



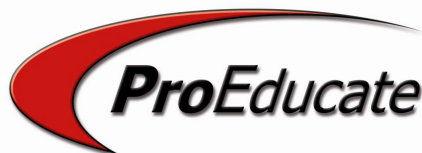
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# **2024 Mandatory – LREC Mandated Forms & Hot Topics STUDENT Manual**

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**This course will consist of four modules:**

- **UPDATES TO THE PROPERTY DISCLOSURE DOCUMENT**
- **UPDATES TO THE RESIDENTIAL AGREEMENT TO BUY OR SELL**
- **CURRENT TRENDS**
- **HOT TOPICS AND CASE STUDIES**



**A LOUISIANA REAL ESTATE COMMISSION PRODUCTION**

Vendor #9050

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# **Course Syllabus 2024 Mandatory – LREC Mandated Forms and Hot Topics**

## **Instructor Qualifications and Background**

### **Roy L. Ponthier, Ph.D., Ed.D., CDEI, DREI**

Dr. Ponthier is a licensed Louisiana real estate broker, certified real estate and appraisal instructor, and Director of Executive Training Centers, LLC, an educational services company which offers in-class training in real estate, mortgage finance and appraisal, as well as online training through ProEducate, the company's web-based education division which offers real estate and mortgage finance related courses throughout the United States.

Dr. Ponthier holds a B.S. degree from Southeastern Louisiana College. His graduate training was taken at Tulane University (M.S. and Ph.D.) and the University of New Orleans (M.Ed. and Ed.D.). He holds the Certified Distance Education Instructor (CDEI) certification awarded by the International Distance Education Certification Center (IDECC), as well as the Distinguished Real Estate Instructor (DREI) designation awarded by the Real Estate Educators Association in recognition of exceptional effectiveness in the classroom. Dr. Ponthier has served on the faculty of three Universities, currently teaches classes for The Real Estate Law Society of Loyola University Law School and has chaired college divisions of Computer Science, as well as Education. Since 1988 he has taught real estate related subjects to more than 63,000 students. He is a member of five academic honor societies, as well as MENSA, and author of more than two dozen internationally published scientific papers. He was Director of The Center for Computer Education, Inc., which trained teachers in computer science, and was president of Worldwide Information Network, Inc., a provider of Internet and television marketing in real estate. He has owned two mortgage companies, as well as a business brokerage company and a residential and commercial real estate company.

Since early 2009, Dr. Ponthier has served on a work group for the Nationwide Mortgage Licensing System & Registry (NMLS&R) to help develop the functional specifications for mortgage pre-licensing and continuing education programs taught in the U.S. He is a member of the Real Estate Educator's Association, The South Central Educators Group, and the Louisiana Mortgage Bankers Association, for which he is Chair of the education committee. Dr. Ponthier's achievements have been documented in Who's Who (Oxford Edition), American Men and Women of Science, and the International Who's Who in Education.

## **Course Description**

The course focuses on three main areas for licensees: (1.) – Updates to the Property Disclosure Document (PDD), (2.) – Updates to the Residential Agreement to Buy or Sell, and (3.) - Current Trends and Hot Topics in the real estate industry.

## Course Goal

Real Estate licensees will be presented with all major revisions of the mandatory forms for use in real estate practice including the Property Disclosure Document and the Residential Agreement to Buy or Sell. Knowledge and expertise of these forms will be refreshed and enhanced through case studies and detailed analysis. Licensees will also review key current trends such as owner financing and Bond for Deed to better build their understanding of these products and how they are used in the marketplace. Finally, licensees will be updated on current hot topics affecting the industry in order to stay knowledgeable and better serve the public.

## Course Completion Requirements

Students taking Internet based presentations must complete all quizzes and exams with a score of at least 70%.

## Vendor Policies and Regulations:

**Prerequisites:** There are no educational prerequisites for this course.

## Registration:

- The student is responsible for verification of qualifications for licensing, before registering for a course of study.
- Registrants with any form of criminal history, including misdemeanor or felony convictions, or who are currently on parole, must contact the relevant licensing agency before registering for any pre-licensing or pre-certification course.
- An e-mail account is essential to participate in the online program.
- Any attempt to take the course under an assumed identity, or to accept assistance from others in completing any portion of the course, may result in rejection of a license application, revocation of an existing license, fines, or other penalty provided by law governing the relevant state regulatory agency to whom the student submitted documentation.

## Course Participation:

- Students are asked to please be certain that their address book is updated to include acceptance of e-mails from StudentServices@ProEducate.com and Instructor@ProEducate.com
- Instructors may not, in any venue, answer questions of a personal, professional, business, or legal nature, and students should not interpret any information received from instructors, or course content, as being legal or professional advice.
- The instructional staff will respond to questions by e-mail as quickly as possible. In general, questions received by noon on any business day are responded to by 5 pm the following business day. Students who abuse the e-mail opportunity may be dropped from the course, solely at the discretion of the school, without penalty to the school beyond refund of tuition.

## School Contact Information:

- **By Phone:** For questions regarding administrative issues, the administrative offices may be contacted by phone at (504) 454-9866 or (800) 966-9866, weekdays between 8 a.m. and 5 p.m. central time.

- **By E-mail:** Ask technical or course content questions 24 hours a day by e-mailing the school office at the addresses listed below. A response will typically be received by close of business on the next business day.
  - [StudentServices@ProEducate.com](mailto:StudentServices@ProEducate.com) for questions or comments about registration, administrative issues, purchases from the online store, or technical issues.
  - [Instructor@ProEducate.com](mailto:Instructor@ProEducate.com) for questions regarding course content.
- **In Person:** We are in the office to assist you with administrative questions Monday - Friday 8:00 a.m. to 5:00 p.m. central time. We are located at 4200 S. I-10 Service Rd. W., Suite 134, Metairie, Louisiana 70001 (Boy Scouts of America Building).

### **Additional Information Regarding the Online Course:**

- During the allotted class time, students will have access to the course 24 hours a day and may login and work on the course at their convenience.
- During the course, if the students have questions about the course content, they may click on the "e-mail instructor" button and send a question to the instructor.
- E-mails received by 3 PM on any business day will be responded to on the next business day.
- Students are asked to please be very specific about the location of the content they are questioning (lesson #, topic, etc.)
- Instructors are permitted to respond only to questions specifically related to the course content.
- Questions regarding personal situations, unrelated to the specific course material or of a legal nature, may not be responded to.
- The course also makes a detailed glossary available to the students (located in the course resource materials). Students may click on the glossary to study the definition of terms with which they are not familiar. The "Resource Materials" section of the course makes forms and documents available to assist students in their studies
- Upon completion of the course material, each student will be required to respond to a course evaluation in addition to a multiple-choice final examination.

### **ADA Compliance**

Upon request, reasonable accommodations will be provided to individuals with a documented disability to assure that an equal opportunity to participate in this course is provided. For further information, contact our office at (800)966-9866.

### **Vendor Contact Information**

The administrative offices ProEducate are located in Metairie, Louisiana. We can be reached by telephone at 800-966-9866 from 8 AM to 5 PM, Central time or by email [StudentServices@ProEducate.com](mailto:StudentServices@ProEducate.com)

### **Disclaimer**

These materials are to be used for informational purposes and should not be construed as specific legal advice, nor are they designed to cover every aspect of a legal situation or every factual circumstance that may arise regarding the subject matter included.

This publication is for reference purposes only and readers are responsible for contacting their own attorneys or other professional advisors for legal or contract advice. The

comments provided herein solely represent the opinions of the authors and are not a guarantee of interpretation of the law or contracts by any court or by the Louisiana Real Estate Commission.

# **Learning Objectives**

- ✓ Review the latest updates to the Property Disclosure Document (PDD)
  - ✓ Identify best practices in use of the Property Disclosure
  - ✓ Review the latest updates to the Residential Agreement to Buy or Sell (RABS)
  - ✓ Identify best practices in use of the Residential Agreement
  - ✓ Extend licensee knowledge by identifying alternative financing options
  - ✓ Discuss recent legal cases and their effects on the industry
  - ✓ Review case studies and observe best practices in order to limit liability
-

## **COURSE OUTLINE**

### **2024 Mandatory – LREC Mandated Forms and Hot Topics**

#### **Module 1: Updates to the Property Disclosure Document (PDD)**

Basic Concept Review

Updates to the Property Disclosure Document

Introduction

Exemption

Form

Section 1 –

Land

Section 2 – Termites, Wood-Destroying Insects and

Organisms Section 3 – Structures

Section 4 – Plumbing, Water, Gas and Sewerage

Section 5 – Electrical, Heating and Cooling,

Appliances Section 6 – Flood, Flood Assistance and

Flood Insurance Acknowledgements

#### **Module 2: Updates to the Residential Agreement to Buy or Sell (RABS)**

General Notes and Changes

Updates to the Residential Agreement

Box at the Top

Property

Description

Mineral Rights

Prorations, Special Assessments, and Other

Costs Deposit Held by Third Party

Leases

New Home Construction

Due Diligence and Inspection Period (DDI)

Addenda

Acceptance

Expiration of Offer



## **Module 3: Current Trends**

### Owner-Financing and Alternatives

Using the financing clause as a  
guide Current market implications

Owner-  
Financing Bond  
for Deed

## **Module 4: Hot Topics and Case Studies**

### Class Action Fallout

Sitzer/Burnett

Overview Verdict

Implications

Other Cases

Best Practice Suggestions

- a. Buyer-broker agreements
- b. Anti-trust risk reduction
- c. Signal vs. Noise

### Reducing Risk on Reoccurring Issues

General liability overview

Published case examples.

Non-Published Case Examples



**MODULE ONE**  
**UPDATES TO THE**  
**PROPERTY**  
**DISCLOSURE**  
**DOCUMENT (PDD)**

# **MODULE ONE:**

## **UPDATES TO THE PROPERTY DISCLOSURE DOCUMENT (PDD)**

### **I. Basic Disclosure Law Review**

In accordance with R.S. 9:3196 through 9:3200, unless exempted therein, the seller of residential real property shall complete a property disclosure document in a form prescribed by the Louisiana Real Estate commission or a form that contains at least the minimum language prescribed by the commission.

#### **A. Who is Required to Make a Disclosure?**

ALL SELLERS are required to make written disclosure of known defects regarding a property being transferred. A SELLER'S obligation to furnish a *Property Disclosure Document* applies to any transfer of any interest in residential real property, whether by sale, exchange, bond for deed, lease with option to purchase, *etc.*

### **Part One - UPDATES TO THE PROPERTY DISCLOSURE DOCUMENT**

To fulfill your duties as a real estate licensee only the most current documents prescribed by the Louisiana Real Estate Commission must be used. The LREC has published both an updated Property Disclosure Document (PDD) and a Residential Agreement to Buy or Sell (RABS) which will be required for use as of January 1, 2024.

In this module we will review the various updates and revisions made to the Property Disclosure Document. While not all changes are significant, we will review them in their entirety to be sure you are as up to date as possible and understand all revisions made to the form both big and small.

Likely the most notable change you should notice right away is the rearrangement of the initial pages of the PDD. After discussion and review of licensee comments it was thought best to move the explanation page to the beginning and follow with the exemption and acknowledgement pages next.

In practice the idea here is to define the document, obligations, and define the legal terms prior to presenting any parts of the document requiring the seller to initial or sign. As a general principle it is best to explain the purpose of the document first, present the items to be completed next.

One final note before we begin: a complete "redlined" version of the Property Disclosure Document is included with your course materials labeled as **Appendix A**. Feel free to reference it as you review the updates if you find it helpful to see the actual edits made from the old version.

Let's review each part that contains revisions, starting with the "new" page 1 of the document.

## Page 1.1 – Document Introduction and Rights and Duties of the Parties

PROPERTY DESCRIPTION (ADDRESS, CITY, STATE ZIP)

DATE

### PROPERTY DISCLOSURE DOCUMENT

In accordance with LSA-R.S. 9:3196-3200, a SELLER of residential real property shall furnish BUYERS with a *Property Disclosure Document*. A complete copy of these statutes may be found at: [www.legis.la.gov](http://www.legis.la.gov). The required *Property Disclosure Document* may be in the form promulgated by the Louisiana Real Estate Commission (“Commission”) or in another form containing substantially the same information. The Commission form may be found at: [www.lrec.gov](http://www.lrec.gov).

**RIGHTS OF BUYER AND CONSEQUENCES FOR FAILURE TO DISCLOSE:** If the *Property Disclosure Document* is delivered after the BUYER makes an offer, the BUYER can terminate any resulting real estate contract or withdraw the offer for up to **72 hours** after receipt of the *Property Disclosure Document*. This termination or withdrawal will be without penalty to the BUYER, and any deposit or earnest money shall be promptly returned to the BUYER (despite any agreement to the contrary).

**DUTIES OF REAL ESTATE LICENSEES AND CONSEQUENCES FOR FAILURE TO FULFILL SUCH DUTIES:** Louisiana law requires real estate licensees to inform their clients of those clients’ duties and rights in connection with the *Property Disclosure Document*. Failure to inform could subject the licensee to censure, suspension, or revocation of his or her license, as well as fines. The licensee is not liable for any error, inaccuracy, or omission in a *Property Disclosure Document*, unless the licensee has actual knowledge of the error, inaccuracy, or omission by the SELLER.

➤ **The Changes:** Some slight revisions to terminology, other than being moved to the beginning this part is largely the same. Main revisions were efforts to better have the language flow across the document, as well as trying to match the proper terminology defined in the law itself. For instance, in this section you may notice the term “must” was replaced by “shall” in a few places to better match the law and improve continuity throughout the form.

