ARIZONA REALTORS®

THIRD QUARTER 2023

BROKER & MANAGER

QUARTERLY

FORM REVISIONS: JULY 2023

P. 13 LEGAL HOTLINE Q&A

WHAT'S NEW?

ARIZONA REALTORS®

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ARIZONA REALTORS®

BROKER & MANAGER

THIRD QUARTER 2023 | ARIZONA REALTORS® BROKER/MANAGER QUARTERLY

IN THIS ISSUE

REVISED FORM RELEASE

JULY 2023

The Additional Clause Addendum, Buyer Contingency Addendum, Multiple Counter Offer and Multiple Offer/Counter Offer forms have all been revised for release in July 2023.

The major revisions to these forms are discussed below.

Additional Clause Addendum

The Additional Clause Addendum contains numerous important clauses that may be applicable in a real estate transaction. A new clause was added to the Additional Clause Addendum to assist wholesale buyers and wholesale sellers in a residential real property transaction to disclose their wholesaler status as required by law.

In September 2022, a new law became effective which requires wholesalers to disclose their wholesaler status in writing prior to entering into a binding residential real property contract. See A.R.S.§ 44-5101.

A "wholesale buyer" is a person or entity that enters into a purchase contract for residential real property as the buyer and assigns that same contract to another person or entity. A "wholesale seller" is a person or entity that enters into a purchase contract for residential real property as the seller, that does not hold legal title to that real property and that assigns that same contract to another person or entity.

Pursuant to the statute, if a wholesale buyer fails to make the required disclosure in writing, the seller may cancel the contract at any time prior to the close of escrow without penalty and may retain any earnest money paid by the wholesale buyer. Similarly, if a wholesale seller fails to make the required disclosure in writing, the buyer may cancel the contract at any time prior to the close of escrow without penalty and shall be refunded all earnest money. Therefore, the use of this new clause in the Additional Clause Addendum is extremely important when representing a wholesale buyer or seller.

Additional revisions to the Additional Clause Addendum include changing the name of the "Waiver of Appraisal" provision to "Appraisal Contingency Waiver," which more accurately describes the provision and minor changes to the Non-Refundable Earnest Money clause for clarity.

A redlined version of the revised **Additional Clause Addendum** can be found HERE.

Buyer Contingency Addendum

The Buyer Contingency Addendum is for use when the buyer and seller agree to make the Residential Resale Real Estate Purchase Contract ("Contract") contingent on either the closing of a pending sale of the buyer's property or upon an accepted offer for the buyer's property.

The previous versions of the Buyer Contingency Addendum contained an automatic cancellation if the buyer did not accept an offer, or the pending sale of the buyer's property did not close by the date specified. In other words, the form did not provide the buyer an option to waive the contingency and proceed in the transaction towards Contract close of escrow ("COE") in such an event.

The form was revised to allow the buyer three days after the time specified for the closing of the pending sale of buyer's property or for accepting an offer to purchase the buyer's property, to waive the buyer's contingency in the manner required by the Contingency Waiver Provision contained in the form. To waive the contingency, the Contingency Waiver Provision requires the buyer to provide:

(i) written documentation from buyer's lender that buyer can close escrow by the COE date without the sale and closing of buyer's property; or
(ii) in the event of an all cash sale, evidence of buyer's financial ability to close escrow by the COE date without the sale and closing of buyer's property.

Additional revisions were made to further clarify the contingency terms and arrange the information into a more easily understandable format. Instructions and section numbers were also added to the form for clarity.

A redlined version of the revised **Buyer Contingency Addendum** can be found HERE.

Multiple Counter Offer and Multiple Offer/Counter Offer

The Multiple Counter Offer form is for use when the seller is making a counter offer to more than one buyer. A revision to the form clarifies that "Seller Final Acceptance" requires the seller to sign and date the Multiple Counter Offer form and deliver it to the buyer or buyer's broker pursuant to Section 8 of the Contract to create a binding agreement.

The Multiple Offer/Counter Offer form is for use when the buyer is making an offer or counter offer to more than one seller, but does not want to risk entering into multiple contracts with multiple sellers. The revision to the form clarifies that "Buyer Final Acceptance" requires the buyer to sign, date and deliver the acceptance to the seller pursuant to the Contract to create a binding agreement. Additional language was added to the Buyer Final Acceptance section to clarify that, except as modified by the Multiple Offer/ Counter Offer provisions, all other terms and conditions of the prior identified offer/counter offer(s) remain unchanged and are deemed accepted.

A redlined version of the revised **Multiple Counter Offer** can be found HERE and a redlined version of the **Multiple Offer / Counter Offer** form can be found HERE.

Prior Form Revisions

The Arizona REALTORS® strives to keep all its forms up to date as laws change or industry practice evolves. Once released, the forms library contained on all of the Arizona REALTORS® forms licensing platforms are updated.

Form updates are made to minimize your risks and ensure legal compliance. Don't take a chance with outdated forms. All prior Arizona REALTORS® form revisions (2014 – 2023) can be found here: View form-by-form revisions.

