**Arizona Association of REALTORS®**



**Claims and Remedies**

 **Instructor Manual – red and green text is not in student manual**

**rCRMS COURSE LIST**

**REQUIREMENTS FOR CERTIFICATION:**

* Must take ALL 3 Core Courses
* Must take 1 Contract Course
* Must take 1 Elective Course

**CORE COURSES:** (must take **ALL 3** of the following one day courses):

**Agency, Employment and the Standard of Care** *(3hrs Agency, 3hrs Commissioner’s Standards)*
Explore agency and employment agreements, duties, and learn how to comply with the standard of care in the industry.

**Disclosure & Due Diligence** *(6hrs Disclosure)*
Explore how to fulfill the disclosure obligations in a real estate transaction and the due diligence responsibilities of the parties.

**Essential Skills for a Successful Closing** *(6hrs Real Estate Legal Issues)*
Explore the complexities of handling escrow, title and financing issues in a real estate transaction.

**CONTRACT COURSES:** (must take **1** of the following two day courses)

**Mastering the Commercial Transaction** *(6hrs Contract Law, 3hrs Disclosure, 3 Real Estate Legal Issues)*
Master the complexities of the commercial real estate transaction and business brokerage transaction from offer to closing, including drafting the AAR Commercial Real Estate Contract and related addenda.

**Mastering the Land Transaction** *(9hrs Contract Law, 3hrs Real Estate Issues)*
Master the complexities of the vacant land real estate transaction from offer to closing, including drafting the AAR Vacant Land/Lot Purchase Contract and the most common addenda.

**Mastering the Residential Resale Transaction** *(3hrs Disclosure, 9hrs Contract Law)*
Master the complexities of the residential resale real estate transaction from offer to closing, including drafting the AAR Residential Resale Real Estate Purchase Contract and related addenda.

**ELECTIVE COURSES:** (must take **1** of the following one day courses):

**Advertising, Marketing & Misrepresentation: Risk and Regulation** Examine advertising and marketing principles, the rules and regulations governing these activities and how to avoid misrepresentation in a real estate transaction.

**Claims, Litigation and Remedies** (3-legal issues/3-disclosure)
Explore the elements of common real estate claims and litigation, the available remedies, claims management, and dispute resolution.

**Federal Legal Issues** (3-legal Issues/3-fair housing)
Examine how best to comply with the federal laws that impact a real estate transaction such as: fair housing, RESPA, and antitrust.

**Leasing Essentials** *(3hrs Contract Law, 3hrs Real Estate Legal Issues)*
Master the essential elements of real estate leasing, including landlord/tenant laws, property management and a broker’s responsibility in this specialty

**Short Sales, REO’s & Foreclosures** *(3hrs Contract Law, 3hrs Real Estate Legal Issues)*
Short sales and foreclosures are on the rise. Because these transactions are likely to make up a large percentage of your business, it is important to understand the risks inherent in these situations. By familiarizing yourself with the problems that can and do occur in these transactions, you can develop strategies to reduce risks for the clients, salespersons and brokers involved.

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# Course Introduction

This course is a detailed look at common claims and real estate issues along with remedies and risk management tips that may occur in real estate transactions. This course specifically addresses Arizona state laws, but also looks at how the NAR Code of Ethics applies as well. This course allows students to gain a clear understanding of how claims happen, are pursued and resolved, and apply that understanding to minimize risk in their real estate practice. Sections of the text in this course were taken directly from the book *Arizona Real Estate: A Professional’s Guide to Law and Practice* by Michelle K. Lind, General Counsel to the Arizona Association of REALTORS®. Other sources used are annotated.

**Course Learning Objectives**

*Upon completion of this course, students will be able to:*

* Identify four risk management techniques
* Define claim
* Identify the most common claims that may arise in an Arizona real estate transaction
* Identify claims based on transaction issues
* Describe ways to decrease the occurrence of common property condition claims
* Explain breach of contract
* Relate common remedies for breach of contract
* Explain various claims against brokers or agents
* Describe possible risk reduction steps for claims against brokers or agents
* Explain the value of errors and omissions insurance
* Relate how licensees may need to explain contract obligations to a client
* Relate the Code of Ethics to REALTOR® against REALTOR® claims
* Apply the concepts of Pathways to Professionalism to business practices to reduce risk
* List the potential results of claims
* Explain the appropriate venue for various claims
* Relate the difference between ADRE and REALTOR® organization functions with regard to claims
* Describe the ADRE investigative and enforcement process
* Define and differentiate between mediation and arbitration
* Explain common land and title issues affecting residential real estate transactions
* Identify the risks associated with the listing of a home built by an owner builder
* Explain the Homestead Exemption
* Define *lis pendens*

# For the Instructor: Using the Directive Format

**The Directive Format**

*This course uses the directive format. You’ll notice that the left column of the Instructor’s Manual contains some directions and timing for instructors. The right column contains the “meat” of the course. The advantage of using this format is that it provides maximum uniformity in the material being taught. It’s a good idea to familiarize yourself beforehand with the layout of the Student Manual so you can see how the two formats work together to allow for an active learning experience.*

* **Timing**

The course is timed out in small sections. The timing is designed to allow for questions from the students and, in some cases, further discussion as needed. Because the timing is broken up into smaller increments, if one segment runs longer than the allotted time, you can make necessary adjustments to the segment of your choice. Also, if you want to spend slightly more or less time on something, you can plan beforehand to take or add a little time somewhere else. Breaks can be inserted as needed between segments.

* **Exercises**

The exercises are designed to provide active breaks in the lecture. You can certainly substitute exercises of your own to fit the allotted time. The exercises incorporate movement and activity whenever possible, even if it’s only the movement involved in breaking into groups or standing up. Using physical activity helps the students increase retention and cuts down on students “tuning out” due to boredom.

* **Scripted Speech**

Some of the Instructor’s Manual is written as a “script.” This provides some continuity in how the material is presented as well. Should you have to leave a course before it’s completed due to emergency or illness, another instructor – even a less experienced one – would be able to step in for you without compromising the presentation of the material. This isn’t meant to prevent you from incorporating your own illustrations or discussions; you don’t have to use the exact words provided, you should use what’s comfortable for you. The question and answer style used throughout helps increase student involvement in the lecture portions of the course.

* **Materials**

As with any course, you should prepare any needed materials for the students beforehand. *The following is the list of materials needed for this course:*

* Scratch paper and pens for each table
* Some sort of timer
* Small “prizes,” (e.g., candy)

Add to this list any additional materials you require. Also, you might choose to make some of the illustrations more active. The more creative you are with your materials, the better.

* **Slides/Visual Aids**

Although PowerPoint slides are the traditional visual aid of choice, anything that relates to the discussion can serve as a visual “anchor” for students. The more creative you are with your visual aids, the better.

* **Preparation**

You must definitely plan ahead to present this course. One way to prepare is to familiarize yourself with the various Arizona Statutes that relate to the areas in the course. You may also want to better familiarize yourself with the cases referenced so you can add additional background information to the discussion. The case details can provide interesting ways of presenting the concepts in a factual manner. Ensure that you’re familiar with what AAR and NAR have to offer in terms of tools and information regarding risk management, mediation, and the arbitration process. Based on your experience, you can bring in discussion on what the most common claims in Arizona are.

**Zoom activities are noted in blue – ADRE requires a minimum of 5 engagement activities**

**Good Luck!**

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# Unit 1:

# Introduction to

# Claims in

# Real Estate Transactions

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# Unit 1, Segment 1: Basic Risk Management Techniques

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| **Risk Management Techniques**2 mins SLIDE 11Point out the memory device of TRAC for these techniques*Break the class into small groups.* **Group Activity**5 mins for group work5 mins for debrief**Zoom BREAKOUT**Debrief the activity by asking one person from each group to report out.Encourage participants to keep these techniques in mind throughout the course.  | **Learning Objectives:**At the conclusion of this Unit, participants will be able to:* Identify four risk management techniques
* Define a claim

Real estate agents and brokers must exercise risk management techniques to protect their businesses. *When working with clients or other real estate licensees,*Agents or brokers should consider any risk in terms of options and decide whether it is better to: **T**ransfer the risk *by shifting it to another party (for example, by having an insurance policy)***R**etain the risk by *because the chances of something negative or actionable happening are minimal***A**void the risk by *removing or negating the source of it***C**ontrol the risk by Group Activity*Ask the participants to review the TRAC acronym of techniques and identify at least three examples for each element of the acronym.* *Make sure they are prepared to explain their answers.*Identify at least three ways to illustrate each of the four techniques**T\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_****\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_****\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**1. Secure an E&O Insurance Policy.
2. Advise buyer to seek independent tax and legal advice to ensure FIRPTA compliance when dealing with a seller that is a Foreign Person.
3. In a pre- or post-possession scenario, advise clients to seek “appropriate counsel from insurance, tax and accounting professionals” as required by AAC R4-28-1101(K).
4. Recommend clients source legal/financial questions to other professionals, attorneys, accountants, etc
5. A client is asking a legal question regarding an anticipated divorce and how that might affect their property settlement. Suggest they contact an attorney and an explanation that you are not one.
6. A client is purchasing with “others” and asking about a way to take title to be most protective for their needs. Suggest they contact the title company, an attorney or tax accountant. Explain there are legal and financial ramifications in taking title to a property.
7. A client is working with elderly parents and wanting to intercede on their behalf.  Suggest they consult an attorney for a Power of Attorney. Or an attorney as in particular cases, court actions may be necessary to protect the elderly or incompetent.

**R\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_****\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_****\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**1.   Act a dual agent in a transaction.2. Refer professional service providers such as termite inspectors, home inspectors, etc.3. An agent may refer a known- to- them termite inspector. Best suggestion, refer more than one (3-various companies).4. Referring an escrow person/title company who you know to be efficient. Best practice to have the client check fees at (3) various companies and they decide which company to work with.5. A lender may be recommended if they have known expertise in a particular loan type, VA/FHA/Conventional. Someone known to     the agent and again, in refer in 3’s if possible**A\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_****\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_****\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**1. Do not participate in a pre- or post-possession agreement even if your clients plan to do so.
2. Do not complete, or even assist your sellers in the completion of a seller’s property disclosure statement.
3. Do not market your services by text of phone without first checking the phone numbers against do-not-call list.
4. Not making decisions for your clients…let clients make their own decisions and agent acts on their behalf
5. Provide listing range for property, let the client decide the price for the listing and terms of the listing.
6. Discussing what you want the other side of the transaction to know without consulting your client.
7. If you make a commitment to your client, own it and follow through.

**C\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_****\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_****\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**1. Be the source of the source; direct clients to resources and let them pursue the information2. If a Buyer questions whether a building permit was pulled for an addition to property, refer them to the property Municipal reference for discovery. 3. Provide information to assist the Buyer in their due diligence by ALWAYS PROVIDE THE BUYER ADVISORY.   4. Ask the opposite of the transaction to put any requests/answers, etc. in writing and pass them onto the side you are representing.   Do not rely on verbal communication with the other side of the transaction. GET IT IN WRITING and keep a paper trail. |

# Unit 1, Segment 2: Claims Defined

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| **Claims**1 min SLIDE 12Note that in this course, the terms claim and complaint are used interchangeably. Also, note that client is used to indicate an individual(s) with whom the broker or agent has an agency relationship. Consumer or customer is used to indicate a non-agency relationship. **Practice Tip**1 min | ClaimsClaims are defined as:* An allegation
* To assert or maintain as a fact

Claims are more than just an expression of dissatisfaction. Claims are more formal and may involve further action--even litigation--to resolve.**Practice Tip:** Do not let another party’s dissatisfaction turn into a claim. Try to work with the client or consumer to resolve issues amicably and reasonably so that litigation isn’t necessary.*This tip will be discussed in greater detail later in the course.**The next Units discuss specific types of claims filed by various parties.**Any questions?* |

**\*\*\*End Unit 1, Segment 2\*\*\***

# Unit 2:

# Common

# Claims

# Unit 2, Segment 1: Introduction to Common Claims

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| Review the learning objectives of this Unit. **Learning Objectives**1 min SLIDE 14**Introductory Illustration**5 mins group work10 mins debrief**ZOOM BREAKOUT****Who May File Claims**2 mins SLIDE 15Note that more details on the ADRE complaint process are in a separate section titled Forums and Consequences. | Learning ObjectivesAt the conclusion of this Unit, participants will be able to: * Identify claims based on transaction issues
* Describe ways to decrease the occurrence of common property condition claims
* Explain breach of contract
* Relate common remedies for breach of contract

