ARIZONA REALTORS®

FOURTH QUARTER 2023

BROKER & MANAGER

QUARTERLY

DO THE FORMS REALLY MATTER?
REAL ESTATE TALES FROM THE COURTROOM

ARIZONA REALTORS®

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ARIZONA REALTORS®

BROKER & MANAGER

FOURTH QUARTER 2023 | ARIZONA REALTORS® BROKER/MANAGER QUARTERLY

IN THIS ISSUE

DO THE FORMS REALLY MATTER?

REAL ESTATE TALES FROM THE COURTROOM

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

This lawsuit involved claims that are not uncommon in the real estate industry. The Buyer purchased a house in Scottsdale and about a year later claimed to have discovered latent defects with the home's roof and other moisture related issues. What makes the case interesting is what the courts had to say about the forms used in the transaction.

FACTS

The Sellers purchased the house two years after it was built and owned it for 26 years. The Sellers completed a Seller's Property Disclosure Statement ("SPDS"), which the Listing Agent uploaded into the Multiple Listing Service ("MLS"). The "Public Remarks" section of the MLS listing stated: "Second owners of this home, this abode has been lovingly maintained" and "[t]his home has newer A/C units and a roof, which should provide for low maintenance in years to come."

The Buyer and Sellers entered into a purchase contract for the sale of the home for the price of $432,000. The Buyer began his inspections and due diligence.

The Buyer and the Buyer's Agent attended the home inspection, along with the Sellers. The Buyer asked about the condition of the roof and expressed concerns about the moisture in the home. The Buyer inquired about a potential leak in the garage roof, which the Seller said, "was taken care of." The Buyer climbed on the roof with the inspector to discuss roof issues. The "Extended Home Inspection Report" highlighted various roof-related issues and "recommend[ed] monitoring these areas during and after periods of heavy rainfall."

The Buyer submitted the Buyer's Inspection Notice and Seller's Response ("BINSR") and sought a credit or repair for roofing and other moisture related issues. The Sellers responded to the BINSR to "provide Buyer [a] $ 1,000 credit toward [his] closing costs, escrow costs and/or lender fees, in lieu of all repairs on BINSR." The Buyer accepted the BINSR and the parties signed an addendum to the purchase contract. The Buyer conducted a final walkthrough and escrow closed.

The Buyer began renovating the house within a week after escrow closed with extensive repairs and remodeling. The Buyer claims he discovered roof problems almost a year later, after heavy rainfall caused "paint and caulking … to peel and crack," water leaks and mold in the walls and water pooling in front of the home. The Buyer sued all the parties associated with the transaction, except for the home inspector.

The Seller, Listing Agent and Buyer's Agent defendants all moved for summary judgment, which the trial court granted, dismissing the Buyer's claims. The Buyer appealed the trial court's decision to the Court of Appeals.

THE COURT OF APPEALS DECISION

In deciding the Buyer's claims against the Seller, the Court discussed in detail the language in several of the forms used in the transaction, many of which the Buyer had initialed.

- **The Purchase Contract:** The Buyer initialed the "BUYER ACKNOWLEDGEMENT" written in bold and all capital letters, where he "recognize[d], acknowledge[d], and agree[d]" that the Listing Agent and Buyer's Agent "are not qualified, nor licensed, to conduct due diligence with respect to the premises or the surrounding area."
    - The provision further "instructed" Buyer to conduct due diligence, which "is beyond the scope of the Broker's expertise and licensing," and Buyer agreed to expressly release and hold harmless the Listing Agent and Buyer's Agent "from liability for any defects or conditions that could have been discovered by inspection or investigation."
- **The Buyer Advisory:** The Buyer acknowledged receipt of the Buyer Advisory. The Advisory explained that real estate agents are "generally not qualified to discover defects or evaluate the physical condition" of the house; emphasized the limited duties of Buyer's Agent to Buyer, which do not include "verifying the accuracy of" the SPDS or MLS listing; warned that Buyer "is responsible for" conducting due diligence prior to purchase; and cautioned that MLS listings are "similar to an advertisement" and Buyer "should verify any important information contained in the MLS."
- **The SPDS:** The Buyer acknowledged receipt of the SPDS with his electronic initials on each page and an electronic signature at the end. In response to questions about roof issues, the Sellers disclosed their awareness of past roof leaks, water damage and roof repairs. The Sellers said the leaks "were identified and corrected" but otherwise, the Sellers were not aware of "any interior wall/ceiling/door/window/floor problems," "any cracks or settling involving foundation, exterior walls or slabs," or "any past or present mold growth."
    - The SPDS advised Buyer to verify the disclosures with a professional and specifically directed him to

"CONTACT A PROFESSIONAL TO VERIFY THE CONDITION OF THE ROOF."

