

COMPARISON AND ANALYSIS OF 2010 WB-11 VERSUS 1999 WB-11

RICHARD STAFF

RICKSTAFF@RICKSTAFF.COM

WWW.RICKSTAFF.COM

IDENTIFICATION OF DRAFTER'S AGENCY STATUS

2010 WB-11 Residential Offer Lines 1- 2

1999 WB-11 Residential Offer Line 1

Comment: (AGENT OF SELLER) (DUAL AGENT) replaced with (AGENT OF SELLER/LISTING BROKER) (AGENT OF BUYER AND SELLER). This is a non-substantive clarification of terminology. Note that Chapter 452 defines subagents as agents of the listing broker.

GENERAL PROVISIONS

2010 WB-11 Residential Offer Lines 3-22

1999 WB-11 Residential Offer Lines 2-16

Comment: The replacement of the term "paid" with "will be mailed, or commercially or personally delivered within _____ days of acceptance to listing broker or _____" may cause problems with buyers who historically have been able to personally deliver the earnest money to the selling agent and thus "pay" the earnest money. This will apparently be a breach of contract under the Offer unless it is modified appropriately.

The following note is useful to address a common misunderstanding and is supported by caselaw. *Brown v. Grosch* (No. 2004AP1377, Ct. App. 2005)

NOTE: The terms of this Offer, not the listing contract or marketing materials, determine what items are included/excluded.

The deletion of the standard that fixtures and personal property included in the purchase price shall be transferred “free and clear of encumbrances” is mystifying. The thought may have been that liens on fixtures are covered by the title insurance process. In my opinion this is only partially true. Unfortunately there is nothing in the new Offer that requires the personal property to be transferred free of liens.

ACCEPTANCE AND BINDING ACCEPTANCE

2010 WB-11 Residential Offer Lines 23-30

1999 WB-11 Residential Offer Lines 17-21

Comment: The language clarification is useful: Buyers and Sellers have signed one copy of the Offer, *or separate but identical copies of the Offer.*

The additional clarification is also worthwhile: “Seller may keep the Property on the market and accept secondary offers after binding acceptance of this Offer.”

DELIVERY PROVISIONS

2010 WB-11 Residential Offer Lines 31-57

1999 WB-11 Residential Offer Lines 22-33 and 219-237

Comment:

Personal delivery now permitted to entities designated as a party’s recipient for delivery. The old offer only allowed personal delivery to individuals designated for delivery. This creates the problem of a document handed to a non-agent employee of a real estate broker accomplishing delivery even though that employee has no idea what to do with the document or the significance of the “delivery.” Could this be interpreted as allowing the use of a drop box if the recipient is an entity?

Email delivery added with assumption of prior electronic consent at line 46.

Although the failure to obtain required E-Sign consents will not affect the enforceability of the contract I suspect that in retrospect we will discover the less than 100% of parties will actually consent electronically as required by E-Sign and Wisconsin e-commerce law.

The deletion of the traditional Fax language (Lines 219-221 - 1999 Offer) may be appropriate from a license law perspective although I have not researched the law of "originals" in other areas of the law to determine if this raises other issues.

OCCUPANCY

2010 WB-11 Residential Offer Lines 58-62

1999 WB-11 Residential Offer Lines 34-36 and 293-297

Comment: Note addition of broom swept condition and that the term is not defined.

Note deletion of pre/post occupancy paragraph which is thought to be unneeded with wide adoption of Occupancy Addenda.

DEFINITIONS

ACTUAL RECEIPT

2010 WB-11 Residential Offer Lines 64-65

A new definition which will clarify the meaning of the term previously undefined.

REAL ESTATE CONDITION REPORT

2010 WB-11 Residential Offer Lines 146-164

1999 WB-11 Residential Offer Lines 82-91 and 53-58

Comment: No Substantive Changes.

CONDITIONS AFFECTING THE PROPERTY OR TRANSACTION

2010 WB-11 Residential Offer Lines 66-113

1999 WB-11 Residential Offer Lines 59-81

Comment: The rewrite of the definition of conditions affecting the property or transaction began as an effort to allow the seller to make one set of representations – the same representations found in the Seller Condition Report would be reproduced in the Offer. Obviously this goal was not met as the the following items were added in the Offer:

Underground or aboveground fuel storage tanks previously located on the property.