➤ **Best Practices/Legal FAQ/Common Misunderstandings:** Questions come up a lot about the last sentence and the term “actual knowledge.” This is related to La. R.S. 9:3894 which states:

*licensee shall not be liable to a customer for providing false information to the customer if the false information was provided to the licensee by the licensee's client or client's agent and the licensee did not have actual knowledge that the information was false.*

Actual knowledge means just that; the agent actually knew of an issue with the property and allowed the PDD to be sent to the Buyer anyway knowing that the PDD was inaccurate. Basically, unless the agents are actually aware that the information in the Property Disclosure Document is incorrect, there will be no liability.

- **Practice Tip:** Remember La. R.S. 9:3894 deals with all information provided by agents in a real estate transaction; it is not just tied to the Property Disclosure Document. But also, remember there is another statute that tweaks the actual knowledge standard depending on who is giving the agent information. La. R.S. 9:3893(D) states:

A licensee shall not be liable to a client for providing false information to the client if the false information was provided to the licensee by a customer unless the licensee knew or should have known the information was false.

Unlike the actual knowledge standard under La. R.S. 9:3894, this statute allows for potential liability for constructive knowledge, or better stated, in situations where an agent should have known the information it was passing along was incorrect. The distinction is that the actual knowledge standard applies when information is given by Clients (generally, the agent's actual client) and the constructive knowledge standard is added when information is given by Customers (very generally, parties on the other side of the transaction).

## Page 1.2 – Key Definitions

### KEY DEFINITIONS:

- **“Residential real property” or “property”** is real property consisting of one or not more than four residential dwelling units, which are buildings or structures each of which are occupied or intended for occupancy as single-family residences.
- **“Known defect” or “defect”** is a condition found within the property that was actually known by the SELLER and that results in one or all of the following:
  - a) It has a substantial adverse effect on the value of the property.
  - b) It significantly impairs the health or safety of future occupants of the property.
  - c) If not repaired, removed, or replaced, significantly shortens the expected normal life of the property.

**The Changes:** Almost nothing new here other than slight formatting adjustments. However, this is a good time for licensees to take the time to review and explain these terms to their clients. As licensees this is one of our important fiduciary responsibilities laid out in agency law.

**Best Practices/Legal FAQ/Common Misunderstandings:** The vast majority of claims and lawsuits real estate agents and their Sellers have to deal with are with claims by Buyers relating to defects. It is extremely important to discuss the above definition of “known defect” and “defect” with your Client(s) prior to them filling out the property disclosure form, or at least point them in the direction of this definition. As you will see on Question 11, Page 6 of the PDD, there are 18 specific topics the PDD is asking the Seller to state whether defects exist in, and even one question labelled “Other” where the Seller can fit any issues which do not fit under the other 18 categories. There is no “not known” here and for good reason; the person filling out the PDD either knows or does not know of a defect's existence.

Sellers, and in a lot of ways their agents, are sometimes at a disadvantage in regards to the questions “is this a defect”, as every home, every set of facts, is different. So there is not always a perfect answer as to whether or not something is a defect, but in looking at those definitions, sometimes common sense and erring on the side of caution are the best practice.

The Seller should pay attention to the language in the definitions. A “substantial” adverse effect on the value of the property means just that: substantial. A few small holes in sheetrock left over from paintings are likely not to be considered defects; mass termite damage to the studs where those nails had been placed likely will be considered defects. The words in the PDD have meaning.

“Significantly impairs the health and safety of future occupants” should be a commonsense question. An example of the same that was an actual issue was an electrical socket that for a period of months had the habit of sparking and emitting smoke, but that issue went away for a time. Seller did not get the issue inspected and did not disclose that issue in a sale a year later. Shockingly (sarcasm), this untreated and un-inspected issue arose after the sale and could have caused a major fire or injury. This, for most people, would be a commonsense disclosure; but apparently not all Sellers see it that way. Sellers should err on the side of caution.

“If not repaired, or removed or replaced” is a very interesting definition, as it brings up the question of whether or not a defect exists if it was repaired. Generally, the Property Disclosure Form specifically discusses when it wants to know about “repairs,” such as when it directly asks that question under 6(d) (Termites), 12(c) (fire, wind, hail, lightning or other property damage), and 13 (foundation). For the rest, if a Seller believes an issue to be fully repaired, they should not be held liable for failure to disclose.

*Orr v. Jones*, a Jefferson Parish case which dealt with an older version of the PDD that did not specifically ask for information from Sellers about “foundation repairs,” still provides insight into “repairs” and the PDD. In that case, Sellers were sued for bad faith redhibition and agents for misrepresentation, for allegedly failing to disclose a defect with a foundation. The Court found the Sellers and Agent not liable because the evidence at trial shows that they believed the foundation to be repaired at the time of the disclosure to the Buyer and had no intent to mislead or defraud the Buyer. It is important to note that the true belief was the basis of the finding of no liability. Information that could have called that into question, such as an inspection report from a previous buyer who did not close on the property which called into question whether the foundation was truly repaired, could change a Court’s decision.

#### **OTHER IMPORTANT PROVISIONS OF THE LAW:**

- A *Property Disclosure Document* shall NOT be considered a warranty by the SELLER.
- A *Property Disclosure Document* is for disclosure purposes only; it shall not be construed as part of any contract between the SELLER and the BUYER.
- The *Property Disclosure Document* shall not be used as a substitute for any inspections or warranties that the BUYERS or SELLER may obtain.
- Nothing in this law precludes the rights or duties of a BUYER to inspect the physical condition of the property.
- The SELLER shall not be liable for any error, inaccuracy, or omission of any information required to be delivered to the BUYERS if the error, inaccuracy, or omission was not a willful misrepresentation, according to the best of the SELLER's information, knowledge, and belief or was based on information provided by a public body or another person with a professional license or special knowledge, who provided a written or oral report or opinion that the SELLER reasonably believed to be correct and which was transmitted by the SELLER to the BUYER.

**The Changes:** You’ll notice here again the terminology was adjusted adding the term “shall” where appropriate. As was on a later page in previous editions, you might be able to see why it

was thought important to move these explanations to the first page. As a licensee it is prudent that you are well informed as to the terminology and be able to help explain these real estate terms to the parties. While you are not a lawyer and should certainly not give legal advice, it is expected that you understand all duties and responsibilities laid out on page 1 as well as the key real estate definitions.

**Best Practices/Legal FAQ/Common Misunderstandings:** This is great language for a Seller and Agents, but it is not automatic that a Seller or Agent will be absolved of any liability just because these exist. Remember, goof wording and language like this can help reduce the risk of liability, but liability is not always completely eliminated purely because of this language.

## Page 2.1 – Property Disclosure Exemption Form

### PROPERTY DISCLOSURE EXEMPTION FORM

In accordance with LSA-R.S. 9:3196-3200, a SELLER of residential real property shall furnish BUYERS with a *Property Disclosure Document*. A complete copy of these statutes may be found at: [www.legis.la.gov](http://www.legis.la.gov). The required *Property Disclosure Document* may be in the form promulgated by the Louisiana Real Estate Commission (“Commission”) or in another form containing substantially the same information. The Commission form may be found at: [www.lrec.gov](http://www.lrec.gov).

**The Changes:** As with previous section, you’ll notice more small changes here further utilizing the terms shall and may in similar circumstances to previous sections. Important to note here that at least one of the checkboxes listed from numbers 1-15 should be checked. Either the seller fits one of the exemptions listed in numbers 1-14, or they are not exempt from making disclosure and therefore should check choice #15.

**Best Practices:** Regarding the use of “shall,” it is likely one of the most commonly used words in all contracts,

and very likely, also the most misused word in contracts. It is used perfectly here, as its correct usage is where it has the meaning of “has a duty to” or “is obligated to.” The change here is in the sentence “In accordance with LSA-R.S. 9:3196-3200, a SELLER of residential real property shall furnish BUYERS with a Property Disclosure Document.”

So, in accordance with the aforesaid Louisiana law, the LREC has correctly clarified that the Seller “has a duty” to and is “obligated” to provide the Buyer with the Property Disclosure Form. There is no way around it; the Seller has that obligation imposed on it by Louisiana law.

That law gives that obligation some teeth right off the bat through the also edited provision:

If the Property Disclosure Document is delivered after the BUYER makes an offer, the BUYER can terminate any resulting real estate contract or withdraw the offer for up to 72 hours after receipt of the Property Disclosure Document. This termination or withdrawal will be without penalty to the BUYER, and any deposit or earnest money shall be promptly returned to the BUYER (despite any agreement to the contrary).

So, if a Buyer submits an offer prior to the Seller providing the Property Disclosure form, and the Buyer decides to withdraw its offer within the 72-hour window, then the Seller “has a duty

to” and is “obligated to” return the deposit to the Buyer, even if there was an agreement to the contrary. Although it does not state it specifically, Seller would likely be deemed to have an obligation to direct the party actually holding the deposit (such as the Listing Broker or title company) to provide the deposit to Buyer.

**WHO IS REQUIRED TO MAKE DISCLOSURE? ALL SELLERS are required to make written disclosure of known defects regarding a property being transferred.** A SELLER’S obligation to furnish a *Property Disclosure Document* applies to any transfer of any interest in residential real property, whether by sale, exchange, bond for deed, lease with option to purchase, etc. The following transfers are exempt from the requirement to provide a *Property Disclosure Document*:

CHECK ALL THAT APPLY:

1. Transfers ordered by a court, including but not limited to a transfer ordered by a court in the administration of an estate, a transfer pursuant to a writ of execution, a transfer by any foreclosure sale, a transfer by a trustee in bankruptcy, a transfer by eminent domain, and any transfer resulting from a decree of specific performance.

**Best Practices:** Everyone tries to fit into the exemptions to the Property Disclosure Document, but Agents need to be careful especially when their clients are asking if this applies to them. There have been numerous occasions where a Seller or a Succession Representative tells the agent that their property was or is Succession property, so “does this exemption apply?” Quite frankly, with that limited information that answer is generally “Yes it would.” But what if the Seller in those situations fails to inform their agent that the property was a part of a Succession or still is, but that the Seller or Succession Representative had been living in the property for two years obviously seeing firsthand any possible issues with the property? With that additional information, it would be clear that the original reasoning behind the agents original “Yes it would” opinion would not apply as clearly. And the LREC made a great change below, which helps to make this even more clear.

### Page 3.2 – Seller Acknowledgements with Checkboxes

CHECK ONE BOX:

- SELLER claims that he/she is exempt from filling out the *Property Disclosure Document* and declares that SELLER has no knowledge of known defects to the property.

OR

- SELLER has reviewed the *Property Disclosure Exemption Form*. SELLER does not claim any of the exemptions enumerated in the *Property Disclosure Exemption Form*. Accordingly, SELLER will complete the *Property Disclosure Document*.

OR

- SELLER claims that he/she is exempt from filling out the *Property Disclosure Document* and declares that SELLER has knowledge of known defects to the Property and will disclose such known defects on the *Property Disclosure Document*.

**The Changes:** You will notice a key change and addition to the Property Disclosure Document here. Remember the form requests the seller to acknowledge whether they are



exempt or not on page 2. Furthermore, at the top of page 3 the definition of known defects is defined for reference of parties. Finally, here on Page 3 the form requests the seller to acknowledge whether or not they are exempt as well as whether or not they have knowledge of known defects to the property.

You'll see that a third checkbox was added here to help better clarify the seller's disclosure and knowledge of defects. This third checkbox outlines the following language:

*SELLER claims that he/she is exempt from filling out the Property Disclosure Document and declares that SELLER has knowledge of known defects to the Property and will disclose such known defects on the Property Disclosure Document.*

Therefore, it is key here to understand that some sellers might be exempt from the requirement to provide a complete Property Disclosure BUT if they have actual knowledge of defects to the property this still must be disclosed. In other words, even if a seller is exempt it is possible they have actual knowledge of a defect.

For example, what if an heir had assisted their parents a few short years ago in arranging for an insurance claim due to storm damage on the property's roof? If this heir inherits the property and then places it for sale, it is important to note that it is likely that the heir would be considered to have actual knowledge of the defect to the property involving the roof.

Therefore, even though the property would likely fit one of the exemptions outlined on page 2, the third checkbox added here would be proper to check which outlines that the heir may fit an exempt category but has actual knowledge of a defect. Remember the law requires that sellers disclose all known defects, whether exempt or not.

**Best Practices:** This is a great addition by the LREC, and as discussed above, makes disclosure obligations more clear. It helps to take the spotlight, or more appropriately the blame, off the agents when a Seller attempts to state that "the Agent told me I was exempt from the disclosure form." Now, for example, a succession administrator, who is exempt, is having to either acknowledge they have no knowledge of defects or will have to fill out a PDD even if exempt.

## Page 3.3 – Signatures of the Parties

SELLER (sign) _____	Date _____	Time _____	(print) _____
SELLER (sign) _____	Date _____	Time _____	(print) _____
SELLER (sign) _____	Date _____	Time _____	(print) _____
SELLER (sign) _____	Date _____	Time _____	(print) _____
<u>Received by:</u>			
BUYER (sign) _____	Date _____	Time _____	(print) _____
BUYER (sign) _____	Date _____	Time _____	(print) _____
BUYER (sign) _____	Date _____	Time _____	(print) _____
BUYER (sign) _____	Date _____	Time _____	(print) _____

**The Changes:** Nothing has changed here in the section for parties to sign. Remember, this is one of two major places on the Property Disclosure Document which requires signature from the parties. The first, here at the end of page 3, is referencing the Property Disclosure Exemption Form and the acknowledgements made by the seller and received by the buyer.

There are two places for party signatures since in some cases there will be an exemption in effect and therefore no further disclosure will be made. Or, as in many other cases, this part acknowledges the seller(s) requirement to disclosure and therefore the document will be completed to the best of the seller's knowledge.