This article is of a general nature and may not be updated or revised for accuracy as statutory or case law changes following the date of first publication. Further, this article reflects only the opinion of the author, is not intended as definitive legal advice and you should not act upon it without seeking independent legal counsel. 6/7/23

ABOUT THE AUTHOR

K. Michelle Lind, Esq.

K. Michelle Lind, Esq. is an attorney who currently serves Of Counsel to the Arizona REALTORS®. She is also the author of the book - Arizona Real Estate: A Professional's Guide to Law and Practice (3rd Ed.).

For more real estate related articles, visit Michelle's Blog at: Arizona Real Estate – A Professional's Guide to Law & Practice.

BIG LEGISLATIVE WINS

Matthew Contorelli, Sr. Director of External Affairs at Arizona REALTORS®

After 204 days, 1675 introduced bills, 211 bills passed, and a record-setting 143 bills vetoed, the first regular session of the fifty-sixth legislature **adjourned sine die on Monday, July 31, 2023, at 5:16 PM. This session marked the longest in Arizona's history. On that day, the months of dedicated work by the Arizona REALTORS® lobbying team paid off and two very important bills reached Governor Hobbs' desk:** SB1131, which repeals Arizona's regressive residential rental tax (Rental TPT) statewide; and SB1102, a highly contested plan to refer the expiring Proposition 400 transportation tax to the 2024 ballot for approval by Maricopa County voters. The Governor signed both into law, despite having previously vetoed earlier versions of both bills.

So, what changed? Compromise. The Republican-led legislature largely didn't want to pass Prop 400 legislation, viewing the extension of a tax, as a new tax; however, conservative hearts were won over as the Governor kept the door open on Rental TPT.

BACKGROUND

Repealing residential rental tax in Arizona has been a legislative priority for the Arizona REALTORS® for over a decade. Arizona law permits city governments to impose Rental TPT on properties rented for residential purposes for 30 or more consecutive days. Arizona is one of only two states to allow TPT collection on residential rental properties, which not only negatively impacts housing affordability, but has also hurt REALTORS® engaged in property management. SB1131 does not apply to commercial or short-term rental properties and will take effect on January 1, 2025. The timeframe was set at the request of the Governor's office to allow cities more time to adjust for changes in revenue.

IMPACT TO RENTERS

Arizona renters pay an average of $600 in TPT charges annually, or $50 monthly, based on a $2,000/month lease with related taxable charges. This is money that could be used for gas, food, or other monthly expenses or savings towards buying a home. Rental TPT is charged on the taxable gross income, not just the rent amount. Charges for such items as internet, telecommunications, utilities, pet fees, or maintenance are considered part of the taxable gross income, per the model city tax code.

IMPACT TO PROPERTY MANAGERS

For REALTORS® engaged in property management, you know the impact well. Whether city governments or the Arizona Department of Revenue (ADOR) collect the tax, the process has consistently created confusion, sent false notices of taxes not paid, and has not aligned with property management practices. This has even resulted in some property management companies losing business due to miscalculations or related notices. The tax system used to report and collect rental TPT taxes in AZ is woefully inadequate, error-prone, and costly to administer by both property managers and the state alike. The Arizona REALTORS® have spent countless hours working with ADOR to rectify these issues, despite some process improvements, the challenges and costs to businesses persisted.