A note regarding federal lead paint disclosure requirements

The addition of current or previous animal or insect infestations.

Land divisions involving the Property for which required state or local permits had not been obtained.

Violation of applicable smoke detector laws

High voltage electric (100 KV or greater) or steel natural gas transmission lines located on but not directly serving the Property.

The only item I am troubled by is current or previous animal or insect infestations. The Seller condition report limits itself to wood eating insects. If an infestation is defined as: “enough animals or insects running around so as to be unpleasant” (my definition) what house hasn’t had an infestation? Kitchen moths, common ants, asian beetles, ladybugs, etc. commonly infest homes. Sellers who have occupied a property for many years will be hard pressed to properly disclose animal or insect infestations.

Definitions:

2010 WB-11 Residential Offer Lines 173-196

1999 WB-11 Residential Offer Lines 124-133 and 140-146

Comment: Water treatment systems are added to the list of fixtures and satellite dishes and component parts have been removed. Both are reflected in the revised caution:

CAUTION: Exclude any Fixtures to be retained by Seller or which are rented (e.g., water softener or other water conditioning systems, home entertainment and satellite dish components, L.P. tanks, etc.) on lines 17-18.

Comment: No Substantive Changes.

CLOSING (Lines 115-116)

2010 WB-11 Residential Offer Lines 115-137

1999 WB-11 Residential Offer Lines 43-52

Comment:

Note: The new offer gives the right to select the place of closing to the seller rather than the mortgagee. This will certainly cause problems in situations where the place of closing selected by the seller will prevent the lender from obtaining an insured closing letter specific to the transaction – a standard requirement for lenders today.

PRORATIONS

The first issue with the general proration language is DRL's decision to have prorations "based upon date of closing values." Certainly there is value in identifying a date certain for determining proration values. Many values used in prorations do not change on a daily basis. However, there are prorations that do change on a daily basis, e.g. fuel prorations or private or municipal charges based on usage such as water and sewer. Attorneys who regularly participate in closings know that it is not practical to have to wait until the day of closing to calculate prorations. Attorneys who work in markets that prorate these types of charges (e.g. water and sewer charges currently based on the prior billing cycle) will need to revise the Offer to identify an earlier valuation date or possibly eliminate these prorations in favor of "final readings" and payment of account balances at the closing table.

The property tax proration language now provides the parties with three alternatives. Net general taxes, the traditional formula, is the first option. The second option is based on assessment times mill rate and the third option is based on sales price times municipal fair market values. Unfortunately a drafting error makes use of the second and third options problematic. The sentence preceding the three alternatives requires: "Net general taxes shall be prorated at closing based on:" How does one prorate "net general taxes" using "current assessment times current mill rate" or "sales price times fair market value"? Attorneys advising clients wishing to use the second or third alternative will need to rewrite the introductory sentence to avoid this conflict.

The DRL has provided an option for re-proration of taxes at lines 134 - 137. The first problem with the re-proration paragraph is the idea that the parties are going to manage the re-proration themselves. It is understandable that brokers would not want to participate in this process but how many thousands of disputes will arise each year as the parties fail to agree on if, when and how they will re-prorate. The "when" is the least

problematic, the offer states that re-proration is to be conducted within 30 days after the actual tax bill is received for the year of closing. Unfortunately the seller, the likely party to be writing the re-proration check, will not get a tax bill unless the buyer forwards it (note that no system for learning the seller's forwarding address is included in the offer). One might assume that the Offer provides a formula for re-proration – it does not. Most people would assume the formula for re-proration should have something to do with the final tax bill. The re-proration paragraph speaks in terms of “re-prorating the real estate taxes.” Unfortunately the only defined term in the section is “net general real estate taxes,” an altogether different term than “real estate taxes.” Attorneys may be well advised to start from scratch if a re-proration provision is desired.

LEASED PROPERTY

2010 WB-11 Residential Offer Lines 138-141

1999 WB-11 Residential Offer Lines 37-39

Comment: No Substantive Changes.