**Introductory Illustration***Break the participants into small groups and have them answer the following questions. Make sure each group has selected a spokesperson to report out. Ask each group to report out their responses to Question 1. As they report out, note responses on a flip chart or white board. Then, starting with a different group, ask each group to report their response to Question 2 and note responses. Same process for Question 3.*Follow the directions of the instructor.1. *Name some common claims or issues that arise during or after a transaction.*
2. *Who dealt with these claims or issues? The buyer – the seller – the licensee?*
3. *How/could they have been handled better?*

**Who May File Claims****Buyers** **Sellers** **Real estate licensees****Consumers**Buyers and sellers may file claims against one another. Licensees may file claims agent each other or their clients. Claims can be filed by clients against agents or brokers based on the agent’s actions or non-actions or the broker’s actions or non-actions. Depending on the nature of the complaint or claim, a broker may be held liable for the actions or non-actions of his or her agent. *According to R4-28-1103, brokers may be sanctioned for failing to exercise reasonable supervision over the activities of salespersons or others under the broker’s employ.* **Top TEN 2020 issues** and said the issues are still the same so far this year.**#1 Escalation Clauses****#2 Fix & Flips****#3 Double Escrows/Wholesaling****#4 Disclosure of Inspection Reports****#5 Farming & Disclosures****#6 Removal of Contingencies/Multiple Offers** **#7  Waiver of Contingencies****#8 Possession / transfer at COE****#9 Covid “rights” primarily Landlord/Tenant****#10 Wire Fraud** 1. \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
2. \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
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10. \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

The following segments dive a little deeper into some typical claims |

**\*\*\*End Unit 2, Segment 1\*\*\***

**Unit 2, Segment 2: Claims Based on Property Conditions**

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| **Top Claims****Claims Based on Property Conditions**10 minsBring in items from Top Ten on previous pageDiscuss examples of each of these issues with students. Ask who is most at risk – the broker/agent or the seller? For eachPoint out that boundary disputes/encroachments are discussed in more detail later in the course. Also point out lines 197–199 and 224-230 regarding square footage in the AAR Residential Resale Purchase Contract. **Practice Tip**1 min**Risk Reduction Tips**1 min SLIDE 17**Discussion**2mins | Let’s look at some property condition claims:A majority of the claims against brokers and agents come from\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**buyers** and are mostly related to property conditions. *These claims can be made by a buyer who discovers an issue after the transaction has closed.*Some of the more common property condition claims involve \_\_\_\_\_\_\_\_\_\_\_\_\_\_ **misrepresentation** or \_\_\_\_\_-\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **non-disclosure** of the following:**Before you get into the common issues – dig into related Top TEN topics relating to property condition**Current Market Issues: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Issues Never Left Behind:* Water issues

*Potability, availability, waterlines, well issues* * Permit/code/zoning issues*For example work or structures on the property may or may not have a permit. Or misstatement by agent that property is zoned residential when in fact it is commercial or agricultural, etc*
* Termites or termite damage
* Sewer/septic issues
* **Environmental concerns***For example mold, lead-based paint, meth house, etc.*
* **Boundary/encroachments**
* **Acreage/square footage**
* **Structural conditions***Cracks, settling of foundation*
* \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
* \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
* \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
* Electrical problems
* Roof leaks

*to Law and Practice***Practice Tip:** Through communication and education regarding the process, work with a seller to ensure that they are open and honest about the material facts that may affect the sale of the property. If the agent or broker is aware of undisclosed, material defects, he or she may be at risk. *Buyers may sue the seller* ***and*** *the real estate agent and/or broker.***Risk Reduction Tips*** Ensure that the seller has recently and accurately completed a Seller’s Property Disclosure Statement (SPDS). *It will minimize risk to the broker, agent, and the seller.*
* Consider recommending to clients (either buyer or seller) to purchase a home warranty.

*For the seller, a home warranty can be an attractive selling point as well as help prevent issues with the buyer after settlement. For the buyer, a home warranty provides peace of mind that should something go wrong with the HVAC or electrical systems, appliances, etc., he or she will have minimal out-of-pocket expense.* ***Ask*** *the participants, “With regard to the above list, which, if any, TRAC techniques could be used to minimize risk? What suggestions do you have to implement the techniques?”*  |

**\*\*\*End Unit 2, Segment 2\*\*\***

# Unit 2, Segment 3: Claims Based on Transaction Issues

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| **Claims Based on Transaction Issues**10 mins SLIDE 18Bring in items from Top Ten on previous pageDiscuss examples of each of these issues with studentsAsk who is most at risk – the broker/agent or the seller for each**Discussion**3 mins | *Not all claims involve property conditions. Some are related to the transaction or transaction documents such as purchase contracts or disclosure documents.* **Before you get into the common issues – dig into related Top TEN topics relating to property condition****Current Market Issues:** \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**Issues Never Left Behind:**Not all claims involve property conditions; some are transaction-related. Transaction-related complaints against licensees include (but are not limited to):* Disagreements over what was included in the sale and what was not*For example, the Purchase Agreement stipulated that an antique chandelier was included in the sale but the buyer discovers it has been removed either during the walk-through or after settlement*
* \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**Earnest money** disputes*For example, the seller refuses to release funds associated with the transaction.*
* Problems with \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**offer/acceptance***For example, the seller refuses to sell or the acceptance of the offer deadline has passed.*
* \_\_\_\_\_\_\_\_\_\_\_\_\_\_**Financing** problems*For example, the buyer can’t obtain financing or the appraisal is too low.*
* Pre-possession & \_\_\_\_\_\_\_\_\_\_\_\_\_ **post-possession** agreement disputes*For example, there may be differences in timing of when the seller moves out of the property and buyer takes possession. Point out that R4-28-1102(J)(1) and (2) prohibits licensees from permitting occupancy in real property without prior written permission from owner and prohibits licensees from delivering possession prior to closing unless expressly instructed to do so by owner of the property.*

***Ask*** *the participants, With regard to the above list, which, if any, TRAC techniques could be used to minimize risk?**What suggestions do you have to implement the techniques?*  |

**\*\*\*End Unit 2, Segment 3\*\*\***

# Unit 2, Segment 4: Breach of Contract

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| **Breach of Contract**5 minsDiscuss examples of breach with students.Ask if any of the TRAC tools apply to breach of contract. If so, which one(s)?**Cure Period**2 minsBriefly review the information about Cure Period and note that this topic is covered in more depth in the rCRMS Contracts course. Do not delve too deeply into this topic but do address it. | *Most real estate transactions are completed without dispute. Sometimes, however, one or more parties refuse to comply with the terms of the contract for various reasons. If that happens, the nonperforming party is in breach of the contract. A breach of contract can arise between agent and client, seller and buyer, agent and broker, etc. Breach of contract can occur anytime a contract is involved.*One common claim that may arise with regard to a real estate transaction is breach of contract. Breach of contract is, in essence, a \_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_ **broken promise**.A breach of contract is a nonperformance of a \_\_\_\_\_\_\_\_\_ **contractual** duty and a violation of any of the terms or conditions of a contract without legal cause.An \_\_\_\_\_\_\_\_\_\_\_\_ **anticipatory** breach is when a party communicates that they will not perform a contractual obligation before the time the performance is due. Cure PeriodThe Arizona Association of REALTORS® (AAR) Residential Purchase Contract provides for a Cure Period, where a party to the transaction is given an opportunity to cure a **noncompliance** \_\_\_\_\_\_\_\_\_\_\_\_\_\_or potential breach of the contract. Michelle Lind, in *Arizona Real Estate: A Professional’s Guide to Law and Practice*, statesIf a party fails to comply with any provision of the contract, the other party must deliver a notice to the non-complying party specifying the non-compliance before declaring a breach. If the non-compliance is not cured within three days after delivery of the notice (cure period), the failure to comply becomes a breach of contract. The cure provision only applies when a party does or does not do something that would have otherwise been an immediate breach of contract. The cure notice provides a second chance to fix a problem before it becomes a breach – the cure notice does not address what happens when there is a breach. . . . The cure period does not apply to a contingency.  |
| **Common Remedies-Cancellation**Discuss examples of each common remedy as they relate to real estate transactions.**Rescission/Cancel.**2 mins SLIDE 20 | Common Remedies for Breach of ContractParties to contracts have options for remedies for breach of contract. The options often depend on which party is in breach. Rescission/CancellationA contract can be rescinded or canceled for the following reasons:* **Material breach**  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_A failure to perform that permits the other party of the contract to either compel performance or collect damages because of the breach.
* **Misrepresentation**\_\_\_\_\_\_\_\_\_\_\_\_\_ A false statement of fact made by one party to another.
* **Fraud**\_\_\_\_\_\_\_\_\_\_ An intentional deception made for personal gain.

To justify a cancellation, the breach must relate to a \_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_ **vital contract** provision such as the ability to close the transaction, and is generally not warranted for a breach of a \_\_\_\_\_\_\_ **minor** contract revision that can be rectified by monetary damages.*Missing the date of an inspection or not getting something fixed appropriately as per the contract are generally items that can be remedied without cancellation.***Risk Reduction Tips:**All AAR contracts include cancellation as an available remedy for breach of contract. However, a cancellation is not always a remedy. Parties must justify the cancellation of the contract.Any party threatening cancellation of a contract over the objections of the other party should be referred to legal counsel. |
| **Specific Performance**2 mins SLIDE 21 | Specific PerformanceSpecific performance is when a court orders a party to perform a specific act, usually what is stated in a contract. *For example, in a contract for the sale of land, the court may order the defendant to convey title instead of awarding monetary damages** Specific performance may be an available remedy for the refusal to complete the purchase or sale of real estate.
* Specific performance may apply if the land is viewed as unique and when an award of damages is considered an inadequate remedy to the situation.

Before a buyer is awarded specific performance, he or she must satisfy the court that he or she is ready to perform. However, if the seller repudiates the contract, the buyer is not required to tender performance before commencing with a specific performance action. *Sabin v. Rauch, 75 Ariz. 275, 255 P.2d 206 (1953)**When dealing with real property, “. . . a Court may assume the inadequacies of damages as a remedy without the necessity of a showing to that effect.”**In this case, the defendant refused to execute the deed for delivery to escrow as agreed stating that the plaintiffs did not and could not convey good and marketable title.* Damages may be awarded instead of specific performance when the specific performance is considered inadequate.  |
| **Damages**2 min**Liquidated Damages**2 minsDirect participants to the copy of the Residential Resale Real Estate Purchase Contract in the Appendix. Review lines 276-285. **Scenarios Regarding Breach of Contract**15 mins group work20 mins debrief SLIDE 22 ZOOMAs a class go through the scenarios and prompt the students to USE THEIR REACTIONS TOOL for yes/no answers**Scenario 1**ZOOM Use reaction tool click YES or click NO**Scenario 2**ZOOM Use reaction tool click YES or click NOZOOM Use reaction tool click YES or click NOZOOM Use reaction tool click YES or click NO ZOOM Use reaction tool click YES or click NOZOOM Use reaction tool click YES or click NOZOOM Use reaction tool click YES or click NO | DamagesDamages are generally monetary compensation that may be recovered in court for the loss suffered by the injured party due to the other party’s breach of contract. An award of damages is intended to put the injured (non-breaching) party in the position he or she had if the contract had not been breached. *See Woodward v. Chirco Construction Co., 141 Ariz. 514, 516,687 P.2d 1269, 1271 (1984) where the Court explained that a plaintiff “can seek to recover in contract for defects in the structure itself as such defects render the home less than purchaser bargained for*Liquidated Damages* Liquidated damages are a specific sum of money that has been agreed uponby all parties as the amount of damages to be recovered for breach of contract.
* Liquidated damages serve as an economical alternative to the costly and lengthy litigation involved in a breach of contract action.
* Many contracts contain damages or liquidated damages clauses. When liquidated damages are specified in a contract, the contract generally controls.