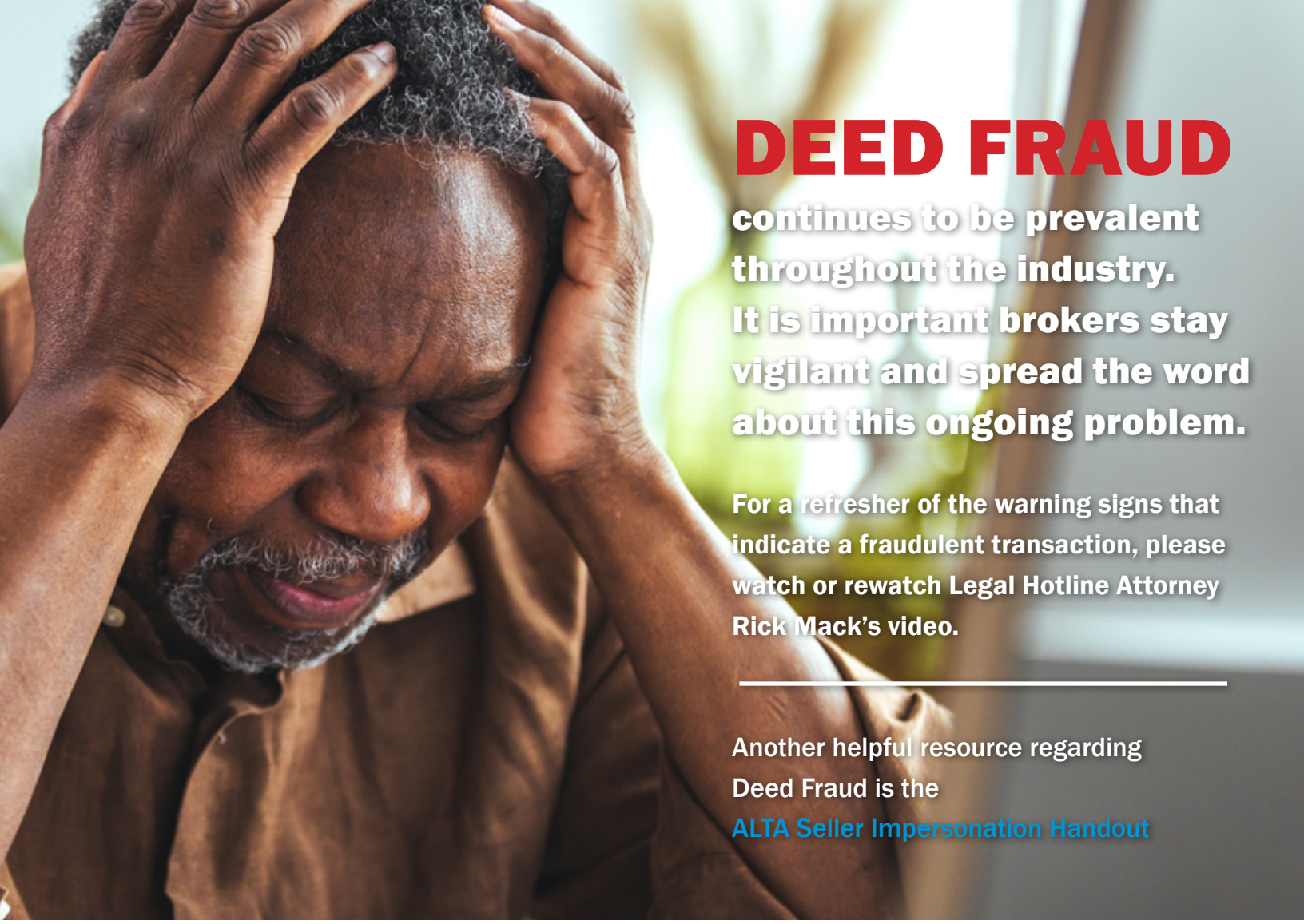
OPPOSITION FROM CITIES

One thing you may be asking yourself is why did the Cities fight so hard? Haven't we heard elected leaders from across the state agree that we must improve housing supply and affordability? Well, Cities that levy this tax on renters stand to collectively lose $200M+, annually. That may sound like a lot, but some cities are sitting on budget surpluses in excess of $100M. In fact, Rental TPT revenues often account for less than 1% of the general fund. Since FY2020, cities' TPT collections have increased by $1.15 BILLION and Rental TPT collections have increased by 28%. As rents increase, cities tax renters deeper into desperation, all while spending millions on lobbyists, membership organizations, and international trips. Fortunately, the Arizona REALTORS® had the bipartisan support of legislative leaders to get this to Governor Hobbs' desk, despite the calls, threats, and fearmongering.

PROP 400

SB1102 seeks to continue the tax that has helped support Maricopa County Infrastructure for the past 40 years, for another 25 years. If approved by voters, Prop 400 will generate over $20 Billion, but the rules of where the monies can go will be stricter than ever. 40.5% of the funds will go to freeways and roads, 22.5% into arterial projects, and 37% into public transit if approved by voters. However, no tax revenue will be used for light rail expansion projects, a compromise reached between the Governor and legislative Republican leadership. The bill does allow capital costs, as well as maintenance and operation of public transportation and capital rehabilitation spending for existing light rail systems. No more than 3.5% of the 37% of public transit funds can be used for light rail rehabilitation. Even though the Prop 400 bill the Legislature passed doesn't include money to expand light rail, the county can still expand using other funding. One area where the light rail will not be expanded to is a Capitol loop project that the city of Phoenix and the Maricopa Association of Governments had been planning for years to extend light rail service in Phoenix to Interstate 10. The bill states no light rail projects will be built near 17th Avenue on the east, Adams Street on the north, 18th Avenue on the west, and Jefferson Street on the south, effectively killing the Capitol loop project. This is just a glimpse into how heated the Prop 400 negotiations got.

The Arizona REALTORS® fought hard for eight months, attending countless meetings, whipping votes, whipping them again, brokering deals, strategizing, re-strategizing, and fielding calls and texts from morning to midnight – because getting these two pieces of legislation make Arizona a better place to live and work. These bills speak to the core values of the REALTOR® Party. The session was long and hard but 2024 is just over four months away and the Arizona REALTORS® will be ready for the next fight.



DEED FRAUD

continues to be prevalent throughout the industry. It is important brokers stay vigilant and spread the word about this ongoing problem.

For a refresher of the warning signs that indicate a fraudulent transaction, please watch or rewatch Legal Hotline Attorney Rick Mack's video.

Another helpful resource regarding Deed Fraud is the ALTA Seller Impersonation Handout

Legal Hotline Attorney
Rick Mack
tells us what we need to know about
Deed Fraud

◀ WATCH

GOOD FENCES MAKE GOOD NEIGHBORS

K. Michelle Lind, Esq., Of Counsel at Arizona REALTORS®

Neighbor Segal appealed to the Arizona Court of Appeals from the trial court's grant of summary judgment in favor of his Adjoining Neighbors in a boundary-by-acquiescence and adverse-possession action concerning a strip of land between the parties' properties.

FACTS

In July 2006, Neighbor Segal built a block wall fence between his lot and the adjacent vacant lot, which was owned by the Adjoining Neighbors. The wall fence did not track the property line, but sat east of the recorded boundary line, leaving 440 square feet of Neighbor Segal's property on the Adjoining Neighbor's side of the wall (the "Disputed Area"). The Adjoining Neighbors assert that Neighbor Segal asked that they share in the cost of constructing the wall, which Neighbor Segal denied.

