


What you need to know about the New Distressed Properties Law



2009 DISTRESSED PROPERTY LAW FAQs

The information provided in these FAQs was developed by the Washington REALTORS® and NWMLS. Because the law is new, it must be interpreted before it can be applied. Different lawyers and judges will interpret this statute differently. You are encouraged to seek the advice of your own lawyer in determining your approach to compliance with the law. The following are recommendations by the Washington REALTORS® and NWMLS for compliance with the new law.

When does the new law take effect?

The law is effective immediately.

What is this new law all about?

You will recall that in 2008, the Washington Legislature enacted a law referred to as the Distressed Home Seller's law. The law sought to protect vulnerable property owners from scam artists who sought to steal the property owner's equity. However, through unintended consequences, real estate agents and, in some cases, buyers were made potential "distressed home consultants" of seller. A distressed home consultant owes greater duties and carries significant liability to the distressed seller. The result of the 2008 law was to deter many real estate agents, brokers and buyers from assisting sellers who were late in their mortgage payments or who feared they would become late in mortgage payments. This new law eliminates and corrects those unintended consequences.

Are real estate agents and brokers exempt from becoming distressed home consultants?

Yes. Under the new law, a person licensed as a real estate licensee or broker is exempt so long as the licensee or broker is performing real estate services pursuant to the Agency Law and so long as the licensee or broker does not participate, in any way, in a distressed home conveyance. So long as licensee or broker falls within this definition, licensee and broker cannot be considered a distressed home consultant.

What is a distressed home conveyance?

A Distressed Home Conveyance is one in which the buyer takes title to the property but allows seller to continue living in the home with the promise that seller can buy the property back from the buyer at a future date or share in the equity of the sale of the property. It is the classic formula for a scam transaction designed to enable a buyer to wrongfully take a seller's equity. If agent intends to write a purchase agreement that would constitute a Distressed Home Conveyance, agent MUST seek legal counsel for assistance drafting that agreement as Form 21 will not meet the requirements of the law related to that type of transaction. More importantly, if agent or broker participates in a distressed home conveyance in any fashion, then the exemption described above will not apply and agent and broker will be distressed home consultants.

Are the problems with the 20 day rule corrected?

Yes. In the 2008 law, there was a provision stating that if a buyer purchased or closed a distressed home within 20 days of the advertised foreclosure sale, buyer would be a distressed home consultant. The 2009 law provides that a buyer is not a distressed home consultant even if the property is subject to a foreclosure sale within 20 days so long as the seller is represented in the transaction by a lawyer or a real estate agent or broker. This means that if seller is not represented by a lawyer or a real estate broker, buyer must insure that there is not a foreclosure sale pending within 20 days of the closing date.

The best way to protect buyer is to include the 22FSBO (as revised) with every offer for the purchase of real property where seller is not represented by either a lawyer or a real estate agent or broker. If it turns out that a foreclosure sale is scheduled within 20 days of closing, then it will be incumbent upon buyer to insure that seller can hire either legal counsel or a real estate agent/broker. In other words, buyer will be a distressed home consultant if seller does not hire legal counsel or a real estate agent/broker so buyer may want to pay the costs of seller's lawyer or agent/broker, if necessary, to insure that seller can hire professional assistance.

Is the rule fixed regarding delayed possession by seller?

Yes. In the 2008 law, there was a provision stating that buyer would be a distressed home consultant if a distressed home seller was allowed to retain possession after closing. The 2009 law provides that buyer is not a distressed home consultant if the seller is represented by a lawyer or a real estate agent/broker and seller's occupancy after closing is for no more than 20 days and is for the purpose of allowing seller to arrange for and relocate to a new residence. Again, if seller is unrepresented in the transaction and will retain possession after closing, it will be imperative that buyer determine that seller is not a distressed seller. Buyer should include a 22FSBO (as revised) in the transaction if seller is unrepresented and will retain possession after closing.

Are there any forms changes that accompany the new law?