**Best Practices:** As real estate agents it likely goes without saying, but people fail to fully fill out this section time and time again. With wet signatures, try and make sure that this is getting fully filled out. As most Property Disclosure forms are executed via DocuSign these days, the program takes care of the same for you as all of this information is generally contained within the DocuSign signature.

## Page 4.1 – Explanations of Representations

<p>The following representations are made by the SELLER and <b>NOT</b> by any real estate licensee.</p> <p><b>This document</b> is not a substitute for any inspections or professional advice the BUYER may wish to obtain.</p> <p>The following information is based only upon the SELLER's actual knowledge of the property. The SELLER <b>may</b> disclose <b>only</b> what the SELLER actually knows. The SELLER may not know about all material or significant items affecting the property.</p> <p>Y = Yes    N = No    NK = No Knowledge</p>
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**The Changes:** More terminology cleanup here as you'll notice the terms "may" disclose and "only" what the seller actual knows have been clarified. Also more detail was added

in changing the wording to “This document” is not a substitute, in place of simply “It” as appeared before, which helps to clarify the documentation and references here.

Remember, for sellers required to make disclosure they will be asked to check something in each area of the Property Disclosure Document. Not checking something will always add confusion, so care has been taken in providing the proper wording and choices as you’ll see throughout the form.

Sellers should carefully check either Y for Yes, N for No, or NK for No Knowledge.

**Best Practices:** In discussing the responses to the Property Disclosure Form questions, reading the above box which explains that the disclosure is based upon “actual knowledge” is a great practice. The actual knowledge standard is heightened, one must know about the issue – full stop.

## Page 4.2 – Section 1 Land

SECTION 1: LAND					
1. What is the length of ownership of the property by the SELLER? _____					
2. Lot size or acres _____					
3. Are you aware of any servitudes <span style="border: 1px solid red; padding: 0 2px;">or</span> encroachments regarding the property, other than typical, customary utility servitudes, that would affect use of the property? <span style="float: right;"><input type="checkbox"/> Y <input type="checkbox"/> N</span>					
4. Are you aware of any rights vested in others? Check all that apply and explain at the end of this section.					
Timber rights	<input type="checkbox"/> Y	<input type="checkbox"/> N	Leased land	<input type="checkbox"/> Y	<input type="checkbox"/> N
Right of ingress or egress	<input type="checkbox"/> Y	<input type="checkbox"/> N	Mineral rights	<input type="checkbox"/> Y	<input type="checkbox"/> N
Right of way	<input type="checkbox"/> Y	<input type="checkbox"/> N	Surface rights	<input type="checkbox"/> Y	<input type="checkbox"/> N
Right of access	<input type="checkbox"/> Y	<input type="checkbox"/> N	Air rights	<input type="checkbox"/> Y	<input type="checkbox"/> N
Servitude of passage	<input type="checkbox"/> Y	<input type="checkbox"/> N	Usufruct	<input type="checkbox"/> Y	<input type="checkbox"/> N
Servitude of drainage	<input type="checkbox"/> Y	<input type="checkbox"/> N	Other _____		
Common driveway	<input type="checkbox"/> Y	<input type="checkbox"/> N			

**The Changes:** The main change you should notice to this section was an addition of a space for the seller to disclose whether the land is leased. This should be straightforward which is why the choices match others in this section with a simple Y for yes or N for no.

**Best Practices:** These are straightforward questions, that Sellers sometimes make mistakes on. Many Sellers have misremembered (or sometimes misrepresented) the size of their property under Number 2. As to number 3, it is likely a lot of Sellers are not aware what their original act of sale or closing documents stated, but persuasive argument can be made that they should be assumed to have knowledge of what was in there. And that documentation can contain information and/or confirmation that some of the things listed in Number 3 do in fact exist. Sellers need to think about this question and what they were informed of in writing when they purchased the property. Finally as to Number 4, there is no “Not Known” option here, as the question is

specifically asking whether you are “aware” of any of the list of rights.

### Page 4.3 – Section 1 Land (Continued)

5. Has any part of the property been determined to be or pending determination as a wetland by the United States Army Corps of Engineers under §404 of the Clean Water Act?  Y  N  NK

*If yes, documentation shall be attached and become a part of this Property Disclosure Document.*

The Clean Water Act is a federal law that protects the wetlands of the United States. Section 404 of the Act contains permit requirements for altering or building on property that has been determined a wetland by the Army Corps of Engineers. The Corps may assess a fee to the **SELLER** or **BUYER** of a property for this determination. A property that has been determined a wetland may result in additional costs for a Section 404 permit.

Question Number	Explanation of “Yes” answers	<input type="checkbox"/> Additional sheet is attached	
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

BUYER’S Initials: \_\_\_\_\_ BUYER’S Initials: \_\_\_\_\_ SELLER’S Initials: \_\_\_\_\_ SELLER’S Initials: \_\_\_\_\_  
BUYER’S Initials: \_\_\_\_\_ BUYER’S Initials: \_\_\_\_\_ SELLER’S Initials: \_\_\_\_\_ SELLER’S Initials: \_\_\_\_\_

**The Changes:** Nothing has really changed in this section of the form. As a good reminder each section includes an area such as you’ll notice here for additional information and explanation for “Yes” answers. Any time a seller has selected a choice on the form which acknowledges a defect, it might be prudent to add additional explanations or even additional sheets and/or documents to best provide complete disclosure to potential buyers.

**Best Practices:** The written “Explanation of Yes Answers” sections found throughout the Property Disclosure Form is where a lot of Sellers, and sadly by association, their agents, get into trouble. Numerous lawsuits have been filed arising out of situations such as “yes the seller stated there was prior flooding, but only wrote about a hose leak in a laundry room and not the 5 feet of water from Hurricane Ida.” That is obviously a glaring example, but arguments do get made that explanations are not detailed enough, so it is best to tell your clients to be sure they are providing an explanation to all issues when they mark “Yes” to a question that calls for more detail.

<b>SECTION 2: TERMITES, WOOD-DESTROYING INSECTS AND ORGANISMS</b>	
6. Has the property ever had termites or other wood-destroying insects or organisms?	
a) During the time the SELLER owned the property?	<input type="checkbox"/> Y <input type="checkbox"/> N
b) Prior to the time the SELLER owned the property?	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> NK
c) Was there any damage to the property?	<input type="checkbox"/> Y <input checked="" type="checkbox"/> N <input type="checkbox"/> NK
d) Was the damage repaired?	<input type="checkbox"/> Y <input checked="" type="checkbox"/> N <input type="checkbox"/> NK
7. If the property is currently under a termite contract, provide the following:	
a) Name of company _____	
b) Date contract expires _____	
c) List any structures not covered by contract _____	
Question Number	Explanation of "Yes" answers <input type="checkbox"/> Additional sheet is attached
_____	_____
_____	_____
_____	_____
_____	_____

**The Changes:** In this section the only slight change was the addition of the "N" choice box for items c and d under choice 6. Previously the only choice here was either "Y" or "NK", and the "N" box was added for clarity from the seller. For instance, if the seller's knowledge is that there was no damage to the property and/or nothing was repaired then a clear no is likely a better choice than simply Not Known.

**Best Practices:** Termite disclosures are the root of a lot of litigation in Louisiana. And the failure to provide full documentation or explanation to the termite section is usually a reason for it. "Repairs" were discussed earlier, but it must be restated – you need to have a legitimate belief that the repairs fixed all of the issues in order to avoid liability such as past termite issues. Almost every agent in Louisiana has dealt with a Seller who discloses that their property had termites, but that it was repaired. There are also many agents who know of Sellers who report that way, but were also in possession of information, such as a Wood Destroying Insect Report (WIDR), that calls into question whether or not the repairs were complete and Seller failed to disclose the same. Sellers need to explain this information clearly and fully.

## Page 5.2 – Section 3: Structures

SECTION 3: STRUCTURE(S)			
8. What is the approximate age of <span style="border: 1px solid black; padding: 2px;">each structure</span> on <span style="border: 1px solid black; padding: 2px;">the</span> property?			
Main structure _____			
Other structures _____			
9. Have there been any additions or alterations made to the structures during the time the SELLER owned the property?			
<input type="checkbox"/> Y <input type="checkbox"/> N			
If yes, were the necessary permits and inspections obtained for all additions or alterations?			
<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> NK			
10. What is the approximate age of the roof of each structure?			
Main structure _____			
Other structures _____			
BUYER'S Initials: _____	BUYER'S Initials: _____	SELLER'S Initials: _____	SELLER'S Initials: _____
BUYER'S Initials: _____	BUYER'S Initials: _____	SELLER'S Initials: _____	SELLER'S Initials: _____

**The Changes:** Only slight change here to the wording on #8 to better match the area below where the disclosure asks for details on the age of the main structure as well as other structures. By using the language “each structure,” a seller should separate each structure and provide the approximate age of each structure separately in the area provided.

**Best Practices:** For older properties especially, if a Seller is not sure, using “approximately” for Number 8 is good practice.

Litigation seems to follow number 9 through issues with both questions listed. As to “structures on the property,” discuss anything that could possibly fit into that definition; for example, a shed, pergola, outhouse, separate carport, covered boat dock.

As to permits and inspections, it is a hard question, as Sellers and their agents do not always know of the laws associated with construction of certain structures or additions to those structures. Sellers tend to quickly go over this, but a lot of litigation has been filed due to Sellers marking Yes to the second question, when they did not get a permit for their skylight additions, or pool house, or connected carport, and one was needed by municipal code.

<b>SECTION 4: PLUMBING, WATER, GAS, AND SEWAGE</b>	
15. Are you aware of any defects with the plumbing system?	
a) During the time the SELLER owned the property?	<input type="checkbox"/> Y <input type="checkbox"/> N
b) Prior to the time the SELLER owned the property?	<input type="checkbox"/> Y <input type="checkbox"/> N
16. Are you aware of any defects with the water piping?	
a) During the time the SELLER owned the property?	<input type="checkbox"/> Y <input type="checkbox"/> N
b) Prior to the time the SELLER owned the property?	<input type="checkbox"/> Y <input type="checkbox"/> N
c) The water is supplied by:	
<input type="checkbox"/> Municipality <input type="checkbox"/> Private utility <input type="checkbox"/> On-site system <input type="checkbox"/> Shared well system <input checked="" type="checkbox"/> Other _____	
d) How many private wells service the primary residence only? _____	
e) If there are private wells, when was the water last tested? Date _____ Results _____	
f) Are you aware of any polybutylene piping in the structure?	<input type="checkbox"/> Y <input type="checkbox"/> N
17. Is there gas service available to the property?	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> NK
a) If yes, what type? <input type="checkbox"/> Butane <input type="checkbox"/> Natural <input type="checkbox"/> Propane	
b) If yes, are you aware of any defects with the gas service?	<input type="checkbox"/> Y <input checked="" type="checkbox"/> N
c) If Butane or Propane, are the tanks: <input type="checkbox"/> Owned <input type="checkbox"/> Leased	
d) If leased, please list service provider: _____	
18. Are you aware of any defects with any water heater?	
a) During the time the SELLER owned the property?	<input type="checkbox"/> Y <input type="checkbox"/> N
b) Prior to the time the SELLER owned the property?	<input type="checkbox"/> Y <input type="checkbox"/> N

**The Changes:** In this section you’ll notice some changes in the way the disclosure questions are worded and as a result changes to the selection choices. For instance, in several places the phrase “are there any known” is replaced by the phrase “are you aware of any” defects. As a result, in these same areas you’ll also see that the “NK” choice was removed.

The difference in the amended language here better matches the law and the key definitions laid out earlier in the PDD. The seller is being asked if “they are aware” - which eliminates the need for a “NK” choice. Therefore, a seller should carefully consider each item asked about in this section and choose the best selection based on the best of their knowledge. As a reminder, any further details, or explanations can be provided in the blanks provided at the end of the section.

**Best Practices:** Beware the “prior to the time Seller owned the Property” questions. Issues have arisen where the Seller marked no, but the Plaintiff was able to go back to the transaction file of the Seller’s own purchase of the property and locate past property disclosure forms which stated there was an issue. The Seller may not even remember that, but that is powerful evidence against a Seller. It is good practice to remind Seller to think back at their past closing file when it comes to the “prior to the time Seller owned the Property” questions.

## Page 8.1 – Section 5: Electrical, Heating and Cooling, Appliances

### SECTION 5: ELECTRICAL, HEATING AND COOLING, APPLIANCES

20. Are **you aware of any** defects with the electrical system?
- a) During the time the SELLER owned the property?  Y  N
- b) Prior to the time the SELLER owned the property?  Y  N
- c) Are you aware of any aluminum wiring in the structure?  Y  N
21. Are **you aware of any** defects with the heating or cooling systems?
- a) During the time the SELLER owned the property?  Y  N
- b) Prior to the time the SELLER owned the property?  Y  N

22. If a fireplace(s) exists, is it working?  Y  N  NK
23. Are **you aware of any** defects in any permanently installed or built-in appliances?
- a) During the time the SELLER owned the property?  Y  N
- b) Prior to the time the SELLER owned the property?  Y  N

**The Changes:** Very similar to the previous section, you'll notice the main questions asked for each item number now utilize the same phrase "are you aware" of any defects. Just as before the "NK" selection was also removed to better match the question as it is asked here. Another reminder as to the importance of those key terms and definitions previously outlined.

**Best Practices:** Same as above, be careful with "prior to the time Seller owned the property."



**Page 8.2 – Section 5 (continued): Electrical, Heating and Cooling, Appliances**

24. Does the property or any of its structures contain any of the following? Check all that apply and provide additional details at the end of this section.