RENTAL WEATHERIZATION

2010 WB-11 Residential Offer Lines 142-145

1999 WB-11 Residential Offer Lines 40-42

Comment: The problem here is that the new Offer dropped the phrase “If not exempt,” which had preceded the language indicating that the seller must provide a certificate of compliance if the seller was responsible for compliance. Does this mean that in exempt transactions the seller must obtain a certificate if they are responsible for compliance? Certificates of compliance can be obtained for any property whether required by the rental weatherization Code or not. It may come as a shock to sellers to find out after accepting an offer that the buyer is demanding a Certificate of Compliance but that appears to be the buyer's right given the literal meaning of the language. It is unlikely that this is the DRL's intent but it is yet another example of an issue that will require legal counsel to careful review and modify the language of the Offer to protect the interests of the client.

PROPERTY DIMENSIONS AND SURVEYS

2010 WB-11 Residential Offer Lines 197-203

1999 WB-11 Residential Offer Lines 92-96

Comment: No Substantive Changes.

PRE-CLOSING WALK THROUGH

2010 WB-11 Residential Offer Lines 204-207

1999 WB-11 Residential Offer Lines 111-114

Comment: The new form substitutes “walk through” for “inspect.” Since “walk through” is not defined it is difficult to determine what the impact of this will be.

The standard of “good and workmanlike manner” has been dropped in this paragraph in favor of “in the manner agreed to by the Parties.” This seems to be imprudent as the parties to the Offer only agree that cures done under the inspection contingency must meet this standard. Other repairs may be agreed upon in the Offer but the parties may be unaware that no “baseline” standard of performance is included in the Offer. It makes sense to apply the “good and workmanlike standard” to all cures and then allow the parties the opportunity to agree on a different standard if one is preferred.

PROPERTY DAMAGE BETWEEN ACCEPTANCE AND CLOSING

2010 WB-11 Residential Offer Lines 208-217

1999 WB-11 Residential Offer Lines 115-123

Comment: The 2010 Offer requires the seller to provide lien waivers for repairs to damages occurring between acceptance and closing. This seems to be an unreasonable requirement as the majority of these repairs are not lienable events.

FINANCING CONTINGENCY

2010 WB-11 Residential Offer Lines 218-265

1999 WB-11 Residential Offer 149-179

Comment: The following language is new:

If Buyer is using multiple loan sources or obtaining a construction loan or land contract financing, describe at lines 165-172 or 438-444 or in an addendum attached per line 436.

Buyer and Seller agree that delivery of a copy of any written loan commitment to Seller (even if subject to conditions) shall satisfy Buyer's financing contingency if, after review of the loan commitment, Buyer has directed, in writing, delivery of the loan commitment. Buyer's written direction shall accompany the loan commitment. Delivery shall not satisfy this contingency if accompanied by a notice of unacceptability.

CAUTION: The delivered commitment may contain conditions Buyer must yet satisfy to obligate the lender to provide the loan. BUYER, BUYER'S LENDER AND AGENTS OF BUYER OR SELLER SHALL NOT DELIVER A LOAN COMMITMENT TO SELLER OR SELLER'S AGENT WITHOUT BUYER'S PRIOR WRITTEN APPROVAL OR UNLESS ACCOMPANIED BY A NOTICE OF UNACCEPTABILITY.

Comment: The DRL apparently is concerned that too many financing contingencies were being inadvertently satisfied because lenders or brokers delivered commitment letters to the seller without the buyer's permission. Therefore, the DRL has said delivery of a commitment plus written authorization from the buyer for delivery will be required to satisfy the financing contingency. It appears that this is a change that may cost many buyers their offers if their written delivery instructions are not submitted with the commitment letter.

■ **IF THIS OFFER IS NOT CONTINGENT ON FINANCING:** Buyer shall provide Seller within 7 days of acceptance written evidence from a financial institution or a third party in control of the funds, that Buyer shall have the required funds available at closing. If Buyer does not provide written evidence, Seller has the right to terminate this Offer by delivering written notice to Buyer. Buyer may or may not obtain mortgage financing but does not need the protection of a financing contingency. Seller agrees to allow Buyer's appraiser access to the

Property for purposes of an appraisal. Buyer understands and agrees that this Offer is not subject to the appraisal meeting any particular value, unless this Offer is subject to an appraisal contingency, nor does the right of access for an appraisal constitute a financing contingency.

