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## **Legal Hotline Q & A**

**From Get the Facts 05/02/17**

**QUESTION:** Our brokerage had a meeting about the importance of using the Evidence of Funds addendum on all transactions, however there is some verbiage on there that is misleading and we had one broker on the other side of a transaction flat out refused to have her buyers complete one.

Under paragraph 2 for Non Contingent funds it states "Buyer is relying on Non Contingent Funds for payment of the Purchase Price." People are taking this too literally and interpreting it as the entire purchase price even though it states further down "unless buyer discloses other sources of funds for the payment of the Purchase Price." Is the broker's interpretation a reasonable basis for rejecting use of the form?

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**ANSWER:** Absolutely not. Brokers engage in the permitted practice of law, according to the Supreme Court decision in *Cultum v. Heritage House*, when they fill in the blanks on forms AND when they select which forms to use. This means that if there are statewide forms available for a broker's use, and the form should be used in a given situation, broker is practicing law if broker chooses NOT to include the form. Broker's decision will be compared to the standard of care expected of an attorney.

Consider now, why it is important to use Form 22EF. Form 21, paragraph a, says that buyer is not relying on a contingent source of funds unless disclosed to seller in the PSA. If a buyer includes a Form 22A, Form 22B or Form 22Q, buyer is disclosing a contingent source of funds.

But, if buyer is relying on an additional contingent source of funds, which many, many buyers are, then buyer is either misrepresenting buyer's financial condition or fraudulently inducing seller to enter the PSA by failing to disclose buyer's reliance on the contingent source of funds. It is important to understand the definition of "contingent funds". Contingent funds are any funds that are NOT in a US bank account in buyer's name. That means that if buyer is relying on funds in an IRA, a 401, the stock market, a gift, a line of credit, the sale of personal property, etc., buyer is relying on a contingent source of funds.

If a broker refuses to include a statewide form designed and intended to prevent her client from committing misrepresentation or fraud because broker misunderstands or misinterprets the form, then broker engages incompetently in the practice of law. Form 22EF serves a fundamental and unavoidable function in many transactions. It is not acceptable for any broker to have a personal rule refusing use of the form in appropriate circumstances.

Moreover, and equally as important, buyer's broker has no authority to unilaterally refuse the use of any form that comes to buyer in the form of a counteroffer. Buyer broker's obligation was to present the offer to buyer in a timely manner and let buyer choose how to proceed. A broker should never, as this question indicates, reject a seller counteroffer because of the inclusion of any term. The buyer is the only person who can reject a seller counteroffer.

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