Security alarm	<input type="checkbox"/> Y	<input type="checkbox"/> N	<input type="checkbox"/> NK	Generator	<input type="checkbox"/> Y	<input type="checkbox"/> N	<input type="checkbox"/> NK
Fire alarm	<input type="checkbox"/> Y	<input type="checkbox"/> N	<input type="checkbox"/> NK	Smoke detector <i>(10-yr. lithium battery)</i>	<input type="checkbox"/> Y	<input type="checkbox"/> N	<input type="checkbox"/> NK
Solar panel	<input type="checkbox"/> Y	<input type="checkbox"/> N	<input type="checkbox"/> NK	CO detector <i>(Long-life, sealed battery)</i>	<input type="checkbox"/> Y	<input type="checkbox"/> N	<input type="checkbox"/> NK
Audio/Video surveillance	<input type="checkbox"/> Y	<input type="checkbox"/> N	<input type="checkbox"/> NK				

a) Are any of the items leased?  Y  N  NK

b) If leased, please list service provider: \_\_\_\_\_

Question Number	Explanation of "Yes" answers	<input type="checkbox"/> Additional sheet is attached
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

BUYER'S Initials: \_\_\_\_\_ BUYER'S Initials: \_\_\_\_\_ SELLER'S Initials: \_\_\_\_\_ SELLER'S Initials: \_\_\_\_\_  
 BUYER'S Initials: \_\_\_\_\_ BUYER'S Initials: \_\_\_\_\_ SELLER'S Initials: \_\_\_\_\_ SELLER'S Initials: \_\_\_\_\_

**The Changes:** You'll notice some changes here within Question 24 under Section 5. Previously this section only addressed installed security systems. Now you'll see it has been expanded to cover various security-related items including solar panels, generators, smoke detectors, Carbon Monoxide (CO) detectors etc. Later in the document you'll see that questions that used to address these such as solar panels (former question #53) have been removed.

These updates better address the modern world and the way that alarm systems, camera surveillance, and other items are handled in modern real estate. In addition, it makes sense to also include similar safety items in this section for clarity. Finally, you'll notice additional information should be provided regarding any systems that are leased and to include the service provider as well.

The smoke detector and CO detector questions are important due to an updated Louisiana Law relative to these items. Since many residential properties will fall within jurisdiction of this requirement, it makes sense to have the seller disclose the property's current compliance with the statute.

For reference **LA Rev Stat § 40:1581** states the following:

*Smoke detectors; carbon monoxide detectors; one- or two-family dwellings*

*A. All existing one- or two-family dwellings at the time of sale or lease shall contain, at a minimum, an operable ten-year, sealed lithium battery smoke detector.*

*B. All existing one- or two-family dwellings at the time of sale or lease shall contain, at a minimum, an operable carbon monoxide detector with a long-life, sealed battery. The carbon monoxide detector may be combined with smoke detection.*

*C. Professional installers who install generators in one- or two-family dwellings shall include with installation of a home generator, at minimum, an operable carbon monoxide detector with a long- life, sealed battery. The carbon monoxide detector may be combined with smoke detection.*

*D. Failure to comply with the provisions of this Section shall not be a reason for nonpayment of any insurance claims.*

*E. Failure to comply with the provisions of this Section shall not cause a delay or a stoppage in the transfer of the property.*

*F. The real estate agent shall not be liable for the seller's failure to comply with the provisions of this Section.*

**Best Practices:** A Seller should know the answers to these questions, so there should rarely be mistakes on them. But be wary of questions with Generators, especially with whether it is a “whole home generator.” As silly as it sounds, people have different expectations as to what a “whole home generator” is; i.e. covers the major appliances or ia able to cover every plugged in iPhone, iPad, and every other appliance and light running simultaneously while four loads of laundry and dishes are running. As crazy as it sounds, multiple claims and lawsuits have been filed on this issue, which are a waste of time, but you would rather not deal with it. So be careful.

## **Page 9 – Section 6: Flood, Flood Assistance, and Flood Insurance**

27. What is/are the flood zone classification(s) of the property? \_\_\_\_\_ What is the source and date of this information? Check all that apply.

Survey/Date \_\_\_\_\_ Elevation Certificate/Date \_\_\_\_\_ Other/Date \_\_\_\_\_

FEMA Flood Map - <https://msc.fema.gov/portal/home>

<https://www.floodsmart.gov/understanding-my-flood-zone>

Other: \_\_\_\_\_ (please provide)

**The Changes:** Only one small update here to the FEMA-related websites where flood map and risk zone information can be found. Remember the importance of sellers disclosing information here as previously covered in recent mandatory courses. Due to requirements such as FEMA’s obtain and maintain requirement, changes to how flood insurance premiums are determined under Risk Rating 2.0, and other similar matters a seller should provide as much detail as possible.

Notice as well that the “NK” selection has been removed from several items within Section 6. For instance, regarding flood insurance (NFIP), the seller should be able to disclose either yes “Y” or no “N” whether they have made an NFIP claim on the property. When asked about previous owners you’ll see the “NK” selection is still there

since the seller may not have knowledge about the previous owners.

As the agent it may be a good idea to request copies of documents which would support items disclosed by the seller in this section such as the flood policy declarations page, elevation certificates, etc.

**Best Practices:** At this point in Louisiana, Courts (and most Louisiana residents) are not sympathetic to a Seller who does not know its flood zone classification or misstated it. Make sure the Seller is aware of their designation.

## Page 13 – Property Disclosure Document Acknowledgements

### PROPERTY DISCLOSURE DOCUMENT ACKNOWLEDGEMENTS

All SELLERS are required to make written disclosure of known defects regarding a property being transferred. I/We attest that the above statements and explanations have been provided by me/us and are true and correct to the best of my/our knowledge. (If either party is represented by a real estate licensee, your signature below acknowledges that you have been informed of your duties and rights under LSA-R.S. 9:3196-3200 and have read and understand the informational statement). **SELLER(S) shall notify all parties, in writing, immediately if any information set forth in this Property Disclosure Document becomes inaccurate, incorrect, or otherwise materially changes.**

**The Changes:** The last sentence in bold print has been added in this section. The addition reiterates the importance of the seller's requirement to disclose any and all known defects. Therefore, if something has materially changed the parties to the document should be notified in writing. There are many examples of why this would be important, but for simplicity consider if a hurricane damaged the property between the time the PDD was signed and prior to the scheduled Act of Sale. The buyer's walk-through opportunity is not quite enough to inform them if a significant defect is now present with the property. Buyers are not inspection professionals and might miss a present defect on visual inspection, even if it is major! Therefore this statement reminds the parties that this document will be updated, or written notification of changes will be required of the sellers if the situation arises.

**Best Practices:** The last sentence - This is a great inclusion which will help to clear up years of arguments by Plaintiffs' attorneys that even though they were informed via email or text of an issue/defect that popped up, since the Property Disclosure Form was not amended, there is still potential liability. Make sure your client tells the other side of any change **in writing**; it protects them and likely you.

**MODULE TWO:**  
**UPDATES TO**  
**THE**  
**RESIDENTIAL**  
**AGREEMENT TO BUY**  
**OR SELL (RABS)**

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## MODULE TWO

### UPDATES TO THE RESIDENTIAL AGREEMENT TO BUY OR SELL

#### RESIDENTIAL AGREEMENT TO BUY OR SELL

##### Introduction: General Notes and Changes:

- The font throughout the document was enlarged to make the form easier to read in all formats including electronic delivery.
- Many small revisions were made to formatting as you would expect anytime the contract is revised and this course will not focus on non-material revisions such as these.
- A full, red-lined copy of the contract is included in the Appendix if you wish to see every revision from the current to the updated version of the contract.
- As with any contract update, please note some line numbers have changed and you may want to revise and/or update any related documents or software accordingly.
- The most current version of the Residential Agreement to Buy or Sell must always be used to follow the requirements set forth in the Law and Rules.
- The updated version discussed here becomes effective January 1, 2024.

#### Page 1 – General Information and Electronic Notice Authorization

LOUISIANA RESIDENTIAL AGREEMENT TO BUY OR SELL			
PROPERTY DESCRIPTION (ADDRESS, CITY, STATE ZIP)		DATE	
Listing Firm		Selling Firm	
Seller's Designated Agent Name & License Number ("Seller's agent")		Buyer's Designated Agent Name & License Number ("Buyer's agent")	
<input type="checkbox"/> Dual Agent			
Brokerage Name & License Number		Brokerage Name & License Number	
Agent Phone Number	Brokerage Phone Number	Agent Phone Number	Brokerage Phone Number
Email Address		Email Address	
Name of Designated Agent Receiving Agreement		Day _____	Date _____ Time _____ <input type="checkbox"/> AM <input type="checkbox"/> PM
Agreement Transmitted by <input type="checkbox"/> electronic _____ <input type="checkbox"/> hand delivery <input type="checkbox"/> other _____			
Signature of Designated Agent Receiving Agreement		Day _____	Date _____ Time _____ <input type="checkbox"/> AM <input type="checkbox"/> PM
Comments _____			

**The Changes:** You will notice that the first page of the agreement has largely been left unchanged. There's been a small revision to location of the dual agency checkbox on the page. In practice this move is not intended to change anything regarding the disclosure requirement. What the move of the box is intended to do is help streamline the contract process. If acting as a dual agent in a transaction, it is not necessary to complete both the "Listing Firm" and the "Selling Firm" information, so by having the checkbox more to one side the idea is to make this concept a little more clear for the parties in these transactions.

#### Electronic Notice Authorization

The BUYER authorizes his or her agent to electronically deliver notices and other communications to the email address he or she provided to his or her agent. Furthermore, the BUYER authorizes the Seller's agent to electronically deliver notices and communications to the Buyer's agent at the email address shown above.

The SELLER authorizes his or her agent to electronically deliver notices and other communications to the email address he or she provided to his or her agent. Furthermore, the SELLER authorizes the Buyer's agent to electronically deliver notices and other communications to the Seller's agent at the email address shown above.

The authorization contained in this Section is not an authorization for the Buyer's agent to communicate directly with the SELLER or a Seller's agent to communicate directly with the BUYER. The BUYER and SELLER agree the use of electronic documents and digital signatures is acceptable and will be treated as originals of the signatures and documents transmitted in this real estate transaction. Specifically, the BUYER and SELLER consent to the use of electronic documents, the electronic transmission of documents, and the use of electronic signatures pertaining to this Agreement, and any supplement addendum or modification relating thereto, including but not limited to any notices, requests, claims, demands and other communications as set forth in the Agreement.

**The Changes:** The other change on the first page of the agreement is slight language revisions within the Electronic Notice Authorization box. The term "further" was removed to better clarify and simplify the statements for both the Buyer and Seller to check.

Remember there are federal and state laws (LUETA, ESIGN) that govern concepts such as electronic document delivery and notice. The language included in this section attempts to best comply with these various requirements such as express authorization for electronic delivery by the parties. However, also remember that even if extremely common in today's world, your clients and customers are not required to participate in electronic delivery of documents. If a party does not choose to authorize then other more traditional methods such as paper documents will need to be used and delivered.

**Best Practices:** In today's world, the agreement of the Buyer and Seller to allow for the use of electronic notice and other communications should be normal procedure. It allows for easy access and communication and allows for changes to take place quickly when needed. It is a good idea to explain to your clients the benefits of allowing for Electronic Notice in residential real estate transactions.

As an important note for operating in the digital world: the contract requirements as well as the LREC Rules still apply! Therefore, it is imperative that any technology such as digital document delivery software used by a licensee is either set up or customized to meet all requirements. While the traditional paper contract may have been the inspiration behind many of the Laws and Rules we follow today, the rapid adoption of technology should not preclude but enhance a licensee’s ability to comply.

## Page 2 – Property Description

1	<b>PROPERTY DESCRIPTION:</b> I / We offer and agree to Buy / Sell the property at:
2	(Municipal Address) _____
3	City _____; Zip _____; Parish _____; Louisiana,
4	(Legal Description) _____
5	_____
6	_____ on lands and
7	grounds measuring approximately (# _____) or as per record title; including all buildings,
8	structures, component parts, and all installed, built-in permanently attached improvements, together with all
9	fences, security systems, all installed speakers or installed sound systems, all landscaping, all outside TV antennas,
10	all satellite dishes, all installed and/or built-in appliances, all ceiling fans, all air conditioning or heating systems
11	including window units, all bathroom mirrors, all window coverings included but not limited to blinds, drapes,
12	curtains, window shades, window coverings, all associated window covering hardware, all shutters, all flooring,
13	all carpeting, all cabinet tops, all cabinet knobs or handles, all doors, all door knobs or handles, all doorbells, all
14	windows, all roofing, all electrical systems, all installed security systems, installed generators, attached television
15	mounts, gas logs, and all installed lighting fixtures, chandeliers and associated hardware, other constructions
16	permanently attached to the ground. If owned by the SELLER prior to date of this Agreement, standing timber,
17	unharvested crops, and ungathered fruits of trees on the property shall be conveyed to the BUYER. The following
18	movable items shall remain with the property; be transferred without any warranty; be deemed to have no value;
19	and, shall not be considered as part of the Sale Price:
20	_____
21	_____
22	_____
23	_____
24	_____
25	_____
26	_____
27	_____
28	All items listed herein are included in the property sold no matter how they are attached or installed, provided
29	that any or all of these items are in place at the time of signing this Agreement to Buy or Sell (the “Agreement”),
30	unless otherwise stated herein. (All of the above contained in lines 2 through 26 are collectively referred to herein
31	as the “Property.”) The following items are excluded from the Property sold:
32	_____
33	_____
34	_____
35	_____
36	_____
37	_____

**The Changes:** You’ll notice some language change on lines 18-20 in the section regarding movable items (personal property) remaining with the property. First the legal term “shall” is added to better match the law and improve continuity throughout the form. In addition, some rearrangements to the ordering of the statements were also made for better flow of the statements.