The Adjoining Neighbors regularly sprayed weeds and cleared debris from their lot as well as the Disputed Area. Neighbor Segal claims he performed similar maintenance on the Disputed Area during the same time.

In 2010, the Adjoining Neighbors began construction of their home on the lot and, in 2011, they built a permanent shed and drainage structure within the Disputed Area. The Adjoining Neighbors also enclosed their backyard with a "wing wall" fence attached to Neighbor Segal's wall. According to Neighbor Segal, he informed the Adjoining Neighbors in February 2011 that their construction encroached on his land, an assertion the Adjoining Neighbors disputed. It was undisputed that during the construction of the Adjoining Neighbors' shed, Neighbor Segal complained to the city that the shed did not comply with the city's setback requirements and a city inspector found no violations.

In 2018, Neighbor Segal obtained a survey, which revealed that 440 square feet of his land were on the Adjoining Neighbors' side of the wall fence and included part of their shed and drainage structure. The Adjoining Neighbors also obtained a survey that revealed the same results.

Neighbor Segal filed a quiet-title action, and the Adjoining Neighbors counterclaimed, arguing they had obtained the legal right to the Disputed Area through adverse possession and/or boundary by acquiescence through their use of the Disputed Area for more than 10 years.

Both parties moved for summary judgment, and the trial court granted the Adjoining Neighbors' motion, finding they had acquired title by adverse possession and both parties had acquiesced for more than ten years to the establishment of the property line created by the wall fence that Neighbor Segal built.

Neighbor Segal appealed the trial court's decision to the Court of Appeals. This appeal followed.

THE COURT OF APPEALS DECISION

First, the Court of Appeals noted that Summary judgment is only appropriate when there is no genuine dispute as to any material fact and a party is entitled to judgment as a matter of law. When

considering a Summary Judgment Motion the trial court may not weigh witness credibility, or quality of evidence, or "choose among competing or conflicting inferences."

BOUNDARY BY ACQUIESCENCE

To establish a boundary by acquiescence, a party must prove "(1) occupation or possession of property up to a clearly defined line, (2) mutual acquiescence by the adjoining landowners in that line as the dividing line between their properties, and (3) continued acquiescence for a long period of time." The boundary in question must be visible, definite, and clearly marked, and the required time period for the parties' acquiescence is ten years.

There was no dispute that the boundary in question was visible, definite, marked by the wall fence Neighbor Segal built in 2006 and that the Adjoining Neighbors occupied the Disputed Area up to Neighbor Segal's wall from 2010 to 2018. What was in dispute was whether the Adjoining Neighbors occupied the Disputed Area before 2010, whether Neighbor Segal acquiesced that the wall he built was the boundary line, and whether such acquiescence continued for at least ten years.

ADVERSE POSSESSION

To establish title by adverse possession, the party claiming title must prove an (1) actual or visible, (2) open and notorious appropriation of land, (3) under a claim of right (4) hostile to the claim of another that is (5) exclusive (6) continuous and (7) for a period of ten years. Whether the elements of adverse possession have been satisfied is a question of fact based on the circumstances of the case.

Again, the parties disagree as to whether the elements of adverse possession coincided prior to 2010. Neighbor Segal claimed: (i) the Adjoining Neighbors' occasional entry onto the Disputed Area was insufficient to satisfy the "appropriation" element of adverse possession; (ii) the Adjoining Neighbors did not visibly occupy Neighbor Segal's property in an open and notorious manner by maintaining the Disputed Area; (iii) the Adjoining Neighbors' did not have exclusive possession of the Disputed Area due to Neighbor Segal's access to it; and (iv) the Adjoining Neighbors did not occupy the Disputed Area under a hostile claim of right.

THE COURT'S DECISION

The Court of Appeals reversed the trial court's summary judgment and sent the case back to the trial court for findings of fact. Whether the case went to trial or was settled by the Neighbors is unknown to this author.

CASE LESSONS

- Boundary by acquiescence and adverse possession claims can be difficult and costly to prove.
- If you encounter a boundary dispute or adverse possession claim, consult a real estate lawyer as soon as possible.
- Don't build a fence unless you are sure of the property boundaries – good fences make good neighbors.

Segal v. Carstensen
2020 WL 5629766

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

No. 2 CA-CV 2019-0208
Filed September 21, 2020

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THE MORE THINGS CHANGE THE MORE THEY STAY THE SAME

Aaron Green, Esq., General Counsel at Arizona REALTORS®

In February 2023, the Arizona REALTORS® provided a new benefit to its members called Breeze that allows disclosures like the Seller's Property Disclosure Statement (SPDS) to be completed electronically. Breeze disclosures are fast and straightforward for sellers to complete and provide security measures to help mitigate risk of potential liability to the agent. Specifically, Breeze ensures that whenever the listing agent is in possession of the SPDS, it is locked, thereby guarding against any allegation that the listing agent completed the form in whole or in part.

So how does Breeze affect the listing agent's obligations to their client and other parties? In short, the listing agent's duties regarding disclosures remain the same whether electronic disclosures are utilized or not.