All AAR contracts contain a liquidated damages clause. *7b. Breach: In the event of a breach of Contract, the non-breaching party may cancel this Contract and/or proceed against the breaching party in any claim or remedy that the non-breaching party may have in law or equity, subject to the Alternative Dispute Resolution obligations set forth herein. In the case of the Seller, because it would be difficult to fix actual damages in the event of Buyer’s breach, the Earnest Money may be deemed a reasonable estimate of damages and Seller may, at Seller’s option, accept the Earnest Money as Seller’s sole right to damages; and in the event of Buyer’s breach arising from Buyer’s failure to deliver the notice required by Section 2b, or Buyer’s inability to obtain loan approval due to the waiver of the appraisal contingency pursuant to Section 2m, Seller shall exercise this option and accept the Earnest Money as Seller’s sole right to damages. An unfulfilled contingency is a not a breach of contract.*Earnest money is designated as the liquidated damage amount in AAR contracts. If there is an unreasonably large amount of earnest money at issue, the court may refuse to enforce the liquidated damages clause.*Not all liquidated damages sums are deemed unreasonable in spite of what may appear to be a large sum of money. In Pima Sav. And Loan Ass’n, v. Rampello, 168 Ariz. 297, 812 P.2d 1115 (App. 1991) the buyer contracted to purchase for $4.7 million. The liquidated damages were little more than 6% and the contract was enforceable.* Scenarios Regarding Breach of Contract*Break the class into small groups and have them answer the questions following each scenario. Make sure each group has a scribe/reporter. Depending on time, have each group review and report out on all the scenarios, or the instructor can assign specific scenarios to specific groups.* *The answers are provided for instructors in italics.* Follow the instructions of the presenter. Read and answer the questions for the scenarios that follow. **Scenario 1**Tom and Karen were in the process of buying Joe and Mary’s home. After the inspection period expired, Hurricane Helene blew in and damaged a large palm tree in Joe and Mary’s backyard. Tom and Karen’s landscaper reviewed the damage and told them that the palm tree is now potentially a danger to them and their family. Joe and Mary refuse to repair or replace this dangerous palm tree. Are Joe and Mary breaching the contract?*Maybe. The existence of a danger palm tree due to a hurricane/storm occurring after expiration of the inspection period is probably a material and adverse fact requiring disclosure to the seller. Therefore, the seller is required to update the SPDS, and the buyer then has a five-day opportunity to cancel the contract. Further, the buyer should furnish a three-day cure period notice to require the seller to update the SPDS.* Can Tom and Karen cancel the contract even though the inspection period has expired?*Probably. If the seller does not update the SPDS, the buyer can cancel the contract after the expiration of the three days* **Scenario 2**Nevin and Kathy are buying Holly and Jake’s home, using the Arizona Association of REALTORS® Residential Resale Real Estate Purchase Contract. Holly and Jake were underwater on their mortgage and had to sell using a short sale. The lender has approved the short sale, and all contingencies have been removed. Holly and Jake will receive absolutely no monies at the closing scheduled in two weeks. Nevin and Kathy just learned that Holly and Jake removed some of the fixtures from the home, including sinks, toilets and the evaporative cooler on the roof, and they no longer want the home. Did Holly and Jake breach the contract?*Yes.Under line 30 of the contract, Holly and Jake are prohibited from removing fixtures from the home.If Holly and Jake remove those fixtures prior to closing, they have anticipatorily breached the contract, i.e., unequivocally asserted that they (the sellers) will not perform at the time of closing.*Can Nevin and Kathy cancel the contract now, or do they have to wait until close of escrow?*They can cancel now. Nevin and Kathy (the buyers) should issue a 3-day cure period notice requiring Holly and Jake to return all of the fixtures. If Holly and Jake fail to do so, Nevin and Kathy are entitled to cancel the contract at that time and are not required to delay cancellation until close of escrow.* **Scenario 3**Harry is buying Phyllis’ house using the Arizona Association of REALTORS® Residential Resale Real Estate Purchase Contract. Harry approved of Phyllis’ home during the inspection period and qualified for financing. However, Harry refused to close the transaction because the home had depreciated in value during the escrow period. Harry is willing to forfeit the $5,000 earnest money for the failure to close the transaction if Phyllis will let him out of the contract.  Is Phyllis required to accept Harry’s $5,000 earnest money for his breach of contract?*No. Under the contract, Phyllis is generally not required to accept Harry’s earnest money if Harry breaches the contract. Phyllis instead can sue Harry for monetary damages (i.e., the difference between the contract price and the value of the home at the time of closing). NOTE: Phyllis is required, however, to accept the earnest money in two circumstances (see lines 276-285 of the contract): one, if the buyer fails to deliver the notice of inability to get financing; two, waiver of appraisal contingency results in the buyer being unable to qualify for financing.***Scenario 4**Valeria owns a rental property in a condominium complex. She leases the unit to Francesca. Under the lease agreement, Valeria is required to pay the monthly Home Owner Association (HOA) fees, but she hasn’t done so for several months. Now the HOA has restricted Francesca and her family from the use of the swimming pool and community center.  If Francesca terminates the lease, can Valeria sue her for breach of contract? *Probably not. If Valeria fails to bring the HOA fees current after ten days’ notice from Francesca, Francesca can terminate the lease. Francesca is entitled to terminate the lease because of Valeria’s failure to pay the HOA monthly fees. Valeria has breached the contract between her and Francesca. See A.R.S. §33-1361***Scenario 5**Anton is moving from Chicago to Phoenix and has entered into an agreement to buy a home. Just three weeks prior to the close of escrow, Anton sends a letter to Marta, the seller, telling her that he will not be moving and will not be closing on the house. He is also demanding the return of the earnest money. Marta also wants the earnest money – but she is lucky enough to have found another buyer and wants to execute a contract with this new family as soon as possible. Did Anton breach the contract?*Yes. He has anticipatorily breached the contract.* Does Marta have to wait an additional three weeks before entering into a contract with the second family for the purchase of the home?*Probably not. Anticipatory breach provides that “if a party to a contract unequivocally asserts, preferably in writing, that the party will not perform under the contract at the time for performance,” the other party can terminate the contract. Inasmuch as Anton has probably committed an anticipatory breach of the contract by writing the letter, Marta should be entitled to cancel the contract after delivering to Anton a three-day Cure Period Notice. Marta can then battle with Anton over the earnest money AND also enter into a contract with the second family. NOTE: Although the doctrine of Anticipatory Breach generally applies to buyers not wanting to close the transaction, a seller can also commit an anticipatory breach. For example, if the seller unequivocally asserts in writing after escrow has opened that the seller will not repair warranted items such as the air conditioning, the buyer should be entitled to cancel the contract at that time and not wait until the time for closing.*  |
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**\*\*\*End Unit 2, Segment 4\*\*\***

# Unit 3:

# Claims

# Against Brokers

# or Agents

# Unit 3, Segment 1: Potential Claims Against Brokers or Agents

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| Review the learning objectives of this Unit. **Learning Objectives**0 mins SLIDE 25***Potential Claims Against Brokers or Agents***15 mins SLIDE 26As you review the bulleted list, ask the participants for examples to illustrate each bulleted item. **Discussion**Point out that E&O insurance may cover some of these issues and is discussed later in the course.*SLIDE 26**Point out that breach of contract was just discussed. Real estate agents or brokers can sue or be sued for breach of contract, just like buyers or sellers* **Discussion**2 mins**Group Activity**5 minsZOOM: Use chat to write in areas where claim might be pursuedGive students 3 minutes then read some of the responses from the chat**Risk Reduction Tips**2 mins SLIDE 27 | Learning ObjectivesAt the conclusion of this Unit, participants will be able to:* Explain various claims against brokers or agents
* Describe possible risk reduction steps for claims against brokers or agents
* Explain the value of errors and omissions insurance

Additional claims against brokers or agents that may arise and be alleged include the following: * Breach of fiduciary duty

*That is, the broker didn’t protect the interests of the client.* ***Ask*** *the participants to name the six common-law fiduciary duties (which are care, obedience, loyalty, disclosure, accounting, confidentiality).** Professional negligence*For example, a broker has failed to exercise his duties effectively which resulted in harm to clients.*
* Failure to disclose*That is, a material fact was omitted or not told to the clients*
* Innocent misrepresentation*That is, a broker or agent may have had reasonable grounds for believing that a false statement was actually true. Point out that misrepresentation – including innocent, negligent, and intentional – is discussed in depth in the rCRMS course titled, “Advertising, Marketing and Misrepresentation: Risk and Regulation.”*
* Negligent misrepresentation*That is, a broker or agent carelessly makes false statements with no real basis that they are true.*
* Intentional misrepresentation*That is, a broker or agent knowingly makes false statements with the intent to deceive.*
* Breach of contract*That is, the broker or agent did not hold to the terms of a contract.*
* Violation of real estate statutes*That is, a broker or agent has broken one or more of the real estate statutes, regulations, or rules. For example, the prohibition against possession prior to closing unless expressly authorized.*
* Fraud*That is, the broker or agent intentionally deceived the consumer for personal gain. Or, the licensee did not perform in the manner that was advertised.*
* Consumer fraud*Consumer fraud could include deceptive practices in advertising and marketing.*

***Ask*** *the participants, “With regard to the above list, which, if any, TRAC techniques could be used to minimize risk? What suggestions do you have to implement the techniques?”* **Activity**Identify some other areas where a claim might be pursued against a broker or agent. \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_*Potential answers include:* *RESPA violations,* *Fair Housing Act violations,* *CAN-SPAM,* *Do-Not-Call, etc.* *If necessary, briefly explain what these laws and acts are and how they affect sales associates and brokers. Also, discuss jurisdiction of these types of claims.**Any questions?* |

**\*\*\*End Unit 3, Segment 1\*\*\***

# Unit 3, Segment 2: Risk Reduction Tips

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| Risk Reduction Tips30 minsSLIDE 28As you review this list, periodically quiz the participants about the TRAC elements – and see if they can identify which element of TRAC the bulleted item falls under. **T**ransfer the risk *by shifting it to another party (for example, by having an insurance policy)***R**etain the risk by *because the chances of something negative or actionable happening are minimal***A**void the risk by *removing or negating the source of it***C**ontrol the risk by *SLIDE 29*SLIDE 30Discuss with students how they educate their own clients. Have them share ideas with the group.Ask the managing brokers in the class to discuss how they educate their agents.Point out that the handling of offers is also addressed in the NAR Code of Ethics—Standard of Practice 1-6 SLIDE 31Note that Article11 of the REALTOR® Code of Ethics also addresses this concern about competency/expertiseSLIDE 32.Review R4-28-1101. B. (1), (2), (3), (4): Duties to a Client Point out that REALTORS® have a similar obligation, as expressed in Article 2 of the Code of Ethics. Activity10 minsThis is intended to be a work-with-a-partner activity, but could also be a small group activity, depending on time. When debriefing this activity, note all non-duplicate responses on a flip chart or whiteboard so that participants have a full list to take home with them. ZOOM: put in **breakouts** and ask each group to come up with as many things as possible.3 minutesWhen back from breakout – ask each group to share their listErrors and Omissions Insurance5 mins SLIDE 34Note that sometimes the broker obtains the policy and charges the agents a prorated share. Some brokers take a certain amount out of each commission check; others do it annually.Point out that E&O insurance is not required by Arizona law. SLIDE 35Broker Risk Reduction Tip1 min | The following are some basic tips to potentially reduce the risk for claims.Be well informed*The disclosures, advice, and counsel required of the agent or broker depend on information.* * What is the nature and \_\_\_\_\_\_\_\_\_\_\_\_\_\_ **condition** of the property, *Is the property new? Is it in good condition? What are the expectations of the buyer? What are the expectations of the seller?*
* Have you read and understood the purchase contract and the related forms? *Understanding these documents is crucial to providing good advice to clients*. *Do all parties understand the terms of the sale? Is everything in writing?*
* What is the \_\_\_\_\_\_\_\_\_\_\_\_ **knowledge** level and \_\_\_\_\_\_\_\_\_\_\_\_\_ **experience** of the \_\_\_\_\_\_\_\_\_\_ **client**? *Has the client ever been through the purchase or selling process? Do they understand that every transaction is different?*
* Is your information accurate? *Verify information*. *Make sure the information you’ve obtained about the transaction is accurate.*

Educate the Client* Review the \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **facts** of the transaction. *Does the client understand the details of the transaction?*
* Use client questions to \_\_\_\_\_\_\_\_\_ **inform** and \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **clarify**. *Encourage questions and ensure that all of the client’s questions have been addressed and the answers understood.*
* Give buyers the tools they need to obtain information *Get them in touch with the appropriate experts and professionals should they need specific advice beyond what you can legally or ethically give them.*
* Insist on inspections and walkthroughs *This is not a shortcut that you want to take.Take the time to explain the importance to both buyers and sellers.*
* Review all forms with clients. *Explain their purpose, implications, and content – but do not engage in the unauthorized practice of law.*
	+ Contract
	+ Covenants, Conditions, and Restrictions (CC&R’s) *Explain what these are and each item’s relevance to the sale*
	+ Title Report *Explain the purpose of the title search and title report to the client, as well as the contents – including easements, etc.*
	+ Public Reports *Take the client through the report helping them to understand the content.*