Remember, this section of the contract is specifically for movable items (or personal

property as it is commonly called) to be added as part of the agreement. The language here is important as it emphasizes that movables are not included in the sales price, such as what might be appraised to determine the property value such as for a mortgage loan.

Any such items should be included here to preserve the promise the Seller is making to the Buyer. In other words, if the Buyer wants to ensure that a movable item such as a free-standing freezer in the garage is left in the property after the Act of Sale this is where it should be included. Later in the contract lines 428-429 emphasize the importance here when stated "This Agreement constitutes the entire Agreement between the parties, and any other agreements not incorporated herein, in writing, are void and of no force and effect." For instance, if not written here the Seller may have no enforceable requirement to leave the freezer behind no matter what may have been said in various negotiations or discussions. This includes communications such as texts and emails after the agreement has been signed! Therefore, remember the importance and make every effort to include such items here in the designated lines.

**Best Practices and Analysis:** This cleaned up the language and made the sentence clearer. The "no value" position is generally the best way to handle movables that are transferred along with the property. Pool tables, chandeliers, specialty appliances are common examples. But do not be surprised in very high-priced real estate if there is pushback on the "no value" designation for movables that in actuality have a very high value. Lenders can have problems with financing a multimillion-dollar home when the value of the property is based upon and includes movables which can be left with the property.

## Page 2.2 – Mineral Rights

37	
38	<b><u>MINERAL RIGHTS:</u></b> If the SELLER transfers any mineral rights, they are to be transferred without warranty.
39	
40	_____ (____%) of the mineral rights owned by the
41	SELLER are to be reserved and retained by the SELLER. The SELLER shall waive any right to use the surface for
42	any such reserved and retained mineral activity or use.
43	
44	<b><u>PRICE:</u></b> The Property will be sold and purchased subject to title and zoning restrictions, servitudes of record, and
45	law or ordinances affecting the Property for the sum of _____
46	_____ (\$ _____) (the "Sale Price").

**The Changes:** One main theme in revisions to the forms was to streamline the documents wherever possible. One such example you will see here as the box surrounding the mineral rights section was removed. In addition to the box, you'll also notice the signature lines for Buyer and Seller

were also removed from this section. Since the initials of all parties are already at the bottom of every page the extra signature lines were deemed unnecessary.



## Page 4 – Prorations, Special Assessments, and Other Costs

96	
97	<b>PRORATIONS, SPECIAL ASSESSMENTS, AND OTHER COSTS:</b> Real estate taxes, flood insurance premiums if
98	assumed, rents, condominium dues, special assessments, homeowners' associations dues, and/or substantially
99	similar dues or other costs for the current year shall be prorated through the date of the Act of Sale. Act of Sale
100	costs, abstracting costs, title search, title insurance, and other costs required to obtain financing shall be paid by
101	the BUYER, unless otherwise expressly provided for by the parties pursuant to a written agreement.
102	
103	All necessary tax, mortgage, conveyance, release certificates or cancellations, and the SELLER closing fees, if any,
104	shall be paid by the SELLER. On or before the date of the Act of Sale, the SELLER shall also pay all previous years'
105	taxes, special assessments, condominium dues, homeowners' associations dues, and/or substantially similar dues
106	or other costs, which were incurred or bear against the Property prior to the Act of Sale, unless otherwise
107	expressly provided for by the parties pursuant to a written agreement.
108	
109	For this Agreement, "special assessment" includes but is not limited to any assessment levied against the Property
110	for payment of local improvement costs by state or local governmental authorities, political subdivisions, quasi-
111	public bodies, or other public or private entities pursuant to agreement, contract, or law.
112	

**The Changes:** You'll notice quite a bit of language change and additional language in this section. As with many areas of the contract, as time goes on situations arise in the marketplace that may require additions and updates. This area is an example as you'll notice the specific addition of "special assessments" added as well as language to clarify what is included and who is responsible for such costs. Added in Lines 113-115 is the following:

*"special assessment" includes but is not limited to any assessment levied against the Property for payment of local improvement costs by state or local governmental authorities, political subdivisions, quasi-public bodies, or other public or private entities pursuant to agreement, contract, or law.*

Remember this information is included in the Property Disclosure Document in question #43. Therefore, the importance in the agreement is clarified that the Seller should disclose any special assessments they are aware of that are either *current* or *pending*. This part is critical! For instance, if a special assessment has been approved by the HOA Board but will not be invoiced for payment until July of the following year, should it be disclosed? **YES!** Therefore, even if the seller has not been formally assessed and the payment is not yet due, a known pending special assessment should be disclosed by the Seller. Although generally the Seller is not obligated to pay this assessment at the Act of Sale, this could be an item that is negotiated between Buyer and Seller.

If there are any disclosed, then you'll see the contract further clarifies who is responsible for these costs. Since these fees could be entirely negotiated, all licensees should be familiar with this section and ensure the intention of the parties is properly indicated here.

**Best Practices:** Given the skyrocketing costs in HOA and Condominium fees due to insurance costs and inflation, expect to see more negotiation and offers/discussion concerning who pays these fees. There are many examples of properties under a Property Association or a Condominium Association where special assessments have been significant and could be a burden on the Buyer if it was not disclosed. The failure to disclose these, especially when significant, has long been a topic of litigation against Seller and their agents.

## Page 4.2 – Deposit Held by Third Party

134  
135 **DEPOSIT HELD BY THIRD PARTY:** Louisiana Administrative Code Title 46, Part LXVII Section 2717 requires that  
136 funds received in a real estate sales transaction shall be deposited in the appropriate sales escrow checking  
137 account, rental trust checking account or security deposit trust checking account of the listing or managing  
138 broker (“Broker”) unless all parties having an interest in the funds have agreed otherwise in writing. I agree to  
139 have the Deposit related to this transaction to be held by a third party and not in a sales escrow account  
140 maintained by the Broker. I understand that the Louisiana Real Estate Commission may not have jurisdiction  
141 over those third parties holding the funds. I acknowledge the Broker is not legally required to disburse a  
142 security deposit in accordance with LAC 46:LXVII.2901 when a third party holds the Deposit.  
143  
144 Failure to deliver the Deposit shall be considered a default of this Agreement. If the Deposit is held by a Broker,  
145 it must be held in accordance with the rules of the Louisiana Real Estate Commission in a federally insured banking  
146 or savings and loan institution without responsibility on the part of the Broker in the case of failure or suspension  
147 of such institution. **If** the parties fail to execute an Act of Sale by date specified herein, and/or a dispute arises as  
148 to ownership of, or entitlement to, the Deposit or funds held in escrow, the Broker shall abide by the Rules and  
149 Regulations set forth by the Louisiana Real Estate Commission.  
150

**The Changes:** In the spirit of streamlining, you’ll also notice revisions to the third-party deposit section. Like what you saw previously regarding mineral rights, in this section both the box and the signature areas were also removed here. While the box and signature lines were removed, the legal language relating to a deposit held by a third party was expanded. The addition of this additional language was intended to reduce the need for a third party deposit addendum which displays another attempt to streamline the contract process.

## Page 5 – Leases

170  
171 **LEASES:** The sale is conditioned upon the BUYER’S receipt of a copy of all written leases, excluding mineral leases,  
172 from the SELLER **within five (5) calendar days** of acceptance of the Agreement. The BUYER **shall** have **five (5)**  
173 **calendar days** after receipt of the aforementioned documents to notify the SELLER whether they are acceptable  
174 to the BUYER. Security deposits, keys/access, and leases are to be transferred to the BUYER at **or before the** Act  
175 of Sale.  
176

**The Changes:** You’ll notice the difference in this clause where references to special assessments and related items have been removed. Those items are covered in the previous section reviewed on page 4. Yet again you’ll also see the term “shall” was inserted in place of other terms. The final small change is here on line 180-181 where

the phrasing now states “at or before the Act of Sale.” These slight changes help to better clarify the obligations of both Buyer and Seller in relation to leases and related property.

## Page 5.2 – New Home Construction

**The Changes:** Wait a minute, there’s no picture here! Correct. This entire section has been repealed from the contract. Therefore, while not standard language on the mandated form, new construction addendums or other agreements can still be added by the parties.

**Best Practices:** The Construction Addendum has given rise to a lot of issues over the past few years, especially as it applies to inspection periods and when issues arise. Be careful then your client is filling this addendum out and talk to your broker regarding the same when you have questions.

## Page 6 – Due Diligence and Inspection Period (DDI Period)

198     **DDI Period Activities:** During the inspection and due diligence period the BUYER may, at the BUYER’S expense,  
199     have any inspections made by experts or others of his choosing. Such physical inspections may include but are  
200     not limited to surveys, inspections for termites and other wood destroying insects, and/or damage from same,  
201     molds, and fungi hazards, and analysis of synthetic stucco, drywall, appliances, structures, foundations, roof,  
202     heating, cooling, electrical, plumbing systems, utility and sewer, including but not limited to septic tanks and  
203     pump grinder systems availability and condition, out-buildings, and square footage. Other due diligence by the  
204     BUYER may include but is not limited to investigation into the Property’s school district, insurability, flood zone  
205     classifications, current zoning and/or subdivision restrictive covenants and any items addressed in the SELLER’S  
206     Property Disclosure Document. All testing shall be nondestructive testing.  
207

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**OPTION 2:**

A. The BUYER may present a single, **signed, and** complete written list to the Seller of the deficiencies and desired remedies (“BUYER’S Request”).

**B. If the BUYER selects Option 2, the following process shall apply:**

1. (a) **SELLER’S Response to BUYER’S Request:** If provided a BUYER’S REQUEST, the SELLER shall respond in writing as to the SELLER’S willingness to or refusal to remedy any deficiencies identified in the BUYER’S Request. Seller’s **signed,** written response shall be provided to the BUYER **within 72 hours** of receipt of the BUYER’S Request (“SELLER’S Response”).

(b) **Effect of SELLER’S Failure to Timely Respond to the BUYER’S Request:** If the SELLER fails to timely respond to the BUYER’S Request in writing within the required time frame, then the BUYER shall have **72 hours** from when the SELLER’S Response was due to notify the SELLER in writing that the BUYER will:

- (i) accept the Property in its current condition; or
- (ii) elect to terminate this Agreement.

(c) **Effect of the BUYER’S Failure to Timely Respond to SELLER’S Failure to Timely Respond:** If the BUYER fails to provide this notice (lines **228 through 232**) in writing within the required time frame, the Agreement shall be automatically, with no further action required by either party, ipso facto null and void except for return of Deposit to the BUYER.

2. (a) **BUYER’S Response to SELLER’S Response:** Should the SELLER in the SELLER’S Response refuse to remedy any or all the deficiencies listed by the BUYER, then the BUYER shall have **72 hours** from receipt of the SELLER’S Response or **72 hours** from the date that the SELLER’S Response was due, whichever is earlier, to take one of the following actions (“BUYER’S Response”). The BUYER’S Response shall be provided to the SELLER in writing.

- (i) accept the SELLER’S Response to the BUYER’S Request, or
- (ii) accept the Property in its current condition, or
- (iii) to elect to terminate this Agreement in writing which shall automatically make the Agreement ipso facto null and void with no further action required by either party except for the return of Deposit to the BUYER.

(b) **Effect of BUYER’S Failure to Timely Respond to SELLER’S Response:** If the BUYER fails to respond to the SELLER’S Response within the time specified, then the Agreement shall be automatically, with no further action required by either party, ipso facto null and void except for return of Deposit to the BUYER.

Upon receipt of the written BUYER’S Response to the SELLER’S Response, the SELLER shall not be required to remedy any additional deficiencies requested by the BUYER unless the parties enter into an additional agreement in writing.

**The Changes:** After the significant revisions made to this section in 2022, not much needed to be changed here. The term “surveys” was added to line 207 as one of the stated examples of DDI period activities. The other change you’ll notice in this section is that “signed” was added to where the Buyer submits a complete written list and also within the Seller’s response option.

**Best Practices:** It is important to note that the written list of deficiencies must be signed. Many agents force this as standard protocol already, but it is important to note the requirement now. The same applies to the Seller response under Option 2. The addition of the term “signed” reiterates the importance of both parties to the contract to submit written and signed items related to the DDI period clause.

## Page 10 – Addenda to Be Attached

389	
390	<b>LIST ADDENDA TO BE ATTACHED AND MADE A PART OF THIS AGREEMENT:</b>
391	<input type="checkbox"/> Contingency for Sale of the BUYER'S Other Property Addendum <input type="checkbox"/> Deposit Addendum
392	<input type="checkbox"/> Condominium Addendum <input type="checkbox"/> _____
393	<input type="checkbox"/> Private Water/Sewerage Addendum <input type="checkbox"/> _____
394	<input type="checkbox"/> New Construction Addendum <input type="checkbox"/> _____
395	
396	If any of the pre-printed portions of this Agreement vary or conflict with any additional or modified terms on
397	blanks provided in this form or Addendum attached to this Agreement, the additional, modified, or Addendum
398	provisions control.
399	

**The Changes:** Not much to note here other than the removal of the “FHA Amendatory Clause.” You will also notice the “New Construction Addendum” is still an option as discussed previously as well as others you may add that are not pre-printed here.

## Page 10 – Acceptance

402	
403	<b>ACCEPTANCE:</b> Acceptance of this Agreement shall be in writing. This Agreement may be executed by use of
404	electronic signatures, in accordance with the Louisiana Uniform Electronic Transaction Act. The original of this
405	Agreement shall be delivered to the listing Broker's firm. This Agreement and any supplement addendum or
406	modification relating hereto, including any photocopy, facsimile, or electronic transmission thereof, may be
407	executed in two or more counterparts, all of which shall constitute one and the same Agreement.
408	

**The Changes:** There it is again! The term “shall” was also placed here on line 403 to properly outline the legal obligation of the parties to accept in writing. Acceptance is an important legal concept, particularly in real estate contracts, so proper terminology related to the parties' obligations is necessary here.