DUTIES TO SELLER

Under Article 1 of the National Association of REALTORS® Code of Ethics, a listing agent pledges to protect and promote the interests of their seller client. This pledge is mirrored by Arizona law which obligates the listing agent with a fiduciary duty to act in their seller's best interest. See Arizona Administrative Code R4-28-1101(A). A seller has a legal obligation to disclose defects of the property they are selling. See Hill v. Jones, 151 Ariz. 81, 725 P.2d 1115 (App. 1986). The SPDS is provided to help the seller make their legal disclosures and the listing agent should ensure that the seller independently completes the form. Best practice would include educating the seller about the importance of their disclosure obligations and the need to block off adequate time to recall all repairs and gather all paperwork.

It is also prudent for the listing agent to stress to the Seller the importance of answering all questions thoroughly and accurately. This means not guessing and providing an explanation whenever necessary. Although these recommendations are redundant to the Residential Seller Disclosure Advisory and Message to the Seller on the SPDS, reiteration and examples may prove helpful. For example, if the seller was told the roof was 3 years old when they purchased the property a year ago, they should just state those facts. It is not truly accurate for the seller to state the roof is 4 years old because they have no personal knowledge of that fact. Furthermore, if the seller's roof was partially re-shingled 2 years ago, a thorough explanation of all facts is the best course of disclosure.

Once the seller has completed the SPDS, it is best practice for the listing agent to review the disclosure to make sure it aligns with the listing agent's personal observations of the property or what the seller may have shared with the agent at time of listing. The listing agent has no obligation to discover hidden defects and typically lacks any specialized contractor knowledge to identify defects. See Aranki v. RKP Investments, Inc., 194 Ariz. 206, 979 P.2d 534 (App. 1999). But if adverse conditions are apparent, they should be disclosed whether the condition is material or not. Best practice would be for the seller to revise their SPDS if needed

DUTIES TO BUYER

As discussed above, it is in the seller's interest to make sure they have fully and accurately disclosed all conditions of the property in the SPDS. Regardless, the listing agent has independent obligations of disclosure. Under Article 2 of the National Association of REALTORS® Code of Ethics, a listing agent shall avoid exaggeration, misrepresentation, or concealment of pertinent facts relating to the property. This obligation's counterpart in Arizona law requires the listing agent to disclose all material defects existing in the property and to deal fairly with the buyer. See Arizona Administrative Code R4-28-1101(A) and R4-28-1101(B)(3). Thus, if the SPDS fails to disclose all defects or misrepresents the true condition of the home, the listing agent must make an independent disclosure or correction themselves. If the listing agent must do so, they should follow the same guidelines for sellers answering the SPDS: 1) Disclose truthfully and accurately; 2) explain as necessary; 3) if personal knowledge is lacking, fully explain the circumstances; 4) provide supporting documentation if applicable; and 5) if passing along information, identify the source. Notably, in Aranki, the Arizona Court of Appeals held that a listing broker is not liable to the buyers for passing along information obtained without proof that the listing broker knew or should have known that the information might be false.

As technology advances, some tasks become effortless and routine. But as REALTORS®, it is important to be vigilant in adhering to our standards and ethics. Passing advisories or forms back and forth without explanation or review violates our duties whether they are electronic or hard copy.

ABOUT THE AUTHOR

Aaron Green, Esq.

Aaron M. Green, Esq., a licensed Arizona attorney, is the General Counsel for the Arizona Association of REALTORS®. This article is of a general nature and reflects only the opinion of the author at the time it was drafted. It is not intended as definitive legal advice, and you should not act upon it without seeking independent legal counsel.

PROTECT YOUR COMMISSION

Scott M Drucker, Esq., CEO of Arizona REALTORS®

The Arizona REALTORS® Buyer-Broker Exclusive Employment Agreement (the "Agreement") offers benefits to both the buyer and the buyer broker. On the one hand, the Agreement benefits the buyer by spelling out in a clear and concise manner the terms of the buyer-broker relationship. On the other hand, the Agreement benefits the buyer broker by assuring that the broker will be compensated an agreed upon amount if the buyer purchases a property during the term of the Agreement.

But what happens if the Agreement fails to identify the compensation the buyer's broker is capable of earning?

Lines 29 through 33 of the Agreement state in part:

29. **Compensation:** Buyer agrees to compensate Broker as follows:
30. The amount of compensation shall be: _____
31. or the compensation Broker receives from seller or seller's broker, whichever is greater. In either event, Buyer authorizes Broker to accept
32. compensation from seller or seller's broker, which shall be credited against any compensation owed by Buyer to Broker pursuant to this
33. Agreement. Broker's compensation shall be paid at the time of and as a condition of closing or as otherwise agreed upon in writing.

With increasing frequency, brokers are choosing to leave blank the fillable field on line 30 of the Agreement, under the mistaken belief that doing so is not required. Unfortunately, this practice has the potential to deprive a buyer broker of a commission they would otherwise be entitled to.

A.R.S. § 32-2151.02 requires that all real estate employment agreements "fully set forth all material terms, including the terms of broker compensation."