Communicate* Clearly and consistently communicate with the client *and let them know how and when you will next communicate.*
* Avoid shortcuts *This leads to ambiguity and the potential for disputes. Be thorough and explain the process to your clients along the* way.
* Handle offers properly and get them to your clients as soon as is reasonable
* Think before you speak *Don’t speculate or guess*
* Identify your source for any information you provide
* Return calls
* Provide updates
* Contact the client shortly after closing *This will help identify any potential post-closing issues before they become problems.*
* Handle complaints promptly
* Follow through

Disclose and Document* Practice within your area of expertise *If you are not an expert – disclose and refer to someone who is.*
* Suspicious condition *Report it to the client and recommend the appropriate investigation*
* Assist seller client with disclosures *Make sure the seller understands the importance of disclosing and the potential ramifications of not disclosing.*
* Assist buyer clients with due diligence and a thorough review of the seller’s disclosure documents *Do not venture into the unauthorized practice of law, however!*

When in doubt,disclose. *If you have to pause and consider the effects of something you know about the property, it is most likely best to disclose. Explain that real estate licensees, under R4-28-1101, have an obligation to disclose as follows:* *Duties to a Client, B. 1.Through 4: A licensee participating in a real estate transaction shall disclose in writing to all other parties any information the licensee possesses that materially or adversely affects the consideration to be paid by any party to the transaction, including: (1) Any information that the seller or lessor is or may be unable to perform; (2) Any information that the buyer or lessee is, or may be, unable to perform; (3) Any material defect existing in the property being transferred, and (4) The existence of a lien or encumbrance on the property being transferred.** Document the transaction *Take notes, confirm everything in writing, maintain logs of calls, and keep a complete and organized file.*

*Buyer Representation in Real Estate* offers the following additional suggestions: * Ensure that all parties understand the nature of the agency relationships that are implicit or explicit. *If the seller’s agent acts in such a way as to imply he or she represents the buyer, it may result in undisclosed dual agency. Both parties now believe that the agent is representing their best interests. Be certain to stay within the guidelines of the proper agency role – as detailed in a written agreement.*
* Pay careful attention to details, especially as a buyer’s agent: *Details, such as the following, are critical to the successful conclusion of a transaction – and may also be points of contention if things don’t go as planned:*
	+ Home inspection and required negotiations resulting from the inspection
	+ Environmental issues and inspections
	+ Appraisal issues
	+ Survey results
	+ Title problems
* Inform clients about their obligations *including what needs to be done and by when.*
* Prior to closing, offer the client a review of documentation, requirements, etc. This applies particularly to buyer’s agents.
* Establish a standard closing system *and stay organized.*
* Provide clients with checklists *so they can follow along with the process, identify tasks and required documentation, and meet deadlines.*

**Activity**Identify at least five specific things that could go into a checklist to provide to clients.Errors and Omissions InsuranceTo minimize financial risk due to the potential for liability, real estate brokers and agents should purchase errors and omissions insurance (commonly referred to as E&O). E&O insurance is similar to medical and legal malpractice insurance. It covers liability for mistakes or negligence in performing the duties required of the licensees such as: * Property management
* Listing or selling
* Estimating market value
* Counseling clients
* Referrals

E&O policies have deductibles, limits of coverage, and exclusions. E&O policies commonly do not protect licensees from lawsuits arising from the following: *As with other insurance products, most E&O policies have deductibles and limits of coverage for each wrongful act and for each policy year. Policies also have exclusions and commonly does NOT protect licensees from lawsuits arising from** Criminal acts
* Civil rights violations
* Antitrust violations
* Securities
* Physical injury to person or property
* Advertising injury
* Commission disputes
* Criminal acts
* Punitive damages
* Family/personal transactions
* Fair housing/discrimination
* Activities other than real estate duties

Most E&O policies define a “claim” as a written demand for money or services alleging an error, omission, or negligent act. If a buyer or seller makes such a demand, the agent or broker should do the following:* Notify the designated broker or manager, who will:
	+ Notify the E&O carrier in writing
	+ Obtain a claim number
* Cooperate with carrier and attorney
	+ Although the attorney is paid by the insurance company, the attorney represents the broker.

**Broker Risk Reduction Tip**Check with your E&O insurance carrier about possible discounts for education. *For example, one broker reported that she received a small discount because her agents had all taken both Fair Housing and Agency courses – two big areas of potential liability.*More information on E&O is available online at *www.realtor.org/library/library/**Any questions?* |
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**\*\*\*End Unit 3, Segment 2\*\*\***

# Unit 3, Segment 3: Scenarios – only use in live classes – see reference pages for the scenarios which are role plays

Unit 2, Segment 5: Scenarios “You Decide”

**Scenario 1**

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| **Narrator: (addressing jurors)**  | “The respondent has a real estate salesperson’s license and is under the jurisdiction of the Arizona Department of Real Estate. Listen as the complainant explains why he (or she) filed a complaint with the Arizona Department of Real Estate. Then listen to the respondent’s explanation.”“Then **YOU DECIDE**. Did the respondent violate any rules or laws?” |
| **Complainant:**  | “I met, Lisa (Larry) kinda by accident. My original real estate agent became seriously ill and was unable to fulfill her contract with me, so Lisa (Larry) took over.”“Lisa (Larry) really, really did a horrible job – she (he) allowed the buyers into my house prior to escrow . . . and without my permission.”“Those deadbeats removed some uninstalled hardwood flooring I had in the house, turned on the water service, and filled the swimming pool – and then when the deal fell through – they refused to pay for the flooring they stole and the water bill! All because Lisa (Larry) let them in!” |
| **Respondent:** | “That property needed repairs to qualify for financing. I called the original agent and she said that the buyers and I had the owner’s permission to go in and make repairs to qualify for FHA financing.”“Because FHA requires flooring in all rooms, the buyers wanted to and did install temporary carpeting in all rooms.”“Nothing was removed from the house. I don’t know anything about missing uninstalled flooring.”“It’s not my fault the deal fell through. The buyers were unable to secure financing! If the deal had gone through, I wouldn’t be in this mess.” |
| **Narrator: (addressing jurors)**  | “Going by what you just heard, did the Respondent Lisa (Larry) violate any rules or laws? If so, which one(s)?”*The instructor will take over from here. Remain where you are until you receive direction from the instructor.* |

**Scenario 2**

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| **Narrator: (addressing jurors)**  | “The respondent has a real estate broker’s license and is under the jurisdiction of the Arizona Department of Real Estate. Listen as the complainant explains why he (or she) filed a complaint with the Arizona Department of Real Estate. Then listen to the respondent’s explanation.”“Then **YOU DECIDE**.Did the respondent violate any rules or laws?” |
| **Complainant:** | “I am an investor in commercial real estate. I contracted Bob (Bobbi) to act as my buyer’s broker for the purchase of a Glendale apartment complex.”“Back on July 20, I entered into a purchase contract that called for a $5,000 earnest money deposit. The contract also called for a due diligence date of August 25. I wired the $5,000 earnest money to the title company three days later.”“Over the next month, I had the due diligence date extended a few times because I was having difficult securing financing. Each time the date was extended, Bob (Bobbi) received a copy of the approved extension request for the transaction file. The final due diligence date was set as September 15.”“On September 12, my mortgage specialist told me that there was no way I could get financing. My wife (husband) notified Bob (Bobbi) to cancel escrow and reminded Bob (Bobbi) of the September 15 due diligence deadline.” |
| **Respondent:** | “So far, that’s right.”“But what the complainant isn’t telling you is that a team member was handling this transaction for me. She quit my team on September 15 and never told me about the September 15 due diligence deadline.”“Without realizing the deadline was that same day (September 15), I submitted the request to cancel escrow on September 16. But the title company released the earnest money to the seller on September 16.” |

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| **Complainant:** | “Here’s the kicker – Bob (Bobbi) promised me verbally and in writing that he (she) would personally pay the $5,000 but never did!”“He (she) agreed that the loss of the deposit money on the Glendale property was his (her) fault! So, where’s my money?” |
| **Narrator: (addressing jurors)**  | “Going by what you just heard, did the Respondent Bob (Bobbi) violate any rules or laws?” “If so, which one(s)?”*The instructor will take over from here. Remain where you are until you receive direction from the instructor.* |

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| **Scenarios**30 minsInstructions for this activity are included in a separate document titled “Unit 2 Segment 5 Scenario Details for Inst”Zoom:Type in ChatType in ChatAsk students to unmute and shareZoom:Type in ChatType in ChatAsk students to unmute and share | **You Decide**Follow the instructions of the presenter. Be prepared to answer the questions and explain your answers.**Scenario 1**Going by what you just heard, did the Respondent Lisa (Larry) violate any rules or laws? If so, which one(s)?What could Lisa (Larry) have done differently to prevent or minimize the risk of this claim/complaint being filed?**Scenario 2**Going by what you just heard, did the Respondent Bob (Bobbi) violate any rules or laws? If so, which one(s)?What could Bob (Bobbi) have done differently to prevent or minimize the risk of this claim/complaint being filed?*Any questions?* |

**\*\*\*End Unit 3, Segment 3\*\*\***

# Unit 4:

# Licensees

# Against

# Clients Claims

# Unit 4, Segment 1: Potential Claims Against Clients

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| Review the learning objectives of this Unit.**Learning Objectives**0 mins SLIDE 39**Claims Against Clients**1 mins**Risk Reduction Tip**Point out that this is a requirement under Arizona *A.R.S. §44-101(7) SLIDE 41***Scenarios**10 mins SLIDE 42Work through these questions as an entire class. Consider asking volunteers to read each scenario and ask the question(s) following the scenarios.ZOOM: Reactions Tool Yes/NoZOOM: Reactions Tool Yes/NoZOOM: Reactions Tool Yes/NoZOOM: Reactions Tool Yes/No**Remedies**1 minPoint out that alternate dispute resolution, such as mediation and arbitration are discussed in more detail later in the course.  | Learning ObjectivesAt the conclusion of this Unit, participants will be able to: * Relate how licensees may need to explain contract obligations to a client.

Clients are not without obligationsto their real estate licensees and the licensees are not without rights. Real estate agents’ or brokers’ claims against clients primarily involve breach of contract or commission disputes. **Risk Reduction Tip**Ensure that all employment agreements with clients are in writing. *For example, the AAR Buyer-Broker Exclusive Employment Agreement or a local REALTOR® association’s Listing Agreement.* **Scenarios**Scenario 1Barry is a wealthy investor who is working with Lisa, the listing broker. During the term of the listing agreement, Barry loses title to a residential investment property because of a foreclosure sale. The listing agreement provided that Lisa was entitled to a commission if this property was “transferred or conveyed.” Is Lisa entitled to a commission if a foreclosure sale occurs during the term of the listing agreement? *Yes. Barry’s failure to pay his mortgage obligations resulted in the foreclosure sale. Therefore, a commission is owed even though there may not have been a voluntary transfer by the seller. 12 C.J.S., Brokers §234. Note: This does not apply when a property is condemned or otherwise taken by governmental authority.* Scenario 2Shirley wanted to sell her 160 acres of land. She told Marlin, the broker, that she would pay a 2% commission if he found a buyer for the property. Marlin found a buyer, and in the contract between Shirley and the buyer, the seller agreed to pay a 2% commission to Marlin. The transaction closed. Shirley refuses to pay the 2% commission to Marlin, however, because she says there is no written listing agreement as required by *A.R.S. §32-2151.02* because material terms such as inception and expiration dates are not specified. Is Marlin entitled to the 2% commission, even though there is no written listing agreement? *Probably. After Marlin has performed the services, namely produced a buyer to buy the property, there should be no requirement for a written listing agreement. The general rule is that there is no requirement for a written listing agreement if the services to be performed have already been performed, and the seller agreed IN A WRITING to pay a commission to the broker. See Leo Eisenberg & Co., Inc. v. Payson, 152 Ariz. 390, 732 P.2d 1128 (Appr. 1987)*Scenario 3Margot, the broker, is working with her friend Bonita, to help Bonita find a new house. Because they are such good friends, Margot didn’t ask Bonita to sign an employment agreement. She knew she could trust Bonita. Together they have looked at numerous homes over the course of several weeks. Margot showed Bonita one home, which was not in the multiple-listing service. After Bonita got home from seeing this house, she called her brother-in-law – Guillermo – who is also a licensed real estate broker. Bonita directed Guillermo to write an offer on this home and the transaction closed. Is Margot entitled to a commission from the buyer?*No. Under the Statute of Frauds, a buyer’s broker must have a written employment agreement with a buyer in order to be paid a commission by the buyer. See A.R.S. §44-101(7):* *No action shall be brought in any court in the following cases unless the promise or agreement upon which the action is brought, or some memorandum thereof, is in writing and signed by the party to be charged, or by some person by him thereunto lawfully authorized:**7. Upon an agreement authorizing or employing an agent or broker to purchase or sell real property, or mines, for compensation or a commission.*How is this different from Scenario 2?*Although there was no written listing agreement in Scenario 2, the commission was written into the sales contract and the work was already performed.* Assume Margot and Guillermo are both REALTORS®.Does the REALTOR® Code of Ethics address this issue?*Yes. Article 9 says that REALTORS®, whenever possible, should ensure that transactional details are in writing.* Remedies* Depending on the nature of the claim, and the nature of the relationship between the broker/agent and the client, the broker/agent could file a civil suit.
* Mediation or arbitration might also be required – depending on the contract. *For example, lines 54-61 of the AAR Buyer-Broker Exclusive Employment Agreement require mediation and then binding arbitration, if the mediation is not successful.*