## Page 11 – Expiration of Offer

422	<b>EXPIRATION OF OFFER:</b>	
423	This offer is binding and irrevocable until _____, 20__ at _____ <input type="checkbox"/> AM <input type="checkbox"/> PM <input type="checkbox"/> NOON.	
424	The Acceptance of this offer <b>shall</b> be communicated to the offering party by the deadline stated on line <b>423</b> to	
425	be binding and effective.	
426		
427		
428	<input type="checkbox"/> Buyer's/ <input type="checkbox"/> Seller's Signature	<input type="checkbox"/> Date/Time
429	<input type="checkbox"/> Buyer's/ <input type="checkbox"/> Seller's Signature	<input type="checkbox"/> Date/Time
430		
431	Print Buyer's/Seller's Full Name (First, Middle, Last)	Print Buyer's/Seller's Full Name (First, Middle, Last)
432		
433		
434	<input type="checkbox"/> Buyer's/ <input type="checkbox"/> Seller's Signature	<input type="checkbox"/> Date/Time
435	<input type="checkbox"/> Buyer's/ <input type="checkbox"/> Seller's Signature	<input type="checkbox"/> Date/Time
436		
437	Print Buyer's/Seller's Full Name (First, Middle, Last)	Print Buyer's/Seller's Full Name (First, Middle, Last)
438		
439	This offer was presented to the <input type="checkbox"/> Seller <input type="checkbox"/> Buyer by _____	
440		
441		
442	Day/ Date/ Time <input type="checkbox"/> AM <input type="checkbox"/> PM <input type="checkbox"/> NOON	
443		
444		
445	This offer is: <input type="checkbox"/> Accepted <input type="checkbox"/> Rejected (without counter) <input type="checkbox"/> Countered (see attached counter) by:	
446		
447		
448	<input type="checkbox"/> Buyer's/ <input type="checkbox"/> Seller's Signature	<input type="checkbox"/> Date/Time
449	<input type="checkbox"/> Buyer's/ <input type="checkbox"/> Seller's Signature	<input type="checkbox"/> Date/Time
450		
451	Print Buyer's/Seller's Full Name (First, Middle, Last)	Print Buyer's/Seller's Full Name (First, Middle, Last)
452		
453		
454	<input type="checkbox"/> Buyer's/ <input type="checkbox"/> Seller's Signature	<input type="checkbox"/> Date/Time
455	<input type="checkbox"/> Buyer's/ <input type="checkbox"/> Seller's Signature	<input type="checkbox"/> Date/Time
456		
457	Print Buyer's/Seller's Full Name (First, Middle, Last)	Print Buyer's/Seller's Full Name (First, Middle, Last)
458		
459	This offer was presented to the <input type="checkbox"/> Seller <input type="checkbox"/> Buyer by _____	
460		
461		
462	Day/ Date/ Time <input type="checkbox"/> AM <input type="checkbox"/> PM <input type="checkbox"/> NOON	

**The Changes:** One. More. Time! Notice the addition of the term “shall” in reference to the communication of acceptance. Considering the nature of the expiration clause, it is necessary for parties to understand what the contract requires to be considered legally accepted. Written signature of the parties is required.

You will also notice that line numbers have been included all the way through the contract to the very end. This should be extremely helpful when referencing signatures and other information here at the end of the last page.

# **MODULE THREE:** **CURRENT TRENDS**

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## **MODULE THREE:** **CURRENT TRENDS**

### **I. OWNER FINANCING AND ALTERNATIVES**

#### **A. USING THE CONTRACT AS OUR GUIDE**

Often overlooked on the Residential Agreement to Buy or Sell is a simple yet powerful term on lines 93-95 within the Financing Clause. It states "If the BUYER is not able to secure financing, the SELLER reserves the right to provide all or part of mortgage loan(s) under the terms set forth above."

81	
82	The BUYER acknowledges and warrants that the BUYER has available the funds which may be required to
83	complete the sale of the Property, including but not limited to the deposit, the down payment, closing costs, pre-
84	paid items, and other expenses. If this sale is a Financed Sale, BUYER acknowledges that any terms and conditions
85	imposed by the BUYER'S lender(s) or by the Consumer Financial Protection Bureau shall not affect or extend the
86	BUYER'S obligation to execute the Act of Sale or otherwise affect any terms or conditions of this Agreement
87	except as otherwise set forth herein. The BUYER shall supply the SELLER written documentation from a lender
88	that a loan application has been made and the BUYER has given written authorization to lender to proceed with
89	the loan approval process within _____ (# _____) calendar days after the date of acceptance
90	of this offer by both parties. If the BUYER fails to make loan application, and to supply SELLER with written
91	documentation of that application and BUYER'S written authorization for lender to proceed with loan process
92	within this period, the SELLER may, at the SELLER'S option, elect, in writing, to terminate the Agreement and
93	declare the Agreement null and void, by giving the BUYER written notice of the SELLER'S termination. <span style="border: 1px solid red; padding: 0 2px;">If</span> the
94	BUYER is not able to secure financing, the SELLER reserves the right to provide all or part of mortgage loan(s)
95	under the terms set forth above.
96	

To properly discuss financing alternatives, we need to first understand the implications of this clause and how it fits within the context of our entire agreement. One of the more common issues that comes up in problematic residential transactions is the Buyer stating, "I couldn't get financing," and then that Buyer and his agent having the expectation that by just saying that and having a poorly written piece of paper that says financing was denied, the Buyer is free to just walk away. *That is not always the case.* Many agents have seen a very short letter, from some out of town and unknown lender, that simply gives short explanation that the Buyer was denied. The question of "why was the Buyer denied" matters.

First, the Buyer must apply for financing under the terms in good faith. A buyer cannot half-heartedly request financing from a lender, provide that lender with little information, make ridiculous demands about the financing that are better than the financing terms agreed to in the purchase agreement, and then when the lender rightfully balks at financing, just say "I was denied, give me my deposit back." Although most Sellers will just move on for ease and avoiding the hassle, the Buyer who is not in good faith in their financing application and process is not just given a free pass under the contract.

As an example, let's consider a Buyer who is looking for a \$300,000.00 mortgage at the prevailing rate over 30 years. A lender was willing to provide the financing but later



denies final loan approval due to the Buyer not having the funds available for a down payment. Well first, the Buyer has a problem under the purchase agreement since Buyer specifically warranted that he/she has “available the funds which may be required to complete the sale of the Property, including but not limited to...the down payment.”

Secondly, this could be more complicated if the Buyer signed the purchase agreement with the funds available but blew it in Las Vegas right after signing the purchase agreement! Here there is a strong argument the Buyer was not acting in good faith and that the Buyer cannot get out since it warranted that he/she had the Deposit in the contract.

But if the Seller does not feel like fighting out the “good faith” argument of the financing denial or does not think it has the facts to support it, lines 93-95 in the contract become important and give the Seller another option. As this clause reads it specifically gives the right to the Seller to provide all or part of the financing under the terms the parties agreed to. In this time of higher interest rates, more licensees are likely to have questions about this clause than ever before. As a result, when a Buyer says “I was denied here is a letter from the bank saying so,” that does not always mean the Buyer is absolved from the obligation to go forward. Let’s review.

## **B. Current Market Implications**

As just about anyone working in real estate has noticed, interest rates on mortgage loans have skyrocketed over the past two years. In late 2021, the national average for mortgage rates was approximately 3.15% for thirty-year fixed mortgages. Some prime borrowers, depending on credit and location, were even able to lock in sub 3% rates for a period of thirty years.

Compare that with today’s rates, where the national average has maintained steady over 7% for thirty-year mortgages as of the date of this publication. As a licensee it is easy to understand how this dramatic increase in rates has materially impacted the residential real estate market.

Using easy numbers for comparison, a person in December of 2021 who bought a \$300,000.00 home with a 20% down payment (\$240,000 loan) at a 3.0% rate would be paying approximately \$1,012.00 a month in loan payments. A person in December of 2023 buying that same house at the same price with a 7.66% loan would be paying approximately \$1,704.00 a month

in loan payments. That is a huge difference in monthly loan payments for the same house in just over two years! Even though housing prices were at all-time highs back in 2021, those who locked in their rates under 3% a short time ago revel in their good timing.

To see how quickly the situation has changed, look at these projections from major authorities in the real estate industry in the same referenced period in late 2021 and consider what actually happened:

Quarter	Freddie Mac	Fannie Mae	MBA	NAR	Average of All Four
2021 4Q	3.2	3.1	3.1	3.1	3.12%
2022 1Q	3.4	3.2	3.3	3.3	3.30%
2022 2Q	3.5	3.2	3.5	3.5	3.42%
2022 3Q	3.6	3.3	3.7	3.6	3.55%

Does this mean our housing experts are wrong? Well, no, not exactly! Even the best economists at the top agencies in our industry were unable to predict this dramatic rise in interest rates. As real estate licensees we should always consider that market forces are uncertain, constantly changing, and as a result so should our approach and planning.

Couple this increase in interest rates with skyrocketing prices for insurance, and the monthly payments continue to increase the strain on potential buyers. But of course, the real estate market is not “dead”, and people are still buying houses. Buyer demand remains steady, but many find themselves left on the sidelines waiting for possible improvements in rates and affordability.

For this reason it is a great time to refresh ourselves on certain alternative tools available in the residential financing market. Two of those tools are Owner (Seller) Financing and the Bond for Deed. Understanding these options and making sure your clients and potential clients are informed can be of great value. In this section we’ll discuss these two options in detail.

## II. OWNER FINANCING VS. BOND FOR DEED

### A. Owner Financing

#### 1. Introduction

Owner Financing is where the Seller (property owner) in a real estate transaction finances all or part of the purchase price of a property for the Buyer. Basically, the Owner acts like a bank would in a typical financed sale, providing the Buyer with the ability to buy the property on credit to be repaid as per the terms of their financing agreement(s).

Since the Owner is setting the interest rates (subject of course, to negotiation), one possibility is that it can offer a lower rate than the standard amounts provided by traditional lending institutions in the marketplace. *(Note: although almost always much higher than the Applicable Federal Rate which is the lowest amount of interest the federal government allows for private loans without larger tax consequences while also cutting out the large fees charged by those traditional lending institutions if the Owner desires).*

While this method was traditionally used in situations where the Buyer may not have had the best credit for traditional financing approval, you may notice it is gaining much more widespread use again due to the previously mentioned higher interest rates. Sellers who may be noticing lowered buyer demand for their property due to high rates might consider this as a viable option to put cash in their pockets and monetize their real estate, although in a different way than would be typically performed. Also, important to consider is the Seller may desire to proceed with a sale even if the Buyer fails to receive financing approval as discussed previously. As licensees we must be prepared for such scenarios!

## **2. How it Works**

In an owner financing transaction, the Seller and Buyer will agree to the amount to be financed, the down payment (if any), the term for the payment, whether a balloon payment will be involved, and the date of maturity (when all monies become due) amongst other terms. Generally, a Seller will want a down payment to put immediate cash in their pocket. Also, in this climate, although owner financing terms may amortize the principal into monthly payments over a longer time period (15, 20, 25 and 30 years) in order for the loan to act and look like a bank provided residential loan (longer amortized terms also means lower monthly payments), it is very common for a balloon payment to be used. A balloon payment is when the entirety of the remaining indebtedness becomes due on a set date. The balloon payment sets a date for the Seller to get all of its remaining monies at once, while the Buyer has a set time period to pay off the loan in cash or find financing to pay off the balloon, at a hopefully better rate than when Buyer bought the property.

An example of a common owner financed transaction might look like this: a \$300,000 loan, with a 20% down payment, with the monthly payment amortized over 30 years but with a balloon payment due in 5 years. Also, it is generally advisable for Buyer and Seller to use the services of an escrow company to collect and distribute payments of monies owed to Seller and monies owed for insurance and property taxes (and other obligations) on the property, just as a bank in a conventional mortgage would do.

Also, in an owner financing transaction, title passes to the Seller upon the closing normally through an Act of Sale – Seller is no longer the owner of the property upon the closing. The Seller generally receives what is known as a Vendor's privilege (i.e., for ease of understanding, a mortgage) on the property, which is placed upon the property to protect the Seller in the event of a default by the Buyer under the terms of their owner financing agreement(s). In the event Buyer defaults on its obligations,

Seller will have to go through the judicial foreclosure process in order to get title back for the property or to receive monies at auction to hopefully cover the indebtedness still owed.

## **B. Bond for Deed**

The main difference a Bond for Deed has from owner financing is the fact that under a bond for deed, the Seller retains title to the Property until all payments are made. The Bond for Deed normally has a down payment, with the Buyer agreeing to make monthly installment payments to the Seller that after a certain point, the Bond for Deed has been fulfilled and the Seller will transfer title to the Buyer and conclude the transaction. The Bond for Deed contract and its related obligations are very important, as it discusses how much is paid up front, how much is paid monthly, and when the final payments are due. It is also not uncommon for a balloon payment to be used for the final payment.

This type of transaction allows the Seller to forego judicial foreclosure in the event the Buyer fails to adhere to its obligations and/or fails to pay the amounts due when due under the Bond for Deed. That is because title never transferred to the Buyer; the Seller held it throughout and only until Buyer has fulfilled all of its obligations does title transfer. In theory, a Buyer can make half of its payments without fail, miss a few, and lose its claim to own the property under the Bond for Deed because it failed to adhere to the terms of the contract.

That is great for a Seller regarding a situation where Buyer defaults and Seller needs to take the property over. However, remember the Seller is still the legal title holder and therefore can still be responsible for the Property to third parties during the Bond for Deed term. The Seller will want to be sure that there is good insurance coverage in place to not only cover property damage, but also third-party injury as the Seller is no longer in possession or control of the property. Seller will also want to put in several obligations to Buyer about its upkeep of the property, such as maintenance/landscaping obligations and other protective measures such as an indemnification.