COMMENTS: What financial institution is going provide written evidence that the buyer shall have the required funds available at closing unless that institution takes possession of the funds to prevent their use until the time of closing? It appears that nearly every seller in a cash transaction will have a potential reason to terminate the Offer. What does “third party in control of the funds mean”? It may mean a trustee, or a parent gifting the money? It is unclear what the standard for “acceptable” evidence means. Generally these types of contracts would incorporate at least a reasonableness standard.

Does the third party have any obligation to provide proof of the funds?

DEFAULT

2010 WB-11 Residential Offer Lines 281-300

1999 WB-11 Residential Offer Lines 228-246

Comment: Under the new Offer when a buyer defaults the seller may, “terminate the Offer and have the option to: (a) request the earnest money as liquidated damages; or (b) sue for actual damages.” If a seller wants to sue for actual damages, the seller no longer has to first to direct the broker to return the earnest money.

ENTIRE CONTRACT

2010 WB-11 Residential Offer Lines 301-303

1999 WB-11 Residential Offer Lines 272-274

Comment: No Substantive Changes.

SUBJECT TO CLOSING CONTINGENCY

2010 WB-11 Residential Offer Lines 307-314

1999 WB-11 Residential Offer Lines 278-286

Comment: The 2010 form returns to the model used before the 1999 offer, the subject to closing contingency and the “bump clause” are made a single paragraph again. Because a closing cannot occur without a sale the DRL renamed the subject to sale contingency the subject to closing contingency.

SECONDARY OFFER CLAUSE

2010 WB-11 Residential Offer Lines 315-320

1999 WB-11 Residential Offer Lines 287-292

Comment: No Substantive Changes.

TIME IS OF THE ESSENCE

2010 WB-11 Residential Offer Lines 321-327

1999 WB-11 Residential Offer Lines 135-139

Comment: No Substantive Changes.

TITLE ISSUES

2010 WB-11 Residential Offer Lines 328-362

1999 WB-11 Residential Offer Lines 187-199 and 200-212

“GAP” ENDORSEMENT Lines 346-350

The Offer provides that the Seller shall provide a “Gap” endorsement or equivalent “Gap” coverage. The form describes this “Gap” endorsement as *“providing coverage for any liens or encumbrances first filed or*

recorded after the effective date” (emphasis added) of the commitment and before recording of the deed (the “Gap”). If this gap endorsement or equivalent “Gap” coverage is not available, the Offer states that the Buyer may give written notice that title is not acceptable for closing. If the Seller is still unable to provide this “Gap” endorsement the Buyer has 5 days to waive the objection or the offer will be null and void.

Unfortunately, had the DRL consulted the RPPT or the Wisconsin Land Title Association they would have been told that “Gap” endorsements that insure over all liens and encumbrances are generally not available in the marketplace. Although a comprehensive discussion of “Gap” endorsements is beyond the scope of this summary, all “Gap” endorsements will have a variety of exclusions and conditions and will thus fail to meet the standard set forth in the Offer. Furthermore, it appears that the DRL was unaware that beginning with the 2006 ALTA model forms, title policies generally insure over the “Gap,” making the new “Gap” endorsement language at least somewhat unnecessary and potentially an avoidable expense for the parties. Counsel representing buyers and sellers should consider revising this section of the Offer after discussing “Gap” coverage issues with local title counsel.

MERCHANTABLE TITLE

Comment:

This section of the Offer requires a fairly complex analysis. The DRL redrafted this section in order to address an issue regarding the definition of merchantable title found in earlier forms. The 1999 WB-11 provided:

CONVEYANCE OF TITLE: Upon payment of the purchase price, Seller shall convey the property by warranty deed (or other conveyance as provided herein) free and clear of all liens and encumbrances, except: municipal and zoning ordinances and agreements entered under them, recorded easements for the distribution of utility and municipal services, recorded building and use restrictions and covenants, general taxes levied in the year of closing and _____ (*provided none of the foregoing prohibit present use of the Property*), (emphasis added) which constitutes merchantable title for purposes of this transaction.