- The SPDS also included an acknowledgement from Buyer "that the information contained herein is based only on the Seller's actual knowledge and is not a warranty of any kind. Buyer acknowledges Buyer's obligation to investigate any material (important) facts in regard to the Property. Buyer is encouraged to obtain Property inspections by professional independent third parties and to consider obtaining a home warranty protection plan."

- **The BNSR:** The Buyer electronically signed the BINSR, indicating he had "completed all desired [i]nspection[s]" and "verified all information deemed important [from the] MLS or listing information," and "acknowledg[ing]" the Listing Agent and Buyer's Agent "assume no responsibility for any deficiencies or errors made" by the inspector and "neither the Seller nor Broker(s) are experts at detecting or repairing physical defects in the Premises."
- **The Final Walkthrough Form:** The Buyer acknowledged with his signature that "the property [is] as represented at the time the purchase contract was accepted by the parties, and any subsequent repairs that were agreed to ... have been completed to the satisfaction of [Buyer]."

Based upon the evidence, the Court found that the Buyer had failed to create a genuine issue of material fact that the Sellers knew about the alleged defects and had misrepresented or concealed them. Further, the Buyer understood he had imperfect information. The Court stated:

*"**The undisputed facts indicate that Buyer** had notice of roof-related issues from the Sellers and his home inspector, and he **was repeatedly advised that he was responsible for conducting due diligence and warned to verify material information (in his counteroffer, the Buyer Advisory, the SPDS and BINSR).***

*He was instructed to hire a professional roofer, to verify the roof's condition and to further explore roof-related issues. **He acknowledged the warnings and verified that he completed all desired inspections.** Yet Buyer did not hire a roofer to take a closer look and instead opted to complete the transaction with limited knowledge." (Emphasis added).*

The Court rejected the Buyer's assertion that the Sellers "did not completely or truthfully represent the actual condition of the property being sold" due to three affirmative statements from the MLS listing and sales brochure: "lovingly maintained," "beautifully remodeled," and "newer A/C units and a roof." The Court held the "beautifully remodeled" and "lovingly maintained" statements represented mere sales puffery, which is not actionable as fraud or misrepresentation. "These are not concrete representations of fact; they are inexact opinions of an adverb-laden sales pitch." Regarding the MLS description of a "newer" roof, the Court found that "newer" is a relative adjective that derives its meaning from comparing two or more items; the term has no concrete meaning standing alone.

In deciding the case against the Listing Agent and the Buyer's Agent the Court noted that the trial court granted both summary judgment motions based on, among other things, the absence of expert testimony to establish a professional duty and breach of that duty. The Court recognized that expert testimony was indispensable – both to establish the professional standard of care for licensed real estate agents and agencies, and to demonstrate that defendants breached the standard.

The Court stated that an "expert opinion was especially critical here, where Buyer sued seven different real estate professionals and agencies representing different parties with different interests and different relationships; Buyer has contracts with some and no contracts with others; and he signed various documents, guides and disclosures during the transaction which implicate and address the duties and responsibilities of distinct parties."

Therefore, the Court upheld the dismissal of the Buyer's claims against all parties.

CASE LESSONS

- The proper use of the Arizona REALTORS® forms is one of the best risk management practices.
- Always obtain the party's signature or initials on the forms where prompted.
- The language in the Arizona REALTORS® forms does matter.

Seidman v. Weiler
2019 WL 2152666

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.
Court of Appeals of Arizona, Division 1.

No. 1 CA-CV 18-0261
FILED 5/16/2019AMENDED PER ORDER FILED 7/8/2019
Review Denied November 19, 2019

ABOUT THE AUTHOR

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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.). Watch for the Fourth Edition, which should be available soon.

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

Introducing Your 2024 Arizona REALTORS® President

Shelley Ostrowski

Thank you to all our members who traveled far and wide across the state to celebrate our 2024 Line Officers. The passion and adoration for our industry was in the air.

We appreciate your commitment to the Arizona REALTORS®, your fellow REALTORS®, and this industry! It is because of you we can hold such high standards.

With a heartfelt tear or two, the gavel has been passed! We are incredibly excited about everything the 2024 Line Officers have in store.