In a Bond for Deed, it is crucial to have a dedicated and experienced bond for deed escrow service in place to handle the monthly payments, be sure that the obligations are met (insurance, taxes), and assist with keeping track of the number of monthly installments received and administer the transfer of title upon the completion of the bond for deed's terms.

Also, Louisiana law used to allow for the Seller in a bond for deed to terminate the bond for deed without any consequences in the event Buyer defaulted under the contract's terms. Although that is still true to a point, Louisiana law has held more recently that in the event a bond for deed Buyer defaults and loses the ability to purchase the property, the Buyer has a limited argument to recoup monies from the Seller if the monthly bond for deed payment was higher than the fair market rental value of the property at issue. In such an instance, the Buyer may be able to recoup the difference from the monthly Bond for Deed Payment amount and the monthly fair market rental value amount.

Which one of the above options is right for a Seller or Buyer is going to differ from transaction to transaction. Some Sellers may welcome the ability to hold on to title of the property for ease of recovery in the event of a default by Buyer; others may want nothing to do with the liability that follows holding on to a property while someone else is in possession. Some Sellers, for a host of reasons, need to divest of ownership at the point of closing. It is also not uncommon to have Buyers who are wary of the Bond for Deed due to the quicker ability of Seller to take back possession of the property; but just like with owner financing, if the Buyer holds up to its end of the bargain that will not be an issue.

As a practice note, remember that even if as licensees we are armed with knowledge on these alternative financing vehicles, ***we should still seek proper guidance of a professional*** as suggested above. There are many special laws and procedures which will need to be followed in owner financed as well as Bond for Deed transactions requiring expert assistance. However, you will significantly raise the trust of your future clients and customers by having elevated knowledge of what these options are and how they might work.

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# **MODULE FOUR:**

# **HOT TOPICS & CASE**

# **STUDIES**

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# **MODULE FOUR:**

## **HOT TOPICS AND CASE STUDIES**

### **I. THE CLASS ACTION DECISION FALLOUT**

#### **A. Introduction – Reality of Real Estate in a Sitzer/Burnett World**

- ▶ *"I am not worried about this..."*
- ▶ *"I will pay attention to it when the case is finished finished..."*
- ▶ *"This doesn't have anything to do with me, why should I care?"*
- ▶ *"Real Estate Agents aren't Big Tobacco; we didn't intentionally do anything wrong. I don't see how our industry would or should be punished "*

The above are just some of the statements and questions that real estate agents and brokers have been stating and asking since the *Sitzer/Burnett v. National Association* Jury rendered its verdict in October of 2023. And frankly, it's hard to blame them for these positions. Louisiana Agents and Brokers have done nothing intentionally wrong. Licensees have simply worked hard in the industry as it has been organized. Considering the real estate market is already in a state of transition with rising interest rates and insurance prices; it's hard to have to deal with another issue. But just as the market will strengthen during the real estate cycle as it has time and time before, the issues found in this lawsuit will have to be dealt with in one way or another.

Although it would be wonderful to just not have to pay attention to the potential ramifications of the *Burnett* decision and the litigation taking place across the country, real estate licensees are best served (and at their best) being informed, aware and ready to continue assisting their clients and customers, just as they always have. The following is provided to give some insight into what is going on, at least at this moment in time, which is very likely subject to change over the course of 2024-2025.

#### **B. The *Burnett* Verdict**

*Burnett* is the now infamous Missouri federal court lawsuit wherein a jury on October 31, 2023 found that the National Association of Realtors ("NAR"), and some of the largest brokerages in the country, took part in a conspiracy to follow and enforce the Cooperative Compensation Rule which was found to have the purpose and/or effect of inflating, raising or stabilizing broker commission rates paid by home sellers. The Jury awarded the Plaintiffs over \$1,700,000,000.00 under the Sherman Antitrust Act, which is an over 100-year-old set of laws aimed at preserving free and unfettered competition as the rule of trade.

**\$1,700,000,000**

**To place the size of this verdict  
in context – this is the amount  
of a Powerball Lottery  
jackpot won in October 2023!**

The Cooperative Compensation Rule, or more generally known as the Participation Rule, specifies the total commission that a home seller will pay to the listing agent and earmarks a set amount to the buyer's agent; or as stated in the NAR handbook, "the participant of the service is making blanket unilateral offers of compensation to the other MLS participants, and shall therefore specify on each listing filed with the service the compensation being offered to the other MLS participants." The Plaintiffs argued that by pushing the above alleged "conspiracy," and making it a requirement of real estate transactions, the defendants were engaged in "price fixing" which caused home sellers to pay more when selling their homes than they would have had the conspiracy not taken place. The concentration on "price fixing" is important to the case and the basis for the decision, as "price fixing" is considered a "Per Se" Violation of the Sherman Antitrust Act.

Many brokers, real estate agents and persons following this case have asked, "why didn't the defendants bring up all of the good things about the Participation rule," which is a legitimate and important question. The Participation Rule has been in effect for a long time and has been an important contributor to many benefits to the industry. The reason that the "good part" of the Rule was not brought up as much as the industry likely wanted is because under a "Per Se" Rule claim

analysis, once the alleged action of the conspirator is proven it is considered unlawful without any further analysis of its reasonableness, economic justification, or other factors. Had this case not involved "price fixing" and therefore no "Per Se" claim, it would have followed the "Rule of Reason" test, which allows for extensive evidentiary study of (1) whether the practice in question in fact is likely to have a significant anticompetitive effect in a relevant market and (2) whether there are any procompetitive justifications relating to the restraint and then allows for a finding that if any anticompetitive harm would be outweighed by the practice's procompetitive effects, the practice is not unlawful. Basically, all of the things that many agents and brokers thought should have been discussed and/or relevant at the trial.

At this time, the Parties are preparing post-trial briefs, which will affect whether the damages award is decreased, increased (through Plaintiffs ability to claim treble/triple damages), and what injunctive relief (a ruling which prohibits certain actions or forces them) shall be awarded to Plaintiffs. Given that the defendants that settled the case



agreed to the following, some of the injunctive relief that Plaintiffs are seeking likely include the following prohibitions:

- Can no longer mandate that their agents or franchisees must belong to NAR.
- Must advise and remind agents and franchisees that there is no requirement that they must make offers to or must accept offers of compensation from cooperating brokers.
- Must advise and remind agents and franchisees that brokers' commissions are not set by law and fully negotiable (in listing agreements, buyer's agreements and pre closing disclosures).
- Cannot advertise that their agents' services are free.
- Must eliminate minimum client commission requirements.
- Must filter out and restrict MLS listings that are searchable based upon level of Compensation offered.

Given the size and consequence of this case, *Burnett* is likely to be heavily litigated and appealed for the next few years. It is highly encouraged that all licensees stay up to date on the developments as things continue to evolve.

### **C. Other Major Lawsuits and the Copycats post *Burnett***

Around the same time *Burnett* was filed, another case *Moehrl v. National Association of Realtors* was filed in federal court in Illinois seeking class certification. It is very similar to *Burnett*, in that it is alleging a "conspiracy" existed with NAR and many of the largest brokerages in the country revolving around the Participation Rule. This case, which will go to trial in 2024, has the potential for an even higher damage award given that the locations it covers and class size are much larger than the Missouri based *Burnett* case.

In 2021, *Nosalek vs MLS PIN et al* was filed in federal court in Massachusetts against the main local MLS provider and a host of brokerages based upon similar arguments as *Burnett* and *Moehrl*. This is an important case to be aware of though due to the fact that the main defendant, MLS PIN, actually settled with the Plaintiffs, but the Department of Justice intervened to object to the settlement due to the limited nature of changes to MLS Pin's proposed operations, namely that the settlement "still establishes an elaborate protocol regulating buyer-broker commissions." Basically, it appears that the Department of Justice is now paying particular attention to a proposed solution/settlement because they do not feel that it materially changes the Participation Rule enough to their liking.

And of course, since the *Burnett* jury rendered a verdict with a Billion (with a "B") plus dollars in damages, copycat lawsuits have sprung up across the country (so far, Texas, Georgia, South Carolina, New York, Illinois and counting) trying to join in. The Texas lawsuit is the most interesting, as this is the first lawsuit that is directed against the local associations of a state claiming that while NAR was the "creator of the conspiracy" it claims the associations are "at the core of the conspiracy."

### **D. Best Practice Suggestions for Licensees**

Just because this litigation is ongoing does not mean agents and brokers should not take action by being as informed as possible. While also learning about and possibly implementing potential mitigating actions that may become the norm going forward.

The Participation rule is directly under attack in these lawsuits. Whether or not it will be permanently changed is still up in the air, but one quick way to prepare for any potential changes in this rule is the ability to understand, market, explain and use Buyer-Broker Agreements. In its most basic definition, a buyer's agent agreement is a contract between a home buyer and a real estate agent that defines how the two agree to work together, and most likely, how the real estate agent will be paid for its services.

If one of the Main issues that the *Burnett* decision had against the Participation Rule is the non-negotiable aspect of the Buyer's getting paid a commission by the Seller, a Buyer's agreement effectively takes that issue away from the transaction. It allows the Buyer's agent to have an agreement with the Buyer which explains the relationship between them, what is expected and how payment will be rendered. The Buyer's agent will finally not be subject to Listing Agent's being the only party having control and privity of contract through their listing agreement as it relates to compensation. Multiple Associations and trade groups around this state have provided great examples of Buyer's agreements and information as to how to engrain this document and its negotiation into the normal procedure of a Buyer's agent. It is important for all real estate practitioners to not only learn about their use, but to adopt their use into their standard operating procedure while also informing clients and customers about what they are and what they do. Remember this is not the first time Buyer's Agreements are being used; they are the standard and norm in many other states whose real estate industries are alive and thriving.

Some information and tips to remember when negotiating a Buyer's Representation Agreement:

1. Although their use is not mandatory, this may become the standard, and now is the time to get comfortable with them and learn how to best negotiate them. Plus, having these agreements gives the agents clarity as to the scope of their representation and how they will be compensated.
2. Remember, this agreement does not just make the relationship clear for the agent; it also makes it clear for the Client as they now have the scope of their relationship with the licensee defined in writing.
3. Remember that payment and the terms of the agreement are negotiable! The parties to this agreement are free to negotiate its terms in any way they see fit. Each Client may be different and sizing up the Client pre-negotiation can go a long way.
4. Explain everything you can about the agreement. This may be the first time a Buyer has heard of a Buyer's Representation agreement in Louisiana, so be ready to explain to the Buyer what it is, what it does and be ready to answer questions.

**While Listing Agreements must be in writing according to the Law, Buyer-Brokerage agreements do not but is highly recommended.**

5. Transparency is key. Licensees should go into a buyer representation agreement negotiation informing their potential Clients that the licensee wants to make the entire process of purchasing real estate as transparent as possible, and that starts with this Buyer's Representation Agreement.
6. There are advantages to exclusivity if the Buyer will allow it. Having an exclusive agreement gives the agent time to find property for their client without an open-ended timeline or the possibility of a quick trigger termination. These agreements do not have to be exclusive, so expect questions from clients as to the differences.

In line with the above, agents and brokers should review their listing agreements as soon as possible. Many brokers and agents spent the last year or two editing their listing agreements to make clear the distinction as to what the Listing Agent is being paid and what the Buyer's agent is being paid. While those are good changes, agents and brokers may begin wondering if it goes far enough to protect from *Burnett's* possible ramifications. Many practitioners are not aware that after the *Burnett* decision, NAR has stated that you can list "zero" for buyer's commissions on MLSs. This allows for a true distinction and separation from Listing and Buyer's agent commissions. Also, consider adding language that discusses how commissions are negotiable and that Seller is not obligated to pay Buyer a commission.

Find time to go through your other material and training methods, especially managers and brokers. You may want to consider changing documentation that has any form of potentially anti-competitive edge to it. This really appeared to hurt the brokerages during the trial, especially as some of the training material found discussed keeping commissions and commission percentages higher.

Also, post *Burnett*, "Free" is not just literally a 4-letter word anymore in the real estate agent world, it is figuratively one now too. Make sure your documents are clear that the Buyer is not getting a "free" real estate agent through the use of the Participation rule. The ability to negotiate should be made clear to all involved in the transaction.

Be transparent with clients regarding commission practices and know your forms. As you always have, talk your clients through them especially as it relates to commission and the negotiation of the same.

There are potential large changes coming but remember other states have been doing this for years! Sellers always negotiated commission anyway; the listing side should be the same as you can still quote your fee – it is now just may be more open on the buyer's side. If anything is certain, it's that lawyers are going to lawyer, especially when a large sum of money is in play. These lawsuits will likely continue to be filed

and keep running their course through the Courts,

but just because that seems to be the near-term future, it does not mean agents and brokers should just be sitting back and waiting. You are an integral part in the largest wealth creating industry in the history of this country - agents are not going anywhere. Keep trying to learn, gather insight, and be on the cutting edge of how this market will change as you have always done. There may be some changes coming, but you can and will be prepared for it and flourish despite the noise!

## II. REDUCING RISK ON REOCCURRING ISSUES

### A. General Overview of Real Estate Agent Liability Law

The following is provided to give real estate agents a general understanding of the most common Louisiana legal principles and arguments used to protect them in instances where they are brought *into* litigation, or more importantly, used to try and keep them *out* of litigation. Remember, a real estate broker does not perform all tasks for real estate, but renders a service by advertising and showing properties which are for sale.<sup>1</sup> Although litigants are constantly attempting to argue real estate agents have legal duties akin to accountants, inspectors, engineers, contractors, lawyers, and/or title experts; in reality, they are conduits of information that assist in the generalities of the buying and selling of real estate.