With this in mind, imagine a scenario in which a buyer and buyer broker execute a Buyer-Broker Exclusive Employment Agreement but fail to identify the amount of compensation on line 30 of the form. Thereafter, during the term of the Agreement, the buyer employs a different broker and uses that broker to purchase a property. Is the original buyer broker that's identified on the top of the Agreement entitled to a commission? The answer is "no".

There are nonetheless instances in which the buyer broker argues otherwise and asserts that they are entitled to the commission earned by the second broker. Let's therefore examine the merits of this argument.

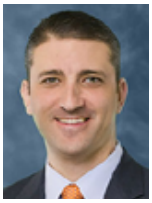
Lines 30-31 of the Agreement state "The amount of compensation shall be: _____ or the compensation Broker receives from seller or seller's broker, whichever is greater." In this case, the term "Broker" refers to the buyer broker that executed the Agreement as identified on line 2. It does not refer to the second broker. Therefore, even if the second broker received a commission of X%, that does not represent the amount to which the buyer broker that executed the Agreement is entitled. With no compensation set forth on line 30, the Agreement fails to "fully set forth all material terms, including the terms of broker compensation" as required by Arizona law.

While the above result is unfortunate, the solution is simple. To avoid being deprived of a commission under this scenario, buyer brokers should ensure that line 30 of the Agreement specifically identifies the amount of compensation to be earned. For example, a buyer broker could insert any of the following on the fillable portion of line 30:

- X% of the price of the Property purchased, exchanged, optioned or leased by Buyer;
- $X (a specific dollar amount); or
- The amount of the listing broker's offer of compensation in the multiple listing service for the Property purchased, exchanged, optioned, or leased by Buyer.

If in doubt about how to complete the Agreement, consult with your employing broker or manager.

ABOUT THE AUTHOR



Scott M. Drucker, Esq.

Scott M. Drucker, Esq., a licensed Arizona attorney, is CEO of the Arizona REALTORS®. This article is of a general nature and reflects only the opinion of the author at the time it was drafted. It is not intended as definitive legal advice and you should not act upon it without seeking independent legal counsel.

Arizona REALTORS®
Legal Hotline

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Please contact Jamilla Brandt, Arizona REALTORS® Risk Management Coordinator, at jamillabrandt@aaronline.com or 602-248-7787

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ARIZONA REALTORS®

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LEGAL HOTLINE

The following is for informational purposes only and is not intended as definitive legal or tax advice. You should not act upon this information without seeking independent legal counsel. If you desire legal, tax or other professional advice, please contact your attorney, tax advisor or other professional consultant.

Q&As are not "black and white," so experienced attorneys and brokers may disagree. Agents are advised to talk to their brokers/managers when they have questions.

SELLER MAY ISSUE A CURE NOTICE WHERE BUYER DOES NOT DEPOSIT EARNEST MONEY FOR SEVEN (7) DAYS

FACTS: The buyer and seller executed an Arizona REALTORS® Residential Resale Real Estate Purchase Contract (the "Contract"), which required a $10,000 earnest money deposit. Seven (7) days after the Contract was entered into, the seller issued a cure based on the buyer's failure to deposit the earnest money with escrow. The buyer contends that the cure is invalid because the Contract does not specify a time for the earnest money deposit.

ISSUE: Is the seller's cure valid?

ANSWER: Yes.

DISCUSSION: The Contract at line 18 provides "upon acceptance, the Earnest Money, if any, will be deposited..." While there is no specific time frame identified, "upon acceptance" generally means the day of the Contract or the next business day. By delaying seven days, the buyer did not deposit the earnest money timely. The seller's cure notice is therefore valid.

DEATH OF A JOINT TENANT VESTS TITLE WITH THE SURVIVING PARTY SUCH THAT PROBATE IS NOT NECESSARY TO SELL THE PROPERTY

FACTS: Two business partners owned a 640-acre ranch as joint tenants with rights of survivorship. One of the partners passed away. The surviving partner, believing he is the sole owner, listed the property for sale. The deceased partner's children have advised the surviving partner he cannot list or sell the property. Rather, they contend any sale can only be accomplished via probate.

ISSUE: Is probate required to list and sell the property?

ANSWER: No.

DISCUSSION: The death of one party who holds title as joint tenants with right of survivorship vests title with the surviving party. A.R.S. §§ 33-431; Estate of Calligaro v. Owen, 159 Ariz. 498, 768 P.2d 660 (App. 1988). Accordingly, as the sole owner, the surviving party may list and sell the property without involvement from the probate court.

WHERE HOME IS DAMAGED BY FIRE, TENANT MAY CANCEL THE RESIDENTIAL LEASE AGREEMENT

FACTS: During the term of the residential tenancy, the home was substantially damaged by fire due to an electrical problem and at no fault of the tenant. The kitchen, dining room, living room and two of the three bedrooms are damaged to the degree that they are not usable. The house is open to the elements through broken windows damaged when the firefighters put out the fire. The air conditioner is also inoperable. The tenant told the landlord he was cancelling the lease. The landlord refused, claiming the tenant still owed rent for the seven months remaining on the lease term.

ISSUE: May the tenant terminate the lease under the circumstances?

ANSWER: Yes.