*Any questions?* |

**\*\*\*End Unit 4, Segment 1\*\*\***

# Unit 5:

# Licensee

# Against Licensee

# Claims

# Unit 5, Segment 1: Licensee Against Licensee Claims

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| Review the learning objectives of this Unit.**Learning Objectives**1 min SLIDE 45**Licensee Against Licensee Claims**10 mins SLIDE 46SLIDE 47**Scenarios**5 mins SLIDE 50These scenarios can be conducted as small group, work-with-a-partner, or individual work. ZOOM REACTION TOOL. Click Yes or NoSee Unit 4; Segment 1; Scenario 3ZOOM REACTION TOOL. Click Yes or NoZOOM REACTION TOOL. Click Yes or No**Remedies**1 min SLIDE 51 | Learning ObjectivesAt the conclusion of this Unit, participants will be able to:* Relate the Code of Ethics to REALTOR® versus REALTOR® claims
* Apply the concepts of Pathways to Professionalism to business practices to reduce risk

Disputes can occur between sales licensees or between sales licensee and broker licensee. As long as one of the parties in question is a REALTOR®, the matter is usually handled through arbitration (as per Article 17). Articles of the REALTOR® Code of Ethics emphasize, cooperation disclosure and respect as key to avoiding licensee complaints: several of the Articles overlap when making this point. **Article 3:** Cooperate with other real estate professionals to advance client’s best interests.**Article 4:** When buying or selling, make your position in the transaction or interest known.**Article 5:** Disclose present or contemplated interest in any property to all parties.**Article 12:** Present a true picture in advertising and other public representations.**Article 15:** Ensure that your comments about other real estate professionals are truthful and not misleading.**Article 16:** Respect the agency relationship and other exclusive relationships recognized by law that other Realtors have with their clients.The National Association of REALTORS® also developed a list of guidelines that demonstrate professionalism and courtesy called “Pathways to Professionalism.” *The items below are taken from those guidelines and suggest behavior that may help licensees (whether or not they are REALTORS®) avoid the situations that give rise to complaints or claims from other practitioners.** Follow the “Golden Rule” do unto others as you would have them do unto you.
* \_\_\_\_\_**Call** if you are delayed or must cancel an appointment or showing.
* If a prospective buyer decides not to view an occupied home, promptly\_\_\_\_\_\_\_\_\_\_ **explain** the situation to the listing broker or the occupant.
* **Communicate** \_\_\_\_\_\_\_\_\_\_\_\_with all parties in a timely fashion.
* Encourage the clients/customers of other brokers to direct questions to their agent or representative.
* Be aware of and respect cultural differences.
* Be aware of – and meet – all deadlines.
* Promise only what you can deliver – and keep your promises.
* Identify your\_\_\_\_\_\_\_\_\_\_\_ **REALTOR®** and professional status in all contacts with clients and other REALTORS®.
* Respond to other associates’ calls, faxes, and e-mails promptly and courteously.
* Be aware that large electronic files with attachments or lengthy faxes may be a burden on recipients.
* Notify the listing broker if there appears to be \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **inaccurate information** on the listing.
* **Share** \_\_\_\_\_\_\_\_\_important information about a property, including the presence of pets; security systems; and whether sellers will be present during the showing.
* Show\_\_\_\_\_\_\_\_\_\_ , \_\_\_\_\_\_\_\_\_\_ **courtesy**, **trust** and\_\_\_\_\_\_\_\_\_ **respect** to other real estate professionals.
* Avoid the inappropriate use of endearments or other denigrating language.
* Do not prospect at other REALTORS® open houses or similar events.
* \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**Return keys promptly.**
* Carefully replace keys in the lockbox after showings.
* Real estate is a reputation business. What you do today may affect your reputation – and business – for years to come.

“Pathways to Professionalism” Compliments of the National Association of REALTORS®**Scenarios**Scenario 1Charlie is the listing broker for a 20-acre parcel of land. Before he can enter the listing into the multiple-listing service, Patrice, a buyer’s broker, produces a buyer for the land. Charlie verbally agrees to pay Patrice a 2% commission. Is this verbal agreement enforceable? *Yes. A verbal co-broke agreement between Charlie, a listing broker, and Patrice, a buyer’s broker, is enforceable. But keep in mind that an agreement between a seller or buyer to pay a commission to a broker is generally required under the statute of frauds.* Scenario 2Reconsider the scenario with Margot, the broker, and her friend Bonita, the buyer. After viewing several properties with Margot, Bonita found one she liked and had her brother-in-law, Guillermo, write an offer on it and the transaction closed. It was previously determined that Margot probably wasn’t entitled to a commission from Bonita, because they did not have a written employment agreement. It was also decided that Article 9 of the REALTOR® Code of Ethics applied (if Margot is a REALTOR®) and Margot should have gotten the representation agreement in writing. Thinking about the relationship between Margot and Guillermo, not between Margot and Bonita, is there any circumstance under which a written agreement is not required?*Yes. No written agreement is required between brokers for the payment of a commission (e.g., if the listing broker tells a buyer’s broker that, “I will pay you a 7% commission if you find me a buyer” and the buyer’s broker finds a buyer, the listing broker will owe the buyer’s broker an 8% commission. Similarly, verbal amendments to a co-broke commission agreement between brokers are enforceable, e.g., if the MLS says 4%, and the listing broker states to the buyer’s broker that, “I will pay you 5%, not 4%,” the buyer’s broker will be entitled to a 5% commission if a buyer is produced. But such agreement should be in writing to avoid disputes.*Assuming Margot and Guillermo are both REALTORS®, is there any action Margot can take against Guillermo? *Yes. Margot could potentially file a request for Arbitration. Under Article 17,REALTORS® are required to arbitrate. She may have a case for being the procuring cause. Margot may also have cause to file a Code of Ethics complaint, citing a violation of Article 16.* Remedies* Licensees can file claims of misdeeds by other licensees with ADRE – or can potentially file civil suits – depending on the nature of the claim and the injury.
* REALTORS® can file claims of misdeeds that violate the REALTOR® Code of Ethics with their local REALTOR® association or the Arizona Association of REALTORS®.

*Any questions?* |

**\*\*\*End Unit 5, Segment 1\*\*\***

# Unit 6:

# Forums

# and

# Consequences

# Unit 6, Segment 1: Forums and Consequences

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| This is a lengthy Unit, watch the pace and timing!Review the learning objectives of this Unit.**Learning Objectives**1 minsSLIDE 53**Forums**1 min**SLIDE 54**Note that each forum is discussed in more detail in just a few minutes.Point out that disputes are generally litigated in the county where the property is located.Also, point out that some contracts may call for mediation or arbitration prior to litigation. Mediation and arbitration are discussed later in this unit. **Potential Results**3 minsReview the table.SLIDE 55Point out those details regarding complaints submitted to the ADRE follow in the next segment.**SLIDE 56****Small Claims Court**1 min**Justice Court**1 min SLIDE 57**Superior Court**2 mins SLIDE 58SLIDE 60Note that several of these bulleted items are in italics – they are NOT in students’ materials. They are intended for instructor use to “flesh out” the discussion. **State and Local REALTOR® Associations**1 min**ADRE**4 mins**Discussion**5 mins | Learning ObjectivesAt the conclusion of this Unit, participants will be able:* List the potential results of claims
* Explain the appropriate venue for various claims
* Relate the difference between ADRE and REALTOR® organization functions with regard to claims
* Describe the ADRE investigative and enforcement process
* Differentiate and explain Buyer/Seller mediation (DRS),

Public/REALTOR® or REALTOR/REALTOR® mediationand arbitration Claims against brokers or agents, may be filed in a variety of forums, depending on the nature of the claim and the amount of the claim. Licensee claims against buyers or sellers, or buyers’ and sellers’ claims against each other may also be filed in a variety of venue.Venues include the following: * Small Claims Court
* Justice Court
* Superior Court *Small Claims Court, Justice Court and Superior Court all involve litigation.*Attorney General’s office *Complaints can be filed with the Attorney General’s office in cases such as consumer fraud and fair housing*
* State and Local REALTOR® Associations *Only regarding alleged ethics violations by REALTORS® ethics complaints and arbitrations.*
* ADRE *Only regarding alleged violations of real estate statutes and rules by licensees*

*Complaints with the Attorney General’s Office, REALTOR® organizations, and ADRE are not litigation.**If a consumer, broker, or agent is found guilty/liable for a claim, the result may be one of the items listed in the table below. This table provides a snapshot view of potential penalties, some of which are discussed in more detail.* **Potential Results of Claims**

|  |  |  |
| --- | --- | --- |
| Claim Against Non-Licensee | Claim Against Broker or Agent | Claim Against REALTOR® |
| Specific performance | Same | Same |
| Actual damages *the amount of money required to compensate the plaintiff*  | Same | Same |
| Punitive damages *money awarded to specifically punish*  | Same | Same |
| Attorney’s fees and costs | Same | Same |
| Court Costs | Same | Same |
|  | Forfeiture of commission for breach of fiduciary duty, regardless of damages | Same |
|  | Criminal penalties *This could happen if a broker or sales associate is found guilty of a criminal act such as fraud* | Same |
|  | Loss of license | Same |
|  | Education requirement imposed by ADRE | Same |
|  | Monetary penalties imposed by ADRE | Same |
|  |  | Education requirements imposed by REALTOR® organization |
|  |  | Monetary penalties, imposed by REALTOR®  |
|  |  | Loss of membership in REALTOR® organization |

Small Claims CourtSmall Claims Courts of the Justice Court are for those cases that involve $3,500 or lessfor resolution.* The procedures are simple enough that an individual can represent himself or herself.
* Lawyers are generally not allowed and a case is heard by a judge or hearing officer.
* The decision is final and there are no rights for an appeal.

AAR contracts do not require mediation if the parties file an action in the Small Claims Division of an Arizona, so long as the matter is not transferred from the Small Claims Division. Mediation - intervention between conflicting parties to promote reconciliation, settlement or compromise.AAR’s Buyers-Seller Mediation program is a quick and inexpensive way to settle a dispute between a buyer and seller. REALTOR members and clients can get help from an objective third party to resolve earnest money disputes, property condition and closing date issues. Mediation is a win-win resolution.Justice CourtJustice Courts handle cases if the amount, exclusive of interest, costs, and attorney fees is less than $10,000. Lawyers may represent their clients in Justice Court proceedings.*Justice Courts process a wide variety of case types.* Justice Courts have jurisdiction to hear the following:* Misdemeanor violations
* Criminal and civil traffic violations
* Civil lawsuits up to $10,000.00
* \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
* **Eviction action (landlord/tenant) actions for possession of property**
* Orders of protection in domestic violence cases
* Injunctions prohibiting harassment

Superior CourtIf the claim exceeds $10,000,the claim must be filed in the Superior Court to resolve the dispute. To file such a lawsuit, the complaining or injured party should probably use an attorney. *The superior court is the state’s general jurisdiction court. It is a single entity with locations in each county. Each county has at least one superior court judge. In counties with more than one superior court judge, the judges operate in numbered divisions.*[Article VI § 14 of the Arizona Constitution](http://www.azleg.gov/FormatDocument.asp?inDoc=/const/6/14.htm) provides the superior court with jurisdiction over the following cases:* Cases and proceedings in which exclusive jurisdiction is not vested by law in another court
* Equity cases that involve title to or possession of real property or the legality of any tax, assessment, toll or municipal ordinance
* Other cases in which the value of property in question is $1,000 or more, exclusive of interest and costs
* *Criminal cases amounting to a felony, and misdemeanor cases not otherwise provided for by law*
* Forcible entry and detainer actions (evictions of renters)
* Proceedings in insolvency *However, bankruptcy is handled in federal court*
* Actions to prevent or stop nuisances
* *Matters of probate (wills, estates)*
* *Dissolution or annulment of marriages (divorces)*
* *Naturalization and the issuance of appropriate documents for these events*
* Special cases and proceedings not otherwise provided for, and such other jurisdiction as may be provided by law.

