

Proper Use of the Home Inspection Contingency

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A home inspection is the process by which the systems and components of residential real estate that are readily accessible and observable are examined. The inspection contingency in the WB-11 "Residential Offer to Purchase" is an optional contingency, but it is widely used in its pre-printed form without modification.

Who is a Home Inspector and What is a Home Inspection?

A home inspector is defined as an individual who, for compensation, conducts a home inspection. Home inspectors in Wisconsin must be registered with the Department of Regulation and Licensing (DRL). They must also pass an examination to become registered, and they must attend continuing education and renew their registration every two years to stay licensed.

A home inspector is obligated to perform a reasonably competent and diligent home inspection to detect observable conditions with respect to the residential real property and improvements. A reasonably competent and diligent home inspection is not required to be technically exhaustive and the home inspector need not use extensive measurements, instruments, testing, calculations or other means to develop scientific or engineering findings, conclusions or recommendations. See pages 2-3 of the August 2004 *Legal Update* for more information on the statutory requirements of home inspections, online at www.wra.org/lu0408.

Additional Items May Be Included

The buyer may, however, customize the home inspection contingency beyond the scope of the statutory minimum requirements of a home inspection by retaining a specialist or other qualified service people to inspect additional items that the home inspector would prefer to not include in the home inspection. For example, a buyer may decide to hire a furnace contractor to inspect the furnace or a roofer to inspect the roof

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by including such provisions in the blanks provided at lines 299-300 of the WB-11.

The inspection contingency authorizes inspections but not testing. A test is not the same thing as an inspection. A test is defined in the offer as the taking of samples of materials, such as soils, water, air or building materials, from the property for laboratory or other analysis. Buyers who want to have any testing performed should add a testing contingency to the offer. Testing contingencies should specify the area or materials to be tested, the purpose of the testing and any obligations to restore the property afterwards.

After completing a home inspection, a home inspector must submit a written report to his or her client. A home inspection report is a

home inspector's written opinion concerning the condition of a residential structure and improvements as well as the mechanical and structural components. A home inspector is not required to use a specific report form.

Buyer's Decision When the Inspection is Complete

Upon receiving the home inspection report, the buyer must make some critical decisions. First and foremost, the buyer must decide whether she wants to deliver a notice of defects. Early on, it may be more beneficial for the parties to consider negotiating through the use of amendments rather than the fairly rigid provisions of the home inspection contingency. If a buyer delivers a notice of defects rather than a proposed amendment, she is giving up her control to keep the deal alive. Lines 309-310 of the WB-11 afford the seller who receives a notice of defects with the sole discretion to decide whether to continue with the transaction by curing the defects or declaring the offer null and void.

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Possible Strategy

Assume the buyer just received a home inspection report that lists three defects, and the parties agree the problems fall within the definition of a defect found at lines 310-315 of the WB-11. Both parties still want to proceed with this transaction (i.e., there aren't other imminent offers or opportunities such that the parties' primary motivations are to get out of the deal). The seller has the right to cure and

two of the defects are relatively minor, such as a defective smoke detector, and one is more substantial, such as a broken furnace.

The first step a buyer may take is to determine the cost of fixing or repairing the defects. Next, the buyer should assess what she is willing to fix at her own expense and what she will absolutely require the seller to fix ("deal breakers"). This will help the buyer frame the upper and lower boundaries of her acquisition cost so she can determine not only whether this property falls within her budget, but also how its value compares to other properties.

The buyer may then provide the seller a copy of the home inspection report and explore whether the repairs may be handled by an amendment rather than by delivering a notice of defects. For example, the buyer may be willing to take care of the two minor defects, but will require the seller to replace the furnace. Licensees may have the opportunity to informally discuss, on behalf of the parties, whether a particular course of action is acceptable to the parties before drafting a proposed amendment.

Such an amendment may state, "This is not a notice of defects. Seller agrees to (provide the following credit at closing) and/or (establish the following repair escrow) and/or (perform the following repairs)." The proposals should include details, time frames, costs, materials, contractors, consultants, etc. The deadline for acceptance of the amendment should ideally be earlier than the deadline for the buyer to give a notice of defects. This will give the buyer the option of giving a notice of defects if the seller does not agree to the amendment proposal.

If the buyer has already submitted a notice of defects and now wants to propose a different way to handle the situation, the amendment may also state, "The right to cure provisions at lines 306-310 of the offer are deleted and the buyer's

notice of defects is withdrawn." Remember, ***once the buyer delivers the notice of defects, she may not unilaterally withdraw it!***

The notice of defects generally should be viewed as the buyer's last resort, because she risks losing the deal by giving the seller an ultimatum – a notice effectively says, "make these repairs or I won't close." Once again, the buyer may only want to include the defects that are "deal breakers" in her notice. In other words, just because something was listed as a defect in the home inspection report doesn't mean the buyer has to include it in her notice of defects. On the other hand, the items she does include in the list of defects should be reflected in the home inspection report. Once the buyer delivers the notice of defects, she must wait to see what course of action the seller will pursue.

Main Takeaways

The home inspection contingency is limited in what it provides and rigid in its application. However, it is possible that no other contingency or step in the residential real estate transaction may afford licensees with more opportunity to practice "the art of negotiation" or to add value to their clients' and customers' outcomes. Keep the following in mind:

- ◆ Neither the WB-11 home inspection contingency nor Wisconsin law affords the buyer the right to a technically exhaustive inspection or the right to test.
- ◆ Buyers are free to tailor the home inspection contingency to provide for more diligent and/or system-specific examination.
- ◆ Deadlines should be set allowing ample time for the inspection, follow-up and negotiation.
- ◆ Amendments may better serve the parties by providing increased flexibility.