DISCUSSION: If a home is "damaged or destroyed by fire... to an extent that enjoyment of the dwelling ... is substantially impaired," a tenant may vacate the premises and notify the landlord of his intent to terminate the lease within 14 days after the fire. A.R.S. §§ 33-1366. Based on the facts presented, the home is substantially impaired as contemplated by the statute. The tenant is therefore legally entitled to terminate the lease.

BUYER MAY CANCEL BY DISAPPROVING SOLAR DOCUMENTS EVEN AFTER THE INSPECTION PERIOD

FACTS: The buyer and seller executed an Arizona REALTORS® Residential Resale Real Estate Purchase Contract (the "Contract"). The Arizona REALTORS® Solar Lease/Solar Loan Assumption Addendum ("Solar Addendum"), was incorporated into the Contract per line 38. The Solar Addendum was signed by the parties and attached to the fully executed Contract. The

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seller provided the documents required for the Solar Addendum to the buyer nine (9) days after the Contract was executed. The Contract contained the standard 10-day inspection period in Section 6a. The buyer provided a notice disapproving the solar documents (based on interest rate) twelve (12) days after the Contract was executed and cancelled the Contract. The listing agent contends that the cancellation is not effective because it came after the inspection period

ISSUE: Is the buyer entitled to cancel the Contract pursuant to the Solar Addendum?

ANSWER: Yes.

DISCUSSION: The seller is obligated to provide the solar documents within three (3) days after Contract acceptance. (See Solar Addendum at lines 26-30.) Accordingly, the delay is largely attributed to the seller delivering the documents on the 9th day. Additionally, the Solar Addendum at lines 34-36 allows a buyer to disapprove of the solar documents and cancel the Contract within five (5) days of receipt or during the inspection period, whichever is later. Here, the buyer cancelled within five (5) days of receiving the solar documents. The cancellation is therefore timely and effective, even though the inspection period has expired.

A COMMERCIAL MONTH TO MONTH TENANCY MAY BE TERMINATED WITH TEN (10) DAYS WRITTEN NOTICE

FACTS: A commercial tenant has been operating a restaurant from the leased premises for seven years. The written lease expired at the end of five years. The tenant has been occupying the premises on a month-to-month basis since the written lease terminated. The landlord recently provided the tenant a 10 day notice to terminate the lease.

ISSUE: May the landlord legally terminate the commercial lease with only ten (10) day's notice?

ANSWER: Yes.

DISCUSSION: Where the term of a commercial lease expires but the tenant maintains possession and continues to pay rent, the lease becomes a month to month tenancy. ARS §§ 33-342. A commercial month to month tenancy may be terminated by either party by providing 10 days written notice.

A.R.S. §§ 33-341. The landlord is therefore legally entitled to terminate the tenancy by providing ten (10) days' notice.

REAL ESTATE AGENT AND MORTGAGE BROKER MAY ENGAGE IN JOINT ADVERTISING PROVIDED THE EXPENSES ARE SPLIT PRO RATA

FACTS: A mortgage broker has proposed to assist an agent in her marketing efforts. In light of the slowdown in the market, the agent is tempted but does not want to violate RESPA. She therefore declined the offer thinking that any joint advertising is a RESPA violation.

ISSUE: May an agent jointly advertise with a mortgage broker and remain compliant with RESPA?

ANSWER: Yes.

DISCUSSION: RESPA prohibits a real estate licensee to give or "accept any fee, kick back or thing of value pursuant to any agreement…" whereby the agent will refer business to another settlement service provider, here the mortgage broker. 12 U.S.C. §§ 2607 (a). The penalties for RESPA violations are severe: up to $10,000 per violation and up to one-year imprisonment, or both.
12 U.S.C. §§ 2607 (d)(1).

The licensee may not engage in joint advertising with the mortgage broker if the mortgage broker pays all of the expenses for the advertising with the understanding that the agent, in return, will refer buyers to the mortgage broker pursuant to the advertising arrangement. However, if the agent pays her pro-rata share of the advertising expense, the joint advertising is permissible. For instance, if post cards are produced and mailed to a certain "farm" area and the agent's information is on two-thirds of the post card and the mortgage broker's information is on the remaining one-third, the agent must pay two-thirds of the total expense for the advertising.

AFFILIATED BUSINESS AGREEMENT MUST BE DISCLOSED IN WRITING WITH EACH TRANSACTION

FACTS: The real estate brokerage firm has an affiliated business arrangement ("ABA") with a title company. The brokerage has a written ABA disclosure form that discloses the existence of the relationship, a range of the title charges, and advises consumers that use of the identified title company is not required. One particular agent refuses to use the ABA disclosure, claiming that he advises clients verbally of the arrangement and written disclosure is not necessary.

ISSUE: Is disclosure of an ABA required to be in writing?

ANSWER: Yes

DISCUSSION: RESPA contains a "safe harbor" for affiliated business arrangements provided certain requirements are satisfied. First, the relationship must be disclosed in writing. Second, the disclosure must contain a range or estimate of the charges for the service. Third, the consumer must be advised that use of the service is not mandatory. Fourth, written disclosure must be provided to the consumer. 12 C.F.R. §§ 1024. Finally, the written disclosure must be provided "at or before the time of referral" to the title company. 12 U.S.C. 2607 (c)(4). In other words, the ABA disclosure must be provided to the consumer before the contract selecting the title company is drafted.