State and Local REALTOR® AssociationsFor REALTORS®, ethics violations or arbitration requests are filed with the local and state associations of REALTORS®.If a REALTOR® is found “guilty” of an alleged violation, the result may be Association-imposed sanctions as outlined in the *Code of Ethics and Arbitration Manual*, ranging from education requirements and monetary penalties to loss of membership, depending on the severity of the claim and findings.5 possible actions:* Letter of warning
* Letter of reprimand
* Educational hours
* Appropriate and reasonable fine not to exceed $5,000
* Member is placed on probation not less than 30 days and not more than 1 year
* Membership suspended 30 days – 1 year
* Expulsion 1-3 year
* Suspension or termination of MLS

Arizona Department of Real Estate (ADRE)This is the licensing entity for the state and agents and for claims involving violations by brokers of real estate statutes and Commissioner’s Rules. For additional information on the ADRE, *http://www.re.state.az.us/Default.aspx*. If a broker or agent is found in violation, the result may be: * ADRE sanctions ranging from civil penalties and consent orders, to loss of license depending on the severity of the claim and findings

***Ask*** *participants to explain the difference between the role of the Arizona Department of Real Estate and state/local REALTOR® Associations by answering the following question.* **Discussion**What is the difference between the ADRE and REALTOR® association in terms of the types of claims addressed?*Any questions?* |

**\*\*\*End Unit 6, Segment 1\*\*\***

# Unit 6, Segment 2: ADRE and Complaints

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| **ADRE and Complaints**5minsSLIDE 61**SLIDE 62****Process Details**10 mins**SLIDE 65****SLIDE 66****ADRE and Real Estate Recovery Fund**1 min SLIDE 67**ADRE and Civil Litigation**3 minsReview this verbatim statement from the Substantive Policy StatementDefine prima facie:  “At first view or on its face or on its first appearance.” It is a legal term for evidence that is sufficient to establish or prove the case unless disputed or rebutted.**Discussion**2 mins | The ADRE investigates violations of the real estate statutes and Commissioner’s Rules by licensed real estate brokers and salespeople.The majority of complaints involve one or more of the following:* Breach of fiduciary duty
* Dishonest dealings
* Disclosure issues
*
* Unlicensed activity
* Other state and rule violations

The department does **not** investigate the following: * Landlord/tenant disputes

*Explain that most local jurisdictions (city or county) have a department that is responsible for these complaints. City and county listings are available at www.az.gov.** Construction defects *Point out that the Arizona Registrar of Contractors has jurisdiction concerning construction defects. They can be contacted at www.rc.state.az.us.*
* Ethics violations

*An action that may be unethical is not necessarily illegal. Consumers are directed by the ADRE to contact the Arizona Association of* REALTORS® at*www.aaronline.com/Disputes.** Homeowners Association violations

*The ADRE instructs consumers to seek legal counsel and directs them to* [*www.azbar.org/LegalResources*](http://www.azbar.org/LegalResources) *to find at attorney in AZ.** Covenants, Conditions, and Restrictions (CC&R) violations

*Because CC&R violations are civil and require civil action, consumers are directed to contact their HOA or legal counsel.** Loan, Interest Rate, or Escrow problems

*The Arizona Department of Financial Institutions regulates escrow and mortgage institutions in AZ. Their web address is www.azdfi.gov.** Title Insurance Issues

*The Arizona Department of Insurance regulates Title Insurance institutions and transactions in Arizona. Their URL is www.id.state.az.us.** Homeowners’ Insurance

*Likewise, the Arizona Department of Insurance regulates Homeowner’s Insurance institutions in Arizona. Their URL is www.id.state.az.us.** Escrow money issues

*For the holding or improper payment of escrow money by escrow/title companies, contact The Arizona Department of Financial Institutions at* [*www.azdfi.gov*](http://www.azdfi.gov)* Commission disputes between licensees

*Commission Disputes are civil disputes. Licensees are directed to contact legal counsel. If the brokers (and their agents) are REALTORS®, however, they must seek mandatory Arbitration – according to Article 17 of the Code of Ethics.* *A.R.S. §32-2108* requires complaints filed with the ADRE to be in writing and signed by the complainant \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_. The complaint must allege conduct that violated ADRE laws or rules.To begin an investigation, the Department determines two things: 1. Does the complaint relate to possible violations of real estate laws or rules?
2. Are the people or companies involved under the Department’s jurisdiction?

Process Details14 days1. After a complaint is filed, it is reviewed by an investigator assigned to the complaint.
2. A copy of the complaint is sent to each licensee involved (and the licensee’s broker) with a request for written response.
3. The licensee has 14 days to respond in writing. The licensee’s response should be a full response to the allegations made by the complainant, as well provide a complete copy of the transaction file.
4. The investigator contacts any other witnesses involved.
5. The investigator may contact the party submitting the complaint for additional information.
6. After the information is reviewed, the ADRE determines if there’s enough evidence to support disciplinary action.
7. Administrative sanctions are not pursued unless there’s a preponderance of evidence.
8. One of the following decisions is made:
* Close the file without action
* Close the case with a non-disciplinary letter of concern
* Refer the case to the Enforcement and Compliance Division for possible disciplinary action.

1 of 3 possible actions: Refer case to Enforcement and Compliance Division* + If the Real Estate Auditing and Investigation Division forwards the case to the Enforcement and Compliance Division for review, Enforcement and Compliance reviews the case to determine if there is sufficient evidence to pursue disciplinary action. If not, the case may be closed without action.
	+ If there is indication of a violation, but it is minor or technical in nature, the Department may issue a non-disciplinary Letter of Concern. A Letter of Concern remains in the file and may be considered when determining the appropriate outcome in any future similar complaint.
	+ When Enforcement and Compliance finds the evidence is sufficient to support discipline, it attempts to negotiate a settlement via a Consent Order with the licensee. If an agreement is reached, the Department and the licensee sign the Consent Order and it becomes effective immediately. There is no appeal of a Consent Order, since the respondent licensee agrees to it.
	+ If a Consent Order cannot be negotiated, or the violation is so severe that the Department will only accept suspension or revocation of the license, it refers the case to the Attorney General’s Office which:
1. Prepares a Notice of Hearing and Complaint, which is sent to the licensee. The document identifies the statutes or rules the licensee has allegedly violated, and sets a date and time for hearing.
2. An administrative law judge hears the matter in accordance with the Administrative Procedures Act. After the hearing, the administrative law judge prepares and sends to the Commissioner a recommended Order.
3. The Commissioner may adopt, modify or reject the order and issues a Commissioner's Final Order. That order may be appealed to the Superior Court.

*Frequently Asked Questions*1. Possible penalties include:
* Provisional license\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
* Revocation of license\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
* Suspension of license\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
* Voluntary surrender of license\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
* Civil penalty\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

ADRE and Real Estate Recovery FundA.R.S. §32-2186 requires the commissioner to establish and maintain a real estate recovery fund for the benefit of any person aggrieved by any act, representation, transaction or conduct of a licensed real estate broker that violates the statute or rules. The recovery fund pays for actual and direct out-of-pocket losses to the injured party directly arising out of the real estate transaction, including reasonable attorney fees and court costs. The fund’s liability shall not exceed: (1) $30,000 for each transaction, regardless of the number of persons, brokers, or parcels of real estate involved; (2) $90,000 for each licensee.ADRE and Civil LitigationAccording to ADRE *Substantive Policy Statement 2005.07*, A Complainant's filing of a civil suit has no bearing on whether the Department will pursue an alleged violation of a statute or rule within the Department’s jurisdiction. The Department shall commit the appropriate resources to investigate possible violations. The Department monitors and regulates real estate licensees, but does not determine a licensee’s civil liability to third parties. A finding by the Department that a violation warranting administrative action did or did not occur, is not dispositive of liability and does not create any presumption regarding whether or not civil liability exists. The Department’s investigations shall not be utilized for the purpose of circumventing the Arizona Rules of Civil Procedure or as a means of discovery of evidence for use in civil litigation. The Department will not intentionally place itself in the position of providing discovery and building a prima facie case for a Complainant, only to have the Complainant use the Department’s investigative file as evidence in a civil suit. It is not the Department’s role to assist a Complainant to develop a case that will assist in the Complainant pursuing damages.The Department shall not delay an investigation to await the outcome of a civil court proceeding. Such a delay may discourage or financially inhibit a Complainant’s pursuit of a civil cause of action. Such a delay might also encourage a licensee to assert the Department’s inaction as an argument in the licensee’s favor.***ASK*** *participants what this means to real estate licensees in terms of the investigation of a complaint.* *Basically, it means that whether or not a civil suit is filed, the ADRE will continue its investigation into a complaint filed with it. The timing of a civil suit or a potential civil suit isn’t relevant to the proceedings of the ADRE investigation. Moreover, the ADRE doesn’t want litigants to use the ADRE investigation for discovery purposes or for “proof” of a misdeed or innocence. It does NOT prohibit anyone from also filing a civil suit.* *Any questions?* |

**\*\*\*End Unit 6, Segment 2\*\*\***

# Unit 6, Segment3: Mediation

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| **Mediation**2 mins**SLIDE 68****Steps in Mediation**5 minsThe chart illustrates the text in the five paragraphs immediately below it.SLIDE 69  | An alternative to litigation or filing a complaint with ADRE may be requested through a REALTOR® association or a REALTOR® association is alternative dispute resolution programs* Many purchase contracts and employment agreements contain alternative dispute resolution clauses.
* All AAR contracts require the parties to mediate any dispute before taking further action. The AAR Residential Purchase Contract and Vacant Land/Lot Contract each requires buyer/seller mediation, or Dispute Resolution System (DRS) and defaults to binding arbitration, unless one of the parties opts out.

**Practice Tip:**Licensees using other contracts or standard forms should review the contracts for potential alternative dispute resolution language. Examples of alternative dispute resolution include mediation and arbitration. Michelle Lind, in *Arizona Real Estate: A Professional’s Guide to Law and Practice*, provides information on mediation, as noted in the following paragraphs:* Mediation is a process in which the parties meet with an impartial person who helps to resolve the dispute informally and confidentially.
* Mediators cannot impose binding decisions.
* The parties must agree and sign an agreement before any settlement reached is binding.

