

COVID-19 FREQUENTLY ASKED LEGAL QUESTIONS

(Subject to continuing revision)

Q: I have a contract pending with an inspection contingency where we cannot secure an inspection within the 10-day period. What should I tell my client to do?

A: First, remember that even during a crisis, a real estate licensee may not under any circumstances engage in the unlicensed practice of law, so avoid giving “legal” advice to your clients or customers, even if they ask questions relating to a MAR form. With that in mind, MAR has created a COVID-19 Addendum to the F1 Contract for the Sale and Purchase of Real Estate that provides some relief to a Seller and Buyer by relaxing the “Time is of the essence” provision of the Contract and acknowledging the parties’ right to cooperate in good faith and make reasonable allowances for delays due to quarantine or closure related to the COVID-19 state of emergency. This addendum, if signed by Seller and Buyer, allows for them to agree to alter deadlines and contingencies as the parties may agree, subject to the right of either party to terminate the Contract if more than 30 days elapses past the Closing Date in the contract.

Q: A pending transaction I am involved with is experiencing difficulty securing an appraisal. What has the government done regarding this situation?

A: Availability of appraisal services has not been limited or restricted by federal or state authorities. Governor Tate Reeves designated as “Essential Services” all “real estate services (including appraisal and title services)” in Executive Order No. 1463 (March 24, 2020). Most lenders are reportedly still requiring full appraisals but have some latitude to vary requirements based upon the type of loan. The Mississippi Banking Association advises that the Federal Financial Institutions Examination Council (FFIEC) is working to have some clarity regarding appraisals within 3-5 days from March 25, 2020. The Federal Housing Finance Agency (FHFA) has directed Fannie Mae and Freddie Mac to allow use of appraisal alternatives to reduce the need for appraisers to conduct interior property inspections for eligible mortgages through May 17, 2020. No exceptions are being made for FHA or VA at this time.

Q: What about use of a remote (virtual) closing if someone is unavailable for an in-person closing?

A: The problem with remote closings is securing of original notary signatures, required for documents to be filed in Mississippi land records. Mississippi law does not recognize electronic or remote notarization as of this date, and the Legislature has suspended their session until at least April 1, 2020. Legislation may be introduced when the Legislature returns to work to address this situation, but until then current Mississippi law does not permit anything other than in-person notarization. The U.S. Congress is currently considering legislation that could enable remote notarization

nationwide, but that solution is not available at the present time. As in the past, *soft closings* can be achieved where parties can secure notarizations in the normal fashion where they are located and then get original documents into the hands of a closing agent prior to

Q: What if a buyer in a pending contract loses their job or has to close their business and this causes them to lose their financing for closing?

A: The Mississippi REALTORS® Contract for the Sale and Purchase of Real Estate (F1) form includes an optional Loan Contingency that provides some protection to a seller, but after this contingency is waived the buyer is obligated to close. Loss of a loan due to COVID-19 is not covered by any other provisions of the MAR contract, and failure to close would constitute a breach of contract by buyer. Mississippi REALTORS® has created a COVID-19 Addendum to the F1 Contract that offers the seller and buyer an option to cover the situation where a buyer loses their financing due to COVID-19 loss of income after the loan contingency has been waived. If seller and buyer execute this Addendum, either party may terminate the Contract. The parties are always free to otherwise amend a pending Contract in writing on any terms they agree upon. If they consider amendment, they should be encouraged to seek competent legal advice before acting.

Q: What is the current situation with Mississippi banks? Are buyers still able to secure loans?

A: Mississippi banks are free to determine their lending practices, except where federal or state regulations have been altered due to the pandemic. The Federal Housing Finance Agency (FHFA) has directed Fannie Mae and Freddie Mac to allow use of appraisal alternatives to reduce the need for appraisers to conduct interior property inspections for eligible mortgages through May 17, 2020; no exceptions are being made for FHA or VA mortgage loans at this time. Mainline banks in Mississippi are open for business as of March 24, 2020, with restrictions on personal access to service areas (most by appointment only); drive-through business remains available in most locations.

Q: Can I refuse to show houses to someone who has been in an area with higher numbers of COVID-19 cases?

A: NAR has provided guidance that says you may ask all clients and potential clients if they have traveled recently or are showing signs of respiratory illness; however, you want to make sure that you ask ALL individuals the same question to avoid claims of discrimination. Refusing to engage with a client or potential client who may be at risk could lead to a potential Fair Housing Act complaint under current law, which has not been revised in light of the pandemic.

Q: Can a seller or buyer terminate a contract because of COVID-19?

A: There is nothing in the Mississippi REALTORS® Contract for the Sale and Purchase of Real Estate (F1) form that gives either party the right to terminate because of COVID-19. MAR has created a COVID-19 Addendum to the F1 Contract for the Sale and Purchase of Real Estate that gives the seller and buyer the option to terminate or amend a pending contract due to COVID-19 issues. As usual, the parties are free to agree to any other amendment they reduce to writing and sign. Without the Addendum or some other amendment to the Contract being executed by seller and buyer, a seller's decision to terminate a pending contract would constitute a breach of the contract by seller, as would a buyer's failure to close in the absence of an applicable contingency that affords a buyer the right to terminate.