The agent's practice of making the disclosure verbally is a violation of RESPA.

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ACCEPTING THE EARNEST MONEY GENERALLY PRECLUDES THE SELLER FROM SEEKING DAMAGES IN LITIGATION BASED ON THE BUYER'S BREACH

FACTS: The buyer and seller executed an Arizona REALTORS® Residential Resale Real Estate Purchase Contract (the "Contract"). The buyer deposited $35,000 in earnest money with escrow as agreed in the Contract. The buyer later defaulted, and the seller received and accepted the earnest money. The seller was unable to sell the property for six months after the buyer's cancellation. The ultimate sales price was $75,000 less than the price in the original Contract. Including carry costs, the buyer's breach cost the seller in excess of $100,000. The seller intends to sue the buyer for the damages.

ISSUE: Does the seller demanding and receiving the earnest money affect his ability to pursue damages through litigation?

ANSWER: Yes.

DISCUSSION: Liquidated damage provisions in real estate contracts are generally enforced as written. See Roscoe-Gill v. Newman, 188 Ariz. 483, 937 P.2d 673 (App. 1996) (cite). Section 7b of the Contract provides in pertinent part:

> In the case of 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.

Here, the seller elected to receive the earnest money and is therefore precluded from seeking additional damages based on the buyer's breach.

ONCE FULLY SIGNED, THE SELLER IS NOT OBLIGATED TO REVISE THE BINSR BASED ON A REPAIR ESTIMATE HIGHER THAN THE BUYER EXPECTED

FACTS: The buyer and seller executed an Arizona REALTORS® Residential Resale Real Estate Purchase Contract (the "Contract"). The home inspection revealed an electrical problem with a subpanel. The buyer requested a $5,000 credit in the BINSR to remedy the subpanel and the seller agreed. Three (3) days before the close of escrow, the buyer received an estimate from a licensed electrical contractor to make the repairs. The repair estimate is for $12,750. The buyer refuses to close escrow, claiming the $5,000 credit negotiated in the BINSR is not sufficient to make the repairs. The buyer is further demanding that the seller agree to revise the BINSR to provide for a $12,750 credit.

ISSUE: Is the seller legally obligated to agree to a BINSR revision?

ANSWER: No.

DISCUSSION: The Contract allows a single BINSR. In fact, in signing the BINSR the buyer agreed that he "has completed all inspections and investigations"... and "Buyer is not entitled to change or modify the Buyer's election after this notice is delivered to the Seller." Accordingly, the seller is not legally required to provide the buyer a $12,750 credit by amending the BINSR.

WHERE OWNERS CANNOT AGREE ON THE SALE OF REAL PROPERTY, AN OWNER CAN FILE A PARTITION ACTION TO FORCE A SALE

FACTS: An engaged couple purchased a home. They hold title as tenants in common and both parties are on the mortgage. The couple broke up. The boyfriend moved out and the girlfriend continues to reside in the home. The boyfriend wants to sell the property to remove the mortgage from his credit report. The girlfriend refuses.

ISSUE: Can the boyfriend force a sale of the property?

ANSWER: Yes.

DISCUSSION: Where parties holding title to Arizona real property cannot agree as to the disposition of the property, one of the owners may file suit for partition pursuant to ARS §§ 12-1211 et seq. Generally, in a partition action, the court will order that the property be sold and the proceeds be spilt equitably between the parties. Here, the boyfriend can initiate a partition action to force the sale of the property. Independent legal counsel should be consulted.

ABOUT THE AUTHOR

Richard V. Mack

Richard V. Mack is a partner at Zelms, Erlich & Mack, which provides the Arizona REALTORS® Legal Hotline service. He is a State Bar of Arizona Board Certified Real Estate Specialist and AV rated by Martindale Hubbell. He has also been designated as a Southwest Super Lawyer. Mr. Mack practices commercial litigation with an emphasis on real estate litigation. He is admitted to practice in the state and federal courts of Arizona and before the 9th Circuit Court of Appeals. Mr. Mack graduated Magna Cum Laude from Southwestern College in Winfield, Kansas with a Bachelor of Business Administration, with an emphasis in economics, and received his Juris Doctor from the University of Arizona.

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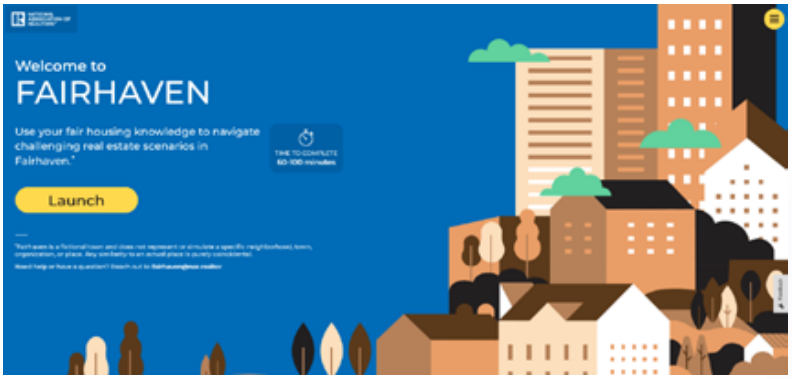

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