The issue presented by the highlighted language of the 1999 offer was that the merchantable title warranty required sellers to not only disclose “prohibited present uses” such as “illegal bedrooms” to avoid misrepresentation claims, but also to exclude these “prohibited present uses” from the merchantable warranty found in the DRL-approved offers (as well as the deeds conveying title per the terms of these offers) or face the risk of being sued for breach of warranty. Other similar “prohibited present uses” include fences erected in

violation of subdivision restrictions or residences zoned as single family but being presently used as a duplex. In practice disclosures of these uses were generally being made by sellers but almost never were the seller's merchantable title warranties modified to except these disclosed "prohibited present uses."

In the new Offer the DRL attempted to address the issue in two ways. First, it removed the phrase "provided none of the foregoing prohibit present use of the Property" from the definition of merchantable title. Second, it added the following phrase to the list of "acceptable" liens and encumbrances under the definition of merchantable title: "present uses of the Property in violation of the foregoing disclosed in Seller's Real Estate Condition Report and in this Offer." The warranty of title section (essentially the definition of merchantable title) now reads:

Upon payment of the purchase price, Seller shall convey the property by warranty deed (or other conveyance as provided herein) free and clear of all liens and encumbrances, except: municipal and zoning ordinances and agreements entered under them, recorded easements for the distribution of utility and municipal services, recorded building and use restrictions and covenants, ***present uses of the Property in violation of the foregoing disclosed in Seller's Real Estate Condition Report and in this Offer***, (emphasis added) general taxes levied in the year of closing and _____ which constitutes merchantable title for purposes of this transaction.

The difficulty with this construction is that present use of a property is not, in and of itself, a lien or an encumbrance. The 1999 offer defines merchantable title by permitting as an "acceptable" lien or encumbrance most ordinances, building codes and subdivision restrictions. The 1999 offer then removed from the broad list of "acceptable" liens and encumbrances (which were allowed under the definition of merchantable title) certain ordinances, building codes and subdivision restrictions, etc. if the property's "current use" violated those certain ordinances, building codes or subdivision restrictions. Thus the old offer considered the "present use" issue as a method of identifying which liens and encumbrances would be permitted under the definition of merchantable title. In simpler terms, if a present use of the property violated an ordinance, building code or subdivision

restriction, then the ordinance, building code or subdivision restriction violated by the present use of the property was removed from the list of “acceptable” liens and encumbrances and would then likely constitute a failure of the seller to convey merchantable title.

The new Offer tries to avoid the situation in which a disclosed improper present use could still constitute a breach of the warranty of merchantable title. The reason for doing so was that neither sellers nor real estate licensees were grasping the need to address the improper present use as both a misrepresentation issue and a warranty of merchantable title issue. The DRL tried to address the problem in the new Offer by eliminating the “present use” standard as a means of determining which liens and encumbrances are acceptable within the definition of merchantable title. All municipal and zoning ordinances and agreements entered under them, recorded easements for the distribution of utility and municipal services, recorded building and use restrictions and covenants are “acceptable” liens and encumbrances for the purposes of the warranty of merchantable title in the new Offer. The new Offer takes the issue a step further by then defining an additional class of “acceptable” liens and encumbrances: present uses of the Property that violate zoning ordinances, building codes, subdivision restrictions, etc. *if they were disclosed in the seller’s condition report or in the offer* (emphasis added). The difficulty with this is that these “present uses” were never liens or encumbrances in the first place and did not need to be excepted from the seller’s warranty of merchantable title. A more serious problem is the fact that because the “present use” standard has been removed, the seller no longer effectively warrants that there are no present uses prohibited by zoning ordinances, building codes, subdivision restrictions, etc. Therefore, in simpler terms, Sellers who don’t disclose illegal present uses of the property are no longer violating the warranty of merchantable title! Attorneys representing buyers, particularly buyers purchasing real estate “as-is,” should consider use of the warranty of title found in the 1999 residential offer to purchase.

SPECIAL ASSESSMENTS

1999 WB-11 Residential Offer Lines 213-218

Comment: No Substantive Changes.

EARNEST MONEY

2010 WB-11 Residential Offer Lines 372-397

1999 WB-11 Residential Offer Lines 247-271

Comment: No Substantive Changes.