Q: I have a tenant in a rental property under the MAR F3 Residential Lease Agreement who says they are sick with COVID-19 and cannot move out before the end of the lease term, which is approaching. What should I do?

A: The Residential Lease Agreement must be amended in order for the end date of the lease to be extended. MAR has created a COVID-19 Addendum to the Mississippi REALTORS® Residential Lease Agreement (F3) that enables the Lessor and Lessee to make allowance for a verifiable quarantine due to COVID-19. The COVID-19 Addendum gives the Lessor the ability to question whether a requested delay based upon quarantine is, in fact, due to a medical diagnosis so that the Lessor maintains the right to decide whether the extension request is valid or not. If the Lessee does not provide sufficient proof of a COVID-19 medical quarantine, the Lessee is not granted an extension and must honor the terms of the Lease to surrender the Premises by the lease Term expiration date.

Q: Can my seller/client refuse to allow access to show their home?

A: A seller, as owner, can make that decision, but there may be consequences. If the house is under contract, the contract may have provisions to provide access, as with inspections, appraisals, etc. If the house is listed, a decision to restrict access may require a change in status in the MLS, which may in turn require removal of the property from active listing, which triggers other things like removal from active marketing venues. MAR has created a COVID-19 Addendum to the Mississippi REALTORS® Listing Agreement (F4) that enables a member to deal with these issues in the context of an existing listing. Whatever the owner does, they need to remember that they are bound by laws like the Fair Housing Act, requiring them to avoid discrimination in prohibiting some but not others from access.

Q: What should I do about open houses during this time period?

A: The Mississippi REALTORS® Listing Agreement (F4) does not specifically require a listing broker to conduct open houses. This is discretionary with the broker, working with the owner. NAR has issued an “Open House Guidance During COVID-19” (March 20, 2020) including strong encouragement to continue to conduct open houses within guidelines from federal, state and local authorities including “The President’s Coronavirus Guidelines for America” recommending that gatherings of ten or more persons be avoided. NAR’s March 16-17, 2020 “2020 NAR Flash Survey: Economic Pulse” revealed that 40% of NAR members nationally say they have suspended open houses, with higher percentages in geographic areas experiencing heavy COVID-19 confirmed cases. According to NAR, “[m]embers have reported temporarily ceasing open houses to restrict traffic into listed homes, to practice social distancing, and to ensure potential buyers are taking recommended precautions.” The Mississippi REALTORS® has links to these and other COVID-19 resources on its website.

Q: I have a tenant in a rental property under the Mississippi REALTORS® Residential Lease Agreement (F3) who says they have lost their job and are unable to continue paying rent. What should I do?

A: The Lessor must decide whether they wish to consider failure to pay rent under these circumstances a default or whether they wish to try to accommodate the Lessee in this situation. If they do not wish to accommodate the Lessee, they may elect to terminate the Lease and not pursue the Lessee for future rent. MAR has created a COVID-19 Addendum to the F3 Residential Lease Agreement that provides a form for the Lessor and Lessee to agree to this option. If a Lessor does not wish to accommodate a Lessee who cannot pay rent, they are not required to do so. To date, no federal or state emergency action has created any moratorium on evictions for Lessees, so the Lessor is free to pursue any remedies for breach of the Lease under normally applicable law.

Q: What if a seller cannot move out of the house at closing because they are quarantined?

A: If a seller is experiencing a medically-ordered self-quarantine due to possible or confirmed infection with COVID-19, there is no provision in the Mississippi REALTORS® Contract for the Sale and Purchase of Real Estate (F1) governing a seller’s inability to vacate the premises due to COVID-19 or otherwise. In these instances, the Mississippi REALTORS® Post-Closing Possession Addendum (F18) would be available to enable the parties to address the situation. This form requires inclusion of a date whereby the seller must vacate, requiring the parties to guess at how long a medical quarantine should last. For a seller with a suspicion of possible infection, the quarantine periods have been in the neighborhood of fourteen (14) days. For persons confirmed to be infected, the quarantine could last for an extended period

of time, especially as the scientific community is still not certain how long treatment may last, depending on multiple factors unique to each patient.

Q: Regarding showings and liability, if REALTORS® are showing property and the buyer ends up testing positive for COVID-19 and someone in the seller household contracts it and the case is linked back to the buyer, is the REALTOR® liable? Should REALTORS® be asking sellers to sign a waiver if the seller insists the house be shown?