Under Arizona law, an agreement in a written contract to submit a dispute or claim to mediation is valid and enforceable. If one party files a lawsuit without offering to mediate, the court will either dismiss the claim as premature or “stay” the litigation pending mediation. If a party refuses to mediate, it could be construed as bad faith or breach of contract.At times, the buyers and sellers are reluctant to mediate. The parties may think that mediation is just a waste of time or will be used only for gathering evidence in support of the complaining party’s claim. Some of these concerns are a result of a lack of understanding of the mediation process. **Steps in Mediation**Mediator meets with Party AMediator meets with all partiesMediator meets with Party BMutually acceptable andbinding agreementMediator goes back to Party A with Party B’s concerns and offersMediator goes back to Party B with Party A’s concerns and offersIn mediation, there is a neutral party, the mediator, who attempts to assist the parties to negotiate a mutually acceptable solution to the dispute. The mediator helps to realistically evaluate the merits of the claim or defense and help the parties evaluate the risks of litigation. Mediators can often provide a creative solution not always possible in court.During mediation, all parties (with or without attorneys) meet in the same room and each side make an opening statement. Each side states their claim or defense, evidence and their desired outcome.The parties are then separated to discuss their position in detail. The mediator works with both sides and helps each party evaluate the strengths and weakness of his or her position. The mediator then engages in shuttle diplomacy conveying each side’s concerns, positions, offers, and counter-offers. Everything told to the mediator in confidence should be kept confidential.The mediator’s goal is to achieve a mutually acceptable and binding agreement between the parties.The Arizona Rules of Evidence preclude the introduction of evidence of settlement negotiations in a trial for the purpose of proving liability, the validity of a claim, or its amount. Offers made during mediation should not be allowed as evidence in any trial or hearing regarding the matter.Mediation is less expensive and less time consuming than litigation. The fees are typically split between the parties and most disputes resolved in two and a half to three hours. Agreeing does not mean agreeing to settle, but just means the parties are trying to settle without going to court. The parties do not give up any right to pursue other legal remedies if mediation is not successful.For transactions involving the AAR Residential Resale Real Estate Purchase Contract, if mediation is unsuccessful, the unresolved dispute or claim must be submitted for binding arbitration. The Attorney General’s office (*www.azag.gov*) as well as AAR provides mediation services. Some local REALTOR® associations may also provide this service. *Any questions?**Key Points:** Mediation of a business dispute is an alternative dispute resolution process (ADR) offered by the Arizona REALTORS®.
* A REALTOR® must be a party to the business dispute
* A mediation conference will be arranged when all parties agree to participate – mediation is voluntary
* There is no fee associated with mediation, unlike arbitration
* A trained REALTOR® mediator will work with the parties to resolve the dispute and arrive at a mutually agreed upon settlement
* The parties to the dispute decide the settlement rather than a hearing panel decision for them
* Mediation = win-win, whereas a Hearing Panel = one winner, one loser
* If the parties to the dispute cannot agree on a settlement they may terminate the mediation
* Mediation is a confidential process
* Mediation moves faster than a formal arbitration process
 |

**\*\*\*End Unit 6, Segment 3\*\*\***

# Unit 6, Segment 4: Arbitration

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| **Arbitration**8 mins**SLIDE 70**Although arbitration can be binding or non-binding – using the AAR Contract, it is binding and the decision is final. **Arbitration Scenario**3 minsThis is intended to be a group discussion. **Arbitration and REALTORS®**3 minsSLIDE 72**Risk Reduction Tip** | Arbitration is similar to litigation in the court system. In arbitration, an arbitrator hears evidence and testimony and makes a decision of who wins and who loses. Arbitration can be binding or nonbinding. * If the parties agree that the arbitration is binding, the decision cannot be appealed using the court system.
* If the arbitration is non-binding, the decision can be appealed.

**In the AAR Residential and Vacant Land/Lot Purchase Contract:**If mediation does not resolve the dispute, it must be submitted to binding arbitration unless:* Either party opts out within 30 days after the conclusion of the mediation conference.
* If opting out, written notice must be provided to the other party.

If neither party opts out:* All the parties must agree on an arbitrator
	+ If the parties cannot agree on an arbitrator, the dispute must be submitted to the Arbitration Association of America in accordance with the Arbitration Rules for the Real Estate Industry, available at *www.adr.org/sp.asp?id=22011.*
* All parties must cooperate in the scheduling of the meeting

The decision of the arbitrator is final and non-appealable. **Exclusions**There are exclusions from the contractual requirement for mediation and arbitration, including but not limited to:* Any action brought in Small Claims Court
* Lis Pendens
* Foreclosures (judicial or non-judicial) or other actions or proceedings to enforce a deed of trust, mortgage, or agreement for sale
* Filing or enforcement of mechanic’s lien
* Any matter that is within jurisdiction of probate court

“The filing of a judicial action to record a *lis pendens* or order of attachment, receivership, injunction, or other provisional remedies is not a waiver of the obligation to submit the claim to alternative dispute resolution, or a breach of the duty to mediate or arbitrate.”*Arizona Law: A Professional’s Guide to Law and Practice***Arbitration Scenario**Both Marcie, the seller, and Gary, the buyer, are claiming the $25,000 earnest money in a failed transaction. Mediation under lines 286-294 of the AAR contract was unsuccessful. Although Marcie wants now to arbitrate the dispute of the $25,000 earnest money, Gary is opposed to arbitration. Can Gary file a lawsuit for the $25,000 earnest money, or is he required to arbitrate this $25,000 earnest money dispute with Marcie?Adapted from Arizona REALTOR® October 2009*Mediation insert belongs here explanation w/AAR prior to beginning Arbitration verbiage.* *Under lines 286-294 of the AAR contract, either the seller or the buyer can “opt out” of the requirement for arbitration by delivering notice to the other party within thirty days after the unsuccessful mediation.*Arbitration and REALTORS®REALTORS® are required, as a duty of membership in the National Association of REALTORS®, to submit disputes to binding arbitration. Details, including procedures, are specified in the NAR *Code of Ethics and Arbitration Manual* (*CEAM*). According to Part 10 of the *CEAM*, brokers are obligated to arbitrate “entitlement to commissions and compensation in cooperative transactions that arise out of the business relationships between REALTORS® and between REALTORS® and their clients and customers . . .”Article 17 of the NAR *Code of Ethics* provides: In the event of contractual disputes or specific non-contractual disputes as defined in Standard of Practice 17-4 between REALTORS® (principals) associated with different firms, arising out of their relationship as REALTORS, the REALTORS® shall submit the dispute to arbitration in accordance with the regulations of their Board or Boards rather than litigate the matter. In the event clients of REALTORS® wish to arbitrate contractual disputes arising out of real estate transactions, REALTORS® shall arbitrate those disputes in accordance with the regulations of their Board, provided the clients agree to be bound by the decision. The obligation to participate in arbitration contemplated by this Article includes the obligation of REALTORS® (principals) to cause their firms to arbitrate and be bound by any award. (Amended 1/01)The duty to arbitrate encompasses contractual as well as related non-contractualissues or questions, as specified in Standard of Practice 17-4. **Risk Reduction Tip**Go to [*www.realtor.org*](http://www.realtor.org)and review the information available about mediation and arbitration.*Any questions?* |

**\*\*\*End Unit 6, Segment 4\*\*\***

# Unit 7:

# Other Real Estate Issues

(if you run out of time, you can pull some content for discussion from this unit)

# Unit 7, Segment 1: Introduction

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| **Introduction**0 minsReview the learning objectives of this Unit.**Learning Objectives**1 minSLIDE 75 | This Unit addresses other issues that real estate licensees might encounter in their practice. Brokers and agents should be conversationally fluent in these topics but should always defer judgment or opinion to another appropriate professional, such as an attorney. Learning ObjectivesAt the conclusion of this Unit, participants will be able to:* Explain common land and title issues affecting residential real estate transactions
* Identify the risks associated with the listing of a home built by an owner builder
* Explain the Homestead Exemption
* Define *lis pendens*

*Any questions* |

**\*\*\*End Unit 7, Segment 1\*\*\***

# Unit 7, Segment 2: Boundary Disputes

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| **Boundary by Acquiescence**1 min SLIDE 76**Encroachments**1 min**Adverse Possession/Prescriptive Easements**1 min**Arizona Specifics**1 minEmphasize the Arizona-specific 10-year requirement**Prescriptive Easement Scenario**3 minsThis is intended to be a group discussion. **Quiet Title Action**4 mins | Although real estate brokers and agents may not become directly involved in boundary disputes, boundary dispute issues may present during a title search. Boundary by AcquiescenceBoundary by acquiescence was defined by the Arizona Court of Appeals in 2003. To establish the doctrine of boundary by acquiescence, the party asserting the claim must prove:* Occupation or possession of property up to a clearly defined line.
* Mutual acquiescence by the adjoining landowners in that line as the dividing line between their properties
* Continued acquiescence for 10 years .*A.R.S. §12-526 (A).See also Mealey v. Arndt, 206 Ariz. 218 76 P.3d 892 (App. 2003)*

EncroachmentsEncroachments occur when a building, fence, or driveway extends over a legal property boundary. * Encroachments are usually identified by a physical inspection or a property survey.
* If a structure encroaches on a neighbor’s property, the neighbor may be able to recover damages or demand the removal of the building.
* Encroachments that exceed the state’s prescriptive easement/adverse possession rule (ten years) may result in adverse possession or easement by prescription.

Adverse Possession/Prescriptive EasementsAdverse possession is a form of involuntary alienation and “is the process by which the possession and use of property can mature into title.” It is also known as title by prescription where someone who uses a property may eventually gain a higher interest in the property than the actual owner who does not use it. Each state has specific requirements to establish adverse possession, but there are usually basic requirements. Possession of the land must be:1. Open and notorious *Obvious to anyone*
2. Continuous and uninterrupted for a specific period of time *For a period of time governed by state-specific regulations*
3. Hostile *Without owner’s permission*
4. Adverse *To true owner’s possession; true owner is excluded from possession*

Arizona SpecificsAccording to *Arizona Real Estate: A Professional’s Guide to Law and Practice*: Adverse possession is based on the hostile possession of land and results in the acquisition of fee title to the land. *A.R.S. §12-521(A)(1)* defines adverse possession as “an actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another.” To acquire title by adverse possession, a person must demonstrate that the person had exclusive possession over the property for a total of 10 years. *Overson V. Cowley, 136 Ariz. 60, 664P2d 210 (App. 1982) and* Ammer v. Arizona Water Company, 169 Ariz. 205, 818 P2.d 190 (App 1991), A.R.S. §12-521 (A) and 12-526 (A).**Risk Reduction Tip**Adverse possession may be a covered risk under an owner’s title insurance policy.Prescriptive Easement ScenariosPhil and Erika’s home is located in Arizona, which has a ten-year prescriptive period. For the past twelve years, Phil and Erika’s neighbor, Emile, has driven across Phil and Erika’s front yard to reach his garage from a better angle. Does this constitute an adverse possession/prescriptive easement? *Yes.* Why or why not?*It meets all five criteria, open, notorious, against owner’s interest, continuous, etc.*Phil and Erika’s other neighbor, Josh, has occasionally done the same thing over the past three years. Does this constitute an adverse possession/prescriptive easement? *No.*Why or why not?*Not over 10 years and not continuous* Generally, speaking, a person claiming rights by adverse possession or prescriptive may be required to file a quiet title action to obtain title to the property at issue if there is a dispute.Quiet Title ActionA quiet title action is a lawsuit to settle a dispute about who owns a parcel of property (for example in an adverse possession claim). *It is used to remove a cloud on the title meaning that there may be a person who may assert some kind of interest in the property when it cannot be cleared by means of an agreement and a quit claim deed.* In a quiet title action, the court decides the question of property ownership. According to *A.R.S. §12-1101(A)*, a quiet title action may be brought by anyone having or claiming an interest in a parcel of real property against any person who claims an adverse interest. According to *A.R.S. §12-1103 (B),* before filing a quiet title action, the party asserting the claim should send the adverse party a quit claim deed along with $5 (or a larger sum to encourage the party to relinquish the claim) and request that the adverse party execute the quit claim deed. If the adverse party does not execute the quit claim deed, the party asserting the claim may recover the attorney’s fees incurred in the quiet title action if the party prevails. The purpose of this requirement is to avoid needless litigation. *See also Mariposa Development Co. v. Stoddard, 147 Ariz. 561, 711 P.2d 1234 (App. 1985) where the appellants were awarded attorney’s fees due to unnecessary litigation.***Example:** John is selling his property and has found a potential buyer for it. During the title search process, a gap in the title is discovered where the public records can’t identify who owned the property for several years. John files a quiet title action in the county court where the defendants are all persons who have a potential interest in the property. The unidentified owner/owners are included as defendants. John asks the court to declare his title valid, thereby “quieting title” to the property and enabling him to sell it as planned – as long as no one appears to contest John’s title. Assuming no one contests John’s title, the buyer is now able to rely on the court’s decision and continue with the sale. **Risk Reduction Tip**A quiet title action may need to take place if there is a dispute concerning ownership of land. If title is not clear, it will jeopardize a successful settlement. *Any questions?* |

**\*\*\*End Unit 7, Segment 2\*\*\***

# Unit 7, Segment 3: Trees and Vegetation Across Boundaries

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| **Trees and Vegetation Across Boundaries**2 minsSlide 77 | *Sometimes brokers and their agents are asked about property rights and what a current or future homeowner can do about trees crossing property borders.* *Real estate licensees should have a basic understanding of the legal precepts involved, but should never offer legal advice to their clients. That would cross the boundary into the unauthorized practice of law.*Sometimes the roots of plants and trees can cross the boundaries of property and cause damage.In Cannon v. Dunn, 145 Ariz. 115, 700 P2.d 502 (App. 1985)* Roots of a eucalyptus tree in the adjoining landowner’s yard invaded the subsurface of the neighbor’s land.
* Neighbor sued for trespass or the abatement of the nuisance—asked the court for an injunction and damages.
* Court denied the request because no actual damage was sustained.
* Court stated that a landowner who sustains injury may without notice, cut off the offending branches or roots at the property line.
* If some “actual and sensible or substantial damage is sustained-the injured property owner may maintain an action in trespass and an action for injunctive relief to abate the nuisance.