Yes. Effective today, all of the listing agreements and the buyer agency agreements have been revised. The DH listing agreements no longer exist since they were intended solely to protect agents and brokers from becoming distressed home consultants. Statewide listing forms 1-A and 1-B (including 1-A-SWF and 1-B-SWF) have been revised to eliminate the prior distressed seller language and to add a paragraph stating that agent and broker will not assist seller to sell the home as a distressed home conveyance. The buyer agency forms have been revised to add language stating that buyer's agent will not assist buyer to purchase property as a distressed home conveyance. The current 22 NFW and 22FSBO have been revised and combined into a single form called 22FSBO. The 22FSBO should be included with any offer where seller is not represented by a real estate agent or broker or a lawyer.

Do the revised listing agreements require any difference in the way agents use them?

The distressed seller language is eliminated so agents no longer have to explain that section of the form and no longer need to inquire as to whether seller is distressed. The language stating that agent will not participate in a distressed home conveyance is boiler plate so agent does not have to complete any blanks relative to that section. Agents should be prepared to explain to a seller what a distressed home conveyance is. In simple terms, a distressed home conveyance is a sale where seller retains possession after closing with the hope of either buying the property back from buyer or sharing in the equity when buyer sells the property to a new buyer. Again, it is the basic set-up for many scam transactions.

Do agents need to have sellers, who are already in a listing, sign the revised listing agreement?

No. Sellers who are already in a listing do not need to sign a revised listing agreement. However, effective immediately, brokers should destroy their old stock of listing forms and replace the forms with the new listing forms. The same is true of old buyer agency forms.

If seller and listing broker/agent have a Distressed Home Consulting Agreement, does broker need to terminate that agreement?

Recall that under the 2008 law, if an agent intended to contact distressed seller's lender or engage in other activities that constituted distressed home consultant services, agent was required to enter a separate distressed home consultant agreement. That separate agreement is no longer necessary and may create duties and liabilities for broker and agent that are unnecessary under the revised law. Agent and broker may want to terminate that agreement with seller but should consult their own legal counsel for assistance in determining if that is appropriate and if so, how the agreement can and should be terminated.

Did the Buyer Agency Form (statewide forms 41A) change more extensively than just to add the language stating that agent will not participate in a distressed home conveyance?

Yes. Based on changes to the form requested by the statewide forms task force, form 41A also now includes a paragraph allowing agent and broker to establish an exclusive agency relationship by which buyer will owe a commission if buyer purchases any real property within a certain geographical area. Brokers and agents who used the Washington REALTORS® forms prior to October 2007 will recognize this provision. The on-line forms manual, available at Xpress Forms, will include instructions on how to use this new form.

How has the 22FSBO been revised?

The old 22FSBO and the old 22NFW were consolidated into a single form. In this new form, a seller must confirm whether seller is distressed. Seller must also disclose whether a foreclosure sale has been advertised to take place within 20 days of mutual agreement or the closing date established by the purchase agreement. Also, the new 22FSBO mandates that if the seller is distressed, then regardless of the possession date identified on the face of form 21, the purchase agreement, the possession date shall be the closing date. This form allows buyer to evaluate buyer's risk of becoming a distressed home consultant and the resultant need to consider hiring representation for seller. This form should be used whenever a seller is not represented by a lawyer or a real estate broker or agent.

Were any other changes made to the Distressed Seller's Law?

Yes. The definitions of two key concepts were changed. However, because real estate agents and brokers are now generally exempt, these definitional changes will not have a huge impact on agents and brokers. However, agents and brokers must be aware of these definitional changes so that agents and brokers can assist buyers in knowing when it is important to include a revised 22 FSBO. The definition of dwelling was modified so that owners of condo units in buildings with more than four units will now be protected as distressed sellers. Additionally, the definition of homeowner was changed from being strictly owner-occupied to include sellers who have lived in their property within 180 days of entering a purchase agreement or closing of a sale to a buyer.