A: Tort liability turns on a duty breached that proximately causes damage. The duty of a licensee would be the issue in any accusation since without a duty there can be no tort liability. Licensees always have a duty of disclosure of known facts. Under the current circumstances, it would be reasonable for a licensee about to show or enter any property to ask all parties involved if they or anyone on the premises or in their immediate family have travelled outside the country recently, tested positive for COVID-19, or are showing any symptoms (fever, cough, chest pain, per CDC). If they elect to ask such questions, they must ask everyone in the same manner and not be selective in order to avoid any Fair Housing Act discrimination accusations. If a REALTOR® does gain information that a particular person has or could have COVID-19, they should not disclose the name of that individual in respect of their privacy; the proper response to others whose business dealings are affected (*i.e.*, on a need to know basis) would be that confidential information has been received that precludes a showing at this time, or something to that effect. To help with these situations, Mississippi REALTORS® has created a COVID-19 Disclosure and Waiver Regarding Physical Property Showing or Inspection form that provides members an option for clarifying responsibility and risk among the owner, visiting parties (e.g., potential buyers, inspectors, appraisers, others), and the brokers and agents involved with a particular property.

Q: What if one of my agents gets sick?

A: Brokers should be diligent to implement protocols protecting the health and welfare of their clients, customers, agents, staff and the public. NAR has produced “Coronavirus: A Guide for REALTORS®” that defines the virus, points out risks and refers members to the “Sample Preparedness Plan” created by NAR specifically for assisting members with operating protocols during the crisis. MAR has links to these resources on its COVID-19 webpage.

Q: What about my MLS rules and regulations during this crisis?

A: Unless MLS rules and/or regulations are suspended or amended in response to the pandemic, normal rules continue in effect. NAR reports that some MLSs across the nation are promoting use of virtual tours in open house fields, while some have disabled the use of open house fields altogether. Members should check their own MLS rules.

Q: What is the situation with Mississippi recording offices?

A: Real property documents are filed for public record in the offices of the Chancery Court Clerk in each county. To date, the Mississippi Supreme Court, which oversees operation of these offices, has not issued any orders closing these offices. Currently, all offices are open, though some are restricting direct access to staff for recording purposes. Additionally, e-recording services are available only in Calhoun, DeSoto, George, Hancock, Harrison, Hinds, Itawamba, Jackson, Lafayette, Lee, Monroe, Pontotoc, Prentiss, Rankin, Tishomingo, and Union Counties.

Q: Are real estate brokerages required to close under any emergency orders?

A: As of March 24, 2020, no. Executive orders issued by Governor Tate Reeves have not yet required closure of any real-estate businesses or supporting services (such as banks, appraisers, inspectors, etc.). Governor Reeves has stated as of March 24, 2020 that he and his administration are monitoring the situation but at this time decline to take any action restricting the conduct of real-estate business so long as CDC and other federal and state health guidelines are followed, such as recommendations regarding avoidance of assemblies of more than 10 people, “social distancing” between persons in any gathering, regular hand-washing with soap and the like. Governor Reeves designated as “Essential Services” all “real estate services (including appraisal and title services)” in Executive Order No. 1463 (March 24, 2020).

Q: My local government has imposed restrictions on movement and operation of local businesses. Does Governor Reeves’ executive order addressing the Coronavirus situation and deeming real estate services as “essential” override any local proclamations or ordinances to the contrary?

A: Yes; Governor Tate Reeves designated as “Essential Business or Operation” all “real estate services (including appraisal and title services)” in Executive Order No. 1463 (March 24, 2020). This same executive order declares that “any order, rule, regulation or action by any governing body, agency or political subdivision of the state that imposes any additional freedom of movement or social distancing limitations on Essential Business or Operation, restricts the scope of services or hours of operation of any Essential Business or Operation, or which will or might in any way conflict with or impede the purpose of this Executive Order is suspended and unenforceable during this COVID-19 State of Emergency.”

Q: What if I need to access the courts during this crisis?

A: The Mississippi Supreme Court, which governs the Mississippi state court system, has issued multiple emergency orders related to COVID-19. As of March 24, 2020, all courts remain open, with trial judges having wide discretion regarding handling of cases in their individual courts. Federal courts likewise remain open, with some procedural restrictions on proceedings in place to limit personal appearances and prioritize pending matters. Persons having pending or new claims should contact their attorney or an experienced attorney with a good working knowledge of court procedures, including emergency protocols in place.

Q: Are independent contractors entitled to paid leave?

Self-employed individuals may be eligible for paid leave administered through refundable tax credits if they meet the qualifications under the FFCRA's Emergency Paid Sick Leave Act if they were: subject to a quarantine or isolation order; has been advised to self-quarantine; is experiencing symptoms; or, must care for an individual who is subject to an isolation order or who is a quarantined employee; or is on leave to care for a son or daughter if the school or place of care for the child has been closed or the child care provider of the child is unavailable, due to COVID-19 precautions.

Eligible self-employed individuals are able to claim a refundable tax credit equal to 100% of the qualified sick leave equivalent amount for those who must self-isolate, obtain a diagnosis, or comply with a self-isolation recommendation with respect to COVID-19. Eligible self-employed individuals caring for a family member or for a child whose school or place of care has been closed due to COVID-19 receive a credit equal to 67% of a qualified sick leave equivalent amount. **Source: NAR**