Frankly, real estate agents are at a disadvantage as they do not generally know the specifics of property they market or show as they did not live in, use or have detailed knowledge of said properties prior to listing; they are normally stuck with the information provided to them by their client.

Louisiana law is settled in that “a purchaser's remedy against a real estate broker is limited to damages for fraud under Louisiana Civil Code art. 1953 or for negligent misrepresentation under Louisiana Civil Code art. 2315.”<sup>2</sup> In order for a plaintiff to recover for negligent misrepresentation, there must be a legal duty on the part of the defendant to supply correct information, a breach of

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<sup>1</sup> *Leggio v. Realty Mart, Inc.*, 9952 (La. App. 1 Cir. 11/12/74), 303 So.2d 920.

<sup>2</sup> *Smith v. Remodeling Service, Inc.*, 94–589. (La. App. 5 Cir. 12/14/94), 648 So.2d 995; *Verdin v. Rogers*, 03-1457 (La. App. 5 Cir. 4/27/04), 873 So.2d 804; *Osborne v. Ladner*, 96-0863 (La. App. 1 Cir. 2/14/97), 691 So.2d 1245, 1257; *Waddles v. LaCourt*, 06–1245 (La. App. 3 Cir. 2/7/07), 950 So.2d 937, 941; *Gad v. Granberry*, 09-476 (La. App. 3 Cir. 2/3/10), 30 So.3d 265, 267.

that duty, and damage to the plaintiff caused by the breach.<sup>3</sup> A real estate broker or agent owes a specific duty to communicate accurate information to the seller and the purchaser, and may be held liable for negligent misrepresentation.<sup>4</sup> *However*, that duty, as the jurisprudence has shown, extends only to those defects or information of which the broker or agent is **aware**.<sup>5</sup>

The Louisiana legislature has buoyed the aforementioned jurisprudential “awareness” rule by acting to statutorily immunize and protect real estate agents regarding information given to them by their Client, through its enactment of LA. R.S. 9:3894 which states:

*A licensee shall not be liable to a customer for providing false information to the customer if the false information was provided to the licensee by the licensee's client or client's agent and the licensee did not have actual knowledge that the information was false.*<sup>6</sup>

Going hand in hand with the actual knowledge rule for information, Louisiana law does not confer on an agent an independent duty to verify information conveyed to the agent directly by his/her Client before relaying that information to a customer.<sup>7</sup> Such was done for good reason by the legislature and the courts as the real estate industry would be an impossible task for real estate agents as, once again, they are information conduits who have limited information at their disposal upon the start of any listing or showing. Louisiana Courts have even enunciated their basis for such a protective rule:

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *See, Louisiana Hand & Upper Extremity Inst. v. City of Shreveport*, 34,404 (La. App. 2 Cir. 2/28/01), 781 So.2d 695, 698; *Reeves v. Weber*, 86-0531. (La. App. 1 Cir. 5/27/87), 509 SO.2d, 158, 160 (Emphasis Added).

<sup>6</sup> *See, Rabalais v. Gray*, 14–552 (La. App. 5 Cir. 12/16/14), 167 So.3d 101, 107. Although duplicative, *See also*, LA. R.S. 9:3199 (“[Real Estate Agent] ... is not liable ... for any error, inaccuracy, or omission in a property disclosure document, unless the [Real Estate Agent] has actual knowledge of the error, inaccuracy, or omission by the seller.”)

<sup>7</sup> *Id.*

**“In the context of a real estate transaction, the burden that would be placed on the agent if such a duty were to be imposed on the agent (to independently verify all information conveyed to him directly by his seller-client before relaying that information to a prospective purchaser) would apparently be enormous and unreasonable possibly resulting in undesirable adverse consequences to the nature of the business of selling real estate through an agent.<sup>8</sup>”**

The jurisprudence of Louisiana has consistently backed up this line of reasoning.<sup>9</sup> Please note however, the awareness standard is different when the information is given to the agent by a *Customer* as opposed to a *Client* as discussed above. LA. R.S. 9:3893 states:

*D. A licensee shall not be liable to a client for providing false information to the client if the false information was provided to the licensee by a customer unless the licensee knew or should have known the information was false.*

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<sup>8</sup> *Id.*

<sup>9</sup> *See, Id.*, (Seller’s real estate agent did not have a duty to investigate for defects in instances that information provided to her which she supplied to buyer was incorrect without actual knowledge of real estate agent that she was aware said information was incorrect); *Hopkins v. Coco*, 14-1191 (La. App. 4. Cir. 7/29/15), 174 So. 3d 201 (Real Estate Agent did not have duty to take proactive measure of seeking extension; real estate agent only had to convey accurate information she was aware of); *Romano v. GBS Properties, LLC*, 07-1102 (La. App. 4 Cir. 3/5/08), 2008 WL 8922904 (real estate agent did not have independent duty to verify or investigate); *Landry v. Williamson*, 13-0927 (La. App. 1 Cir. 4/25/14), 2014 WL 3555932 (Real Estate Agent was not liable for negligent misrepresentation or fraud when real estate agent had no knowledge of defects and knowledge of buyer or seller could not simply be imputed to real estate agent). *See also, Orr. V. Jones*, 11-1085. (La. App. 5 Cir. 5/31/12), 95 So.3d 583 (At trial, real estate agent was not liable in instance where real estate agent told buyer defect did not exist when real estate agent *believed* defect did not exist as it was repaired as told to real estate agent by clients/documents, even though in actuality it was not).

Finally, there is another defense afforded to real estate agents apropos to the above. Even in instances wherein an agent did have actual knowledge that what their client provided them was inaccurate, the agent still may not be liable for its misrepresentation if the information a party is suing over was apparent in its incorrectness, was reasonably discoverable or was known to be potentially incorrect by the buyer before the sale <sup>10</sup>

Real Estate Agents do have a lot of protections under Louisiana law, but that does not mean they are immune from liability. But if you exercise caution and care in the real estate industry, Louisiana law does tend to protect you.

## B. Published Case Examples

The following are examples of Louisiana cases against real estate agents that can assist in understanding how courts review real estate agent law:

***Casbon v. KWEJ et al.*** This recent unreported 2023 decision, involved a claim by a buyer against an agent because the agent allegedly failed to verify the living area square footage before she purchased her first home by failing to object to the inclusion of an enclosed patio in the living area square footage measurement. The Buyer apparently was made aware of an issue in its attempts to refinance the home as the lender did not consider the patio as part of the square footage which allegedly prohibited the refinancing. The Trial Court denied a summary judgment filed by the Agent, which the Fifth Circuit reversed ruling the agent and her broker were dismissed from the case. The Appellate Court reversed the trial court's decision due to the fact that the evidence submitted showed that the applicable law only requires agents to disclose material defects of which the agent is aware and does not require independent investigation of all disclosures provided by the property sellers. The agent was never provided any information that the inspection or review of the square footage was incorrect. As the Plaintiff did not provide any positive evidence that the agent was aware that a potential issue existed regarding the accuracy of the living area square footage of the home, the agent could not be liable.

***Merlin v. Fuselier Construction.*** In this case, a *Seller* of a home brought an action for negligent misrepresentation against his own agent who listed the property in a redhibitory defect case involving a faulty roof. In *Merlin*, the agent testified that the sellers had informed her that shingles had blown off the roof but that the roof had since then been satisfactorily repaired. The agent had never been told that there was an existing defect with the roof. The real estate agent, based on those assertions, *went so far as to advise her clients, the sellers, that they did not need to disclose the fact that the roof had contained previous problems or that those problems were*

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<sup>10</sup> See, *White v. Lamar Realty, Inc.*, 12423 (La. App. 2 Cir. 11/7/74), 303 So.2d 598.

*repaired* because they were not an “ongoing” problem.<sup>11</sup> The Louisiana Court of Appeal for the Fifth Circuit affirmed the trial court’s conclusion that the agent did not act negligently by advising the sellers they had no obligation to report the previous problems because all information provided to the real estate depicted that the alleged defects had been repaired.<sup>12</sup> But please remember, one must be sure that the current property disclosure form does not specifically request information as to past repairs as to a topic, even if the parties believe the defect was repaired in full.

***Leflore v. Anderson et al.*** In this matter, sellers of a piece of property and their real estate agent were found to have known about the existence of a defect in the home. The Trial Court found that both the sellers and the real estate agents were solidarily liable for rescission of the sale of the property in question and return of the purchase price to plaintiff. The Louisiana Court of Appeal for the Fourth Circuit reversed this finding, stating that because the agents were not owners they could not be found to be liable for the purchase price or for any remedy under redhibition; which subsequently would include rescission/return/reduction. The Court limited the damages to findings of negligent/intentional misrepresentation, a tort based claim, which the Court found precluded the awarding of the purchase price or reduction amounts because the award against agents could not be based in redhibition/contract.

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<sup>11</sup> *Id.* (emphasis added).

<sup>12</sup> *Id.*



## C. Non-Published Case Examples and other topics

Not all cases against real estate agents and brokers make it to trial. Some are never filed as lawsuits, dismissed voluntarily, settled, or dismissed through court, generally through exceptions and/or motions for summary judgment. The following are provided as examples of situations or topics that have come up a few times in the industry that could turn into lawsuits or cause issued/confusion for agents, so if you run into similar issues, you can hopefully be more prepared to help your Client and/or lessen the possible claims or causes of action the *allegedly* aggrieved person can make.

Please note, just because some of the following topics are discussed does not mean any agent did anything wrong or was liable in the stated situation or issue:

- Be cognizant of detail in description.
  - The buyer of the property attempted to bring claim concerning description of “whole house generator” when buyer felt that the generator was not actually for the whole house. Obviously, this begs the question, of what was the buyer thinking a home generator could power but providing the specific brand of generator as opposed to stating “whole house generator” would have negated the poor claim by the claimant before it started.
  
- Be wary of sizes and measurements.
  - When an agent is given a size of square footage of a home, they are generally covered by the actual knowledge standard discussed before. But sometimes agents do their own measurements or see multiple measurements. In one instance, the agent measured using the multiples of the construction plans (i.e. 10 x 14) for each room to arrive at total square footage of the home. But construction plans did not take into consideration sheetrock and other work, and due to size of home, property was significantly less space. In one instance, the agent was shown an appraisal which had one size listed, and another which differed. The seller stated which one it thought was correct, and agent went with that size. Turns out Seller was wrong. The question became whether actual knowledge standard should apply as it was alleged to be obvious that the square footage of the number used was wrong.
  
- You are allowed to trust your clients, but to a point.
  - An agent was told by her client that a property and its full-sized shed had never had flooding in its history and that is what the Seller provided on the property disclosure form. The agent had no reason to believe that such was incorrect and had no other information been provided, would have likely been shielded from any liability if the property had flooded. But during a prelisting walkthrough the agent noticed that the shed’s sheetrock was cut to 12 inches above the floor line which the agent believed to be due to water damage or flooding. With that information, the agent was cautious and reached out to the client and asked about the she. The seller “remembered” that water did get in, and luckily the property disclosure form was changed to reflect the same. Although liability

would definitely not be a certainty, there could have been arguments that the agent had knowledge that the information provided by Seller was incorrect.

- Sellers should beware of the ex-neighbor.
  - Sometimes it is good to remind your Sellers when doing the Property Disclosure Form that if your neighbors know about issues the Seller had with their property prior to selling, the new owner is likely to find out by the neighbor. Time and time again, a lawsuit has been brought for redhibition and/or misrepresentations by a buyer for defects the buyer was made aware of by their new neighbor. Reminding Sellers of this reality may help them provide detailed and correct responses to the disclosure.
- Wholesale Practitioners – They are not real estate agents.
  - Real estate wholesaling is a strategy in which a wholesaler obtains a contract on a property with its seller, and in turn sells the contract to an investor. That by itself does not sound terrible, but in practice what often happens is that individuals who were not in the market to sell are convinced to sell their property for less than what they could have gotten had they actually placed their property for sale on the open market. And as this is an unregulated practice, without Rules, a Commission to oversee their practices, or any ethical obligations, this practice can be the wild west. Further, it is not uncommon for wholesale operators to straddle the line of real estate licensees, so be careful when you encounter wholesalers, as the law holds:
    - “It shall be unlawful for any person ... for a fee... or other valuable consideration, to engage in any real estate activity relating to any portion of a real estate transaction performed for another, unless exempted, as specified ... Whoever violates the provisions of this Section shall be guilty of a misdemeanor and fined not more than five hundred dollars per day of violation, beginning from five calendar days from service by certified mail of the cease-and-desist letter issued by the commission, or imprisoned for not more than three months, or both.”
- Lesion Know the basics.
  - And in line with the aforesaid subject, the topic of lesion gets brought up a lot when it comes to wholesale arrangements. A real estate agent will inevitably run into lesion at some point, and having a basic understanding can help agents inform their clients, while also keeping them out of trouble. The sale of Real Estate may be rescinded for lesion when the price paid is less than one half of the fair market value of the immovable. Only the seller can claim lesion and the seller can still invoke the right to rescind for lesion even if he has renounced the right to claim it (i.e. a contract waiving lesion is not necessarily valid). It is important to note that a Buyer who buys something so out of disproportion to the fair market value may be susceptible to a Seller coming back and rescinding a sale – sometimes a deal can be too good to be true. Some other notes on lesion:
    - The Real Estate sold must be evaluated according to the state in which it was at the time of the sale to determine the fair market value.
    - When a sale is subject to rescission for lesion the buyer may elect either to return the immovable to the seller, or to keep the immovable by giving to the seller a supplement equal to the difference between the price paid by the buyer and the fair market value of the immovable.

- When the buyer has sold the immovable, the seller may not bring an action for lesion against a third person who bought the immovable from the original buyer.
- An action in lesion must be brought within 1 year of the sale.