ARIZONA REALTORS®

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Have any of your agents gone above and beyond by taking their peer-to-peer interactions from ordinary to extraordinary?

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REVISED FORM RELEASE

NOVEMBER 2023

Revised Residential Lease Agreement and Move-In/ Move-Out Condition Checklist forms were released on November 1, 2023.

The major revisions to these forms are discussed below.

Residential Lease Agreement

The only revision to the Residential Lease Agreement (Lease) was the removal of the Move-In/ Move-Out Condition Checklist (Checklist) as a possible Addenda Incorporated into the Lease. The change was made to assist member agents who were hired to find a tenant, but not to provide property management services. Since the tenant does not complete the Checklist until after move-in, the Checklist's incorporation into the Lease implied it was the agent's responsibility to request and obtain the Checklist even after their employment had ended. The removal of the Checklist from potential Addendums to the Lease removes any reference that the Checklist is part of the Lease and reinforces the landlord's contractual obligation to provide the Checklist to the tenant. See Lease at lines 275-277 ("Landlord shall furnish upon move-in, a move-in form for specifying any existing damages to the Premises and Tenant shall return the completed move-in form to Landlord. . .").

Move-In/ Move-Out Condition Checklist

In conformance with the change to the Lease, the Move-In/ Move-Out Condition Checklist was revised to remove language that it was a part of the Lease. The Checklist also now refers to the main bedroom and bathroom as "Primary" instead of "Master".

A redlined version of the revised **Residential Lease Agreement** can be found **HERE** and a redlined version of the **Move-In/ Move-Out Condition Checklist** 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**.

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.

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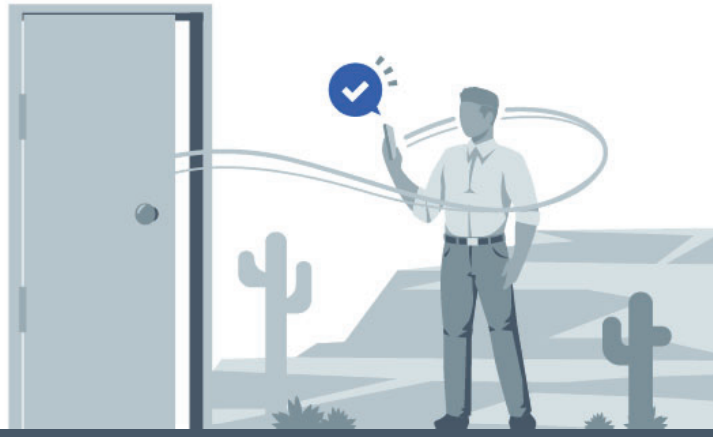

New Member Benefit! No Cost to Our Members.

Today's forecast: disclosures made easy. We couldn't be more excited to introduce Breeze, the digital disclosure solution, as Arizona REALTORS® newest member benefit.

Breeze makes disclosures like the Seller's Property Disclosure Statement (SPDS) fast and straightforward for sellers to complete while providing security measures to mitigate risk of potential liability to the agent. Start using Breeze today to give your sellers (and yourself!) access to a 5-star disclosure experience from start to finish. Watch for more disclosures to be added soon.

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REASONS TO USE THE BUYER BROKER EXCLUSIVE EMPLOYMENT AGREEMENT

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

When a seller signs a listing agreement, the seller understands how much they are going to pay for the broker's service. In contrast, most buyers do not understand the MLS offer of compensation or the concept of procuring cause. The Arizona REALTORS® Buyer Broker Exclusive Employment Agreement ("Buyer Broker Agreement") can be used to address this issue and has many other benefits.

HERE ARE MY TOP TEN BENEFITS OF USING THE ARIZONA REALTORS® BUYER BROKER AGREEMENT.

1. **Sets forth how the buyer's broker is to be compensated for their services.**

2. **Assures that the broker will be compensated the agreed upon amount if the buyer purchases a property during the term of the Buyer Broker Agreement.**

3. **With the understanding of how compensation works, the buyer agrees to work exclusively with the broker and be accompanied by the broker on the buyer's first visit to any property. The buyer acknowledges that the broker may not be compensated by the builder, seller or seller's agent if the broker does not accompany the buyer on the first visit to a model home, new home/lot, or "open house," which would eliminate any credit against the compensation owed by the buyer to the buyer's broker.**

4. **Provides an opportunity to tout the services the buyer will receive. A buyer broker's services are so much more than just showing the buyer listings. The buyer