INSPECTIONS AND TESTING

2010 WB-11 Residential Offer Lines 398-412

1999 WB-11 Residential Offer Lines 97-110

Comment: The testing and inspection paragraphs are merged in the new offer. Buyers can now be present at all inspections and test, this was previously assumed, it is now expressly stated. Appraisers are now covered and all reports including test reports must be given to the seller.

INSPECTION CONTINGENCY

2010 WB-11 Residential Offer Lines 413-435

1999 WB-11 Residential Offer Lines 298-315

Comment: In addition to restructuring the contingency for clarity the new Offer expressly authorizes follow-up inspections recommended by the inspector. The seller's 10 day period to elect to cure runs from delivery rather than actual receipt of the buyer's notice of defects. Attorneys advising sellers may wish to switch this back to 10 days from receipt in order to avoid the seller not having adequate time to respond to a notice which didn't get

into the seller's hands until the later half of the 10 day period. Note that the definition of defect has been moved to the definition section at line 182.

SIGNATURE BLOCK

2010 WB-11 Residential Offer Lines 321-337

1999 WB-11 Residential Offer Lines 445-463

Comment: No Substantive Changes.

NEW PROVISIONS

2010 WB-11 Residential Offer

266 **APPRAISAL CONTINGENCY:** This Offer is contingent upon the Buyer or a lender of Buyer's choice having the Property
267 appraised by a Wisconsin licensed or certified independent appraiser who issues an appraisal report dated subsequent to the
268 date of this Offer indicating an appraised value for the Property equal to or greater than the agreed upon purchase price. This
269 contingency shall be deemed satisfied unless Buyer, within _____ days of acceptance, delivers to Seller, and to listing
270 broker if Property is listed, a copy of the appraisal report which indicates that the appraised value is not equal to or greater
271 than the agreed upon purchase price. If the appraisal report does not indicate an appraised value for the Property equal to or
272 greater than the agreed upon purchase price, Buyer may terminate this Offer upon written notice to Seller.
273 **CAUTION: An appraisal ordered by Buyer's lender may not be received until shortly before closing. Consider**
274 **whether deadlines provide adequate time for performance.**

Comment: This is a new contingency although contingencies of this sort have been used in offer addenda for many years. The primary purpose of the contingency is to plug the gap in the financing contingency caused by lender's issuing commitments subject to appraisal. A separate appraisal contingency protects the buyer in the situation where financing becomes unavailable after delivery of a commitment due to a low appraisal. The contingency is very useful in cash transactions as well. The problem in the current market is timing. Deadlines may be better stated in terms of "days prior to closing."

2010 WB-11 Residential Offer

275 **DISTRIBUTION OF INFORMATION** Buyer and Seller authorize the agents of Buyer and Seller to: (i) distribute copies of
276 the Offer to Buyer's lender, appraisers, title insurance companies and any other settlement service providers for the
277 transaction as defined by the Real Estate Settlement Procedures Act (RESPA); (ii) report sales and financing concession
278 data to multiple listing service sold databases; and (iii) provide active listing, pending sale, closed sale and financing
279 concession information and data, and related information regarding seller contributions, incentives or assistance, and third
280 party gifts, to appraisers researching comparable sales, market conditions and listings, upon inquiry.

Comment: This provision continues the current practice of authorizing brokers to distribute offer copies to lenders, title companies and other settlement service providers. A more recent development is the requirement of the secondary market that appraisers utilize information about pending sales and active listings in their appraisals. Finally MLS rules require brokers to report sales data including certain data regarding concessions. If this reporting avoids some of the lender fraud issues that led to the recent housing meltdown it may be a necessary evil. Parties should be aware that they have the right to refuse to allow distribution of any confidential information if they choose.

NOTICE RE SEX OFFENDERS

2010 WB-11 Residential Offer

304 **NOTICE ABOUT SEX OFFENDER REGISTRY** You may obtain information about the sex offender registry and persons
305 registered with the registry by contacting the Wisconsin Department of Corrections on the Internet at
306 <http://www.widocoffenders.org> or by telephone at (608) 240-5830.

Comment: this language has been widely used by the industry but is now first making its way into an offer form. The language reflects Wisconsin Statutes sections 452.24, 704.50 and 706.20.