspection contingency are independent of one another, and the purchasers are entitled to assert or waive either or both protections. In addition, the purchasers may have a legitimate interest in having a disclosed item reviewed by a professional inspector, such that the purchasers do not want to terminate the agreement until they obtain the inspector's comments and recommendations. Thus, the purchasers can disapprove the inspection on the basis of items previously disclosed to them in the seller disclosure

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statement, if the inspector recommends that the items be corrected.

**Question:** When a roofing company issues a 5-year roof certification, what does that mean in terms of the warranty aspect? Would this cover leaks in a roof 5-months after the certification was given?

**Answer:** A roof certification is not a warranty at all. It is merely an opinion of the roofer given to the lender that the roof probably has a remaining useful life of at least 5 years. For a buyer to have recourse against a roofer, the buyer would have to prove that the roofer failed to exercise the reasonable care and skill expected of a roofer in issuing the certification and that the buyer relied upon the certification in completing the purchase.

**Question:** I have been having sellers perform pest and structural inspections at the time I take the listing, having them do the repairs and then whether or not an offer comes subject to an inspection, the inspection reports are attached to the sellers disclosure form and given to the buyer. I have been doing this for several years without problem. I am using a new inspector who has requested that I NOT give the reports to the buyers because 1) he has been told by other inspectors that giving reports done with seller as client to the buyer increases the inspector liability, 2) that the seller is his client, not the buyer, and 3) that if I want to give the reports to the buyer he should change the name on the report to the buyer's name and then charge the buyer a whole new fee for the same report. I don't get what the problem is; the seller's disclosure form clearly asks if any inspections have been done, seller checks "yes" and attaches the report which we pass on to the buyer who almost never gets another inspection. This has been a wonderful sales tool and relieves much fear right in the beginning. It also takes away the 10-day inspection contingency and keeps repairs out of the price negotiations since they are already done. What is your take on this?

**Answer:** Unfortunately, the inspector is correct. The inspector owns the inspection report, and has licensed its use to the sellers only. It is an infringement on the inspector's copyrights to give a copy to the buyers, when the report was prepared for the sellers.

On the seller disclosure statement, the sellers must disclose any prior inspections done, and must disclose any defects not corrected, but cannot give a copy of the inspection to the buyers.

In addition, from the buyers' perspective, if the sellers' inspector misses a defect, the buyers would have no recourse against the inspector, because they are not in privity with the inspector, unless the inspector was told prior to performing the inspection that the report would be shown to prospective buyers. If we lead the buyers to believe they can rely on the inspection in lieu of obtaining their own, then we could be liable to the buyers!

Although I understand your logic and objectives in having inspections done at the time of listing, the disadvantages outweigh the advantages, and I recommend against the practice.

**Question:** We have a sale pending with no contingencies -- not even financing or inspection. Now, the buyers have asked the sellers if they could have an inspection just for their own benefit. The sellers agreed. Then, the sellers asked the listing agent if there would be any problem with this. The listing agent informed the sellers that it was not a wise decision, as something might go wrong and all the sellers could do is keep the earnest money. What do you think?

**Answer:** It is worse than that -- even without an inspection contingency in the purchase and sale agreement, if the transaction was subject to the seller disclosure law and the seller discovers any information or any change occurs that renders the seller disclosure statement incomplete or inaccurate in any way, then the seller must correct the defect or discrepancy, or deliver to the buyer an amended seller disclosure statement, which would revive the buyer's right of cancellation! There is no such thing as an inspection "just for informational purposes", in light of the seller disclosure law. Advise the seller not to permit the inspection before closing.

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