*A landowner may generally cut the branches of a tree on adjoining land at the property line.* *Any questions?* |

**\*\*\*End Unit 7, Segment 3\*\*\***

# Unit 7, Segment 4: Listing of a Home Built by an Owner Builder

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| **Listing a Home Built by an Owner Builder**10 mins SLIDE 78 **Slide 79**ZOOM REACTION TOOL. Click Yes or NoZOOM REACTION TOOL. Click Yes or No**Risk Reduction Tips**1 min SLIDE 80**Discussion**2 mins | Brokers and agents might want to consider the risk before taking a listing of a home built by an owner builder. According to *A.R.S. §32-1151,* it is unlawful for any person to act in the capacity of a contract or without a contractor’s license. However, under the owner-builder exception:* Property owners who build or improve their own property or do the work themselves with employees or licensed contractors
	+ Need not be licensed if the structure is intended for occupancy solely by the owner and not intended for sale or rent.

Proof of sale or rent or the offering of such within one year after completion is prima facie evidence that such project was undertaken for the purpose of sale or rent.*A.R.S. §32-1121 (A) (5)** This one-year “safe harbor” can be rebutted by a change in circumstance.
* The fact should be disclosed in writing to potential buyers.

**Scenarios**Scenario 1After retirement, a husband and wife built a new home in northern Arizona. The husband and wife were not licensed contractors. Four months after the home was completed, the husband died. The wife now wants to move back to Phoenix to be closer to her family. Can the wife list and sell the home?*Yes. Under the “owner builder” exception, the owner of a lot is entitled to construct a home on the lot without a contractor’s license if the owner does not intend to sell or rent the home. If the owner does not sell or rent the home within one year after completion, the owner presumptively did not construct the home with the intent to sell or rent the home. A.R.S. §32-1121(A)(5). This one-year “safe harbor” is only a presumption, however, which can be rebutted by a change in circumstances such as the death of the husband. Therefore, the wife can list and sell the home. NOTE: Inasmuch as the home was built by an unlicensed contractor, full disclosure is required to a buyer and buyer should have the home inspected by a licensed contractor.*Scenario 2Paul is the chief information officer for a firm whose hobby is carpentry. He has owned a lot near Flagstaff for a while and decides to build a house on it. Although he is not a licensed contractor, he does the construction himself. Immediately after Paul completes the construction, he contacts a real estate broker to list the newly constructed house.Can the broker list the house for sale even if it was built by Paul, an unlicensed contractor?*If an owner of a lot builds a home for his own use, the owner is exempt from the requirement of a contractor’s license. The offering of the home for sale or rent within one year after completion of the home generally eliminates this exemption, however, and the owner can be held liable for violating the statutes requiring a contractor’s license. See A.R.S. §32-1121(A)(5). Under these circumstances, the broker probably should not list the home. If the broker does list the home, however, the broker should require full disclosure to the buyer of the seller’s unlicensed status, and the broker should recommend in writing that the buyer have an inspection by a licensed contractor, or other professional more familiar with construction problems than the normal home inspector.* **Risk Reduction Tips*** A listing broker should advise an owner-builder wishing to list a property within that one-year timeframe to seek legal counsel regarding potential liability.
* The buyer’s broker should advise a buyer in writing to have the property thoroughly inspected by a licensed contractor or other knowledgeable professional.
* Do not list the home unless the seller discloses his or her status as an unlicensed contractor to potential buyers.

*ASK participants which (if any) element(s) of TRAC apply to this?***Any questions?** |

**\*\*\*End Unit 7, Segment 4\*\*\***

# Unit 7, Segment 5: Homestead Exemption

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| **Homestead Exemption**3minsSLIDE 81**Scenario**2 minsThis is intended to be a group discussion.ZOOM REACTION TOOL. Click Yes or No**Risk Reduction Tip**1 min**Discussion**1 min | Short sales and sales of property in foreclosure present risks for real estate agents and brokers, as well as their clients.Sellers of such properties may ask questions about the Homestead Exemption and how it affects the proceeds of the sale. Real estate practitioners should have an understanding of the exemption but should not put themselves at risk by providing information the client may rely on when making a decision. A referral to a qualified professional helps reduce that risk.The Homestead Exemption is created by A.R.S. §33-1101 *et. seq.** Exempts a single family home, condominium, co-op, or mobile home in which the person resides from attachment, execution, and forced sale due to a non-consensual judgment or lien, up to $150,000 in value or equity.
* Consensual liens (liens the homeowner allows to be recorded against the home) are NOT affected by the homestead exemption. Consensual liens include:
	+ Mortgage
	+ Deed of trust
* A mortgage or deed of trust encumbering the homestead may be foreclosed for nonpayment and the homestead exemption will not protect the homeowner.
* Homestead exemption only prevents certain creditors from taking the first $150,000 of equity in a person’s home to satisfy a debt.
* A person can voluntarily waive the protection by signing a declaration of waiver and recording the waiver in the county in which the home is located. A.R.S. §33-1104 (B)

**Scenario**Gary, the seller, has judgment liens recorded against his home. The Homestead Exemption has protected him from the judgment liens, and he will not close the transaction if the judgment liens will have to be paid from his proceeds of the sale. Does the homestead exemption protect the Gary’s proceeds of sale?*Yes. The homestead exemption will protect up to $100,000.00 of the sales proceeds at the close of escrow from judgment liens. The seller will have up to 18 months after close of escrow to invest up to $100,000.00 of the sales proceeds in another home. A.R.S. §33-1101(C).***Risk Reduction Tip**If a seller asks questions about how the Homestead Exemption will potentially affect the proceeds of the sale of his or her home, direct them to an appropriate professional such as a lawyer or accountant. *ASK participants which element of TRAC is this?**Any questions?* |

**\*\*\*End Unit 7, Segment 5\*\*\***

# Unit 7, Segment 6: LisPendens

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| **LisPendens**3 mins SLIDE 82Stated another way, a *lis pendens* is a recorded notice of a pending lawsuit that affects title to a property and should never be recorded in a commission dispute. **Scenario**if time is running out, do them as a class discussion. ZOOM REACTION TOOL. ZOOM REACTION TOOL. Click Yes or NoZOOM REACTION TOOL. Click Yes or No | As one of the tips in an earlier unit, it was noted that real estate agents and brokers, working with buyers in particular, should educate their clients. One specific area to consider is how the title process works and what might turn up or go wrong. *One thing that might turn up is a lis pendens.**Lis pendens:*  A suit is pending and is a document that is recorded against real property to give notice that title of the property is the subject of a lawsuit *For example, a lender records a lis pendens on a property in foreclosure. This action notifies others that a legal action affecting the property is pending.* Brokers and agents need to be aware that a *lispendens* is NOT authorized in a commission dispute. *See A.R.S. §12-1191 (A) and Tucson Estates, Inc. v. Superior Ct., 151 Ariz. 600, 729 P.2d 954 (App. 1986)*If a *lis pendens* is filed in a lawsuit that does not affect title, then it is groundless.*One example is Richey v. Western Pacific Dev. Corp. 140 Ariz. 597, 684 P.2d 169 (App. 1984). In this case,* * + *A broker sued to collect $8,000 real estate commission and recorded a lis pendens on the property that had been sold.*
	+ *Defendant counterclaimed for damages pursuant to A.R.S. §33-420*
	+ *The defendant was awarded $1,000 statutory damages plus attorneys’ fees because this was a commission dispute.*

**Scenarios**Scenario 1David, the buyer, has cancelled the transaction and is demanding the return of the $10,000 earnest money. David is also stating that if the $10,000 earnest money is not returned to him, he will record a *lis pendens* to prevent a sale of the property by Jessica, the seller, to another buyer. Can David record a *lis pendens*? Why or why not?*No. First, a lis pendens (Latin for “pending litigation”) cannot be recorded without a lawsuit being filed, such as a lawsuit demanding specific performance of the contract. Second, unless there is a dispute as to title (or ownership) of the property, the buyer is not even entitled to file a lawsuit and record a Notice of Lis Pendens. The penalty for wrongfully recording a lis pendens can be $5,000 or treble damages, whichever is greater. A.R.S. §33-420(A).*Scenario 2Alexis and Mike are selling their house, and it is scheduled to close on August 31. Although Angela, the buyer, qualified for the loan, the lender was not able to fund the loan on August 31. Alexis and Mike delivered a notice of cancellation to the title company the next day, and the title company released Angela’s earnest money to Alexis and Mike. Angela is extremely upset because of the loss of the earnest money, and is threatening to file a lawsuit against Alexis and Mike. In addition, Angela is threatening to record a notice of *lis pendens* to prevent Alexis and Mike from selling the home to another buyer. Can Angela record a notice of *lis pendens* if she files a lawsuit for the return of the earnest money?Why or why not?*No. The buyer is only entitled to record a notice of lis pendens if there is a claim for specific performance of the contract. In other words, a notice of lis pendens is only appropriate if there is a title dispute as to who should be the owner of the home–the seller or the buyer. If the buyer has a claim only for the return of the earnest money, the recording of a lis pendens could subject the buyer to liability to the seller for $5,000, or three times the seller’s actual damages, for the wrongful recording of a notice of lis pendens. A.R.S. §33-420(A).**Any questions?* |

**\*\*\*End Unit 7, Segment 6\*\*\***

# References and Additional Resources

“Arizona Case Law.” *Loislaw.*<<http://loislaw.com/advsrny/doclink.htp?alias=AZCASE&cite=1+Ariz.+App.+244>>

*Arizona Real Estate Law Book*. Charlottesville: Matthew Bender & Company, 2008. Print.

Brouthers, Dianna Wilson, and Roger Turcotte. *Buyer Representation in Real Estate*. Chicago: Dearborn Real Estate Education, 2006. Print.

“Frequently Asked Questions-Investigations Division. *AZ.gov Arizona’s Official Website*. Arizona Department of Real Estate. Web. (10/09).<<http://www.re.state.az.us/Inv/InvFaqs.aspx>>

Galaty, Fillmore W., Wellington J. Allaway, and Robert C. Kyle. *Modern Real Estate Practice*. La Crosse, WI: DF Institute, 2010. Print.

“Investigation Process, The.” Arizona Department of Real Estate. Print. <<http://www.re.state.az.us>>

Lind, K. Michelle. *Arizona Real Estate: a Professional's Guide to Law and Practice*. Phoenix, Ariz.: Arizona Association of REALTORS®, 2006. Print.

“Liquidated Damages and Penalties.”*lexinter.net.*<<http://www.lexinter.net/LOTWVers4/liquidated_damages_and_penalties.htm>>

“Liquidated Damages.” *Wikipedia, the free encyclopedia.*24 Nov. 2010. <<http://en.wikipedia.org/wiki/Liquidated_damages>> Ref. “Liquidated Damages” <<http://law.jrank.org/pages/8310/Liquidated-Damages.html>> retrieved 7 Apr. 2009 *American Law Encyclopedia*.

“Misrepresentation” *Wikipedia, the free encyclopedia*. 24 Nov. 2010. <<http://en.wikipedia.org/wiki/Misrepresentation>>

“Oldenburger v. Del E. Webb Dev. Co., 765 P. 2d 531-Ariz: Court of Appeals, Div. 1, Depart. A 1988.” *Google scholar.*<http://scholar.google.com/scholar\_case?case=5036889241093696507&q+Oldenburger+…>

*Real Estate Principles.*Bellevue, WA: Rockwell Pub., 2006. Print.

“Specific Performance” *Wikipedia, the free encyclopedia.*10 Nov. 2010.

 <<http://en.wikipedia.org/wiki/Specific_performance>>

Steward, Jan. “Mediation 101: This Alternative to Arbitration Makes Room for Negotiation.” *Arizona REALTOR Magazine,* Arizona Association of REALTORS.Web.<http://www.aaronline.com/AZR/2010/November/mediation-101.aspx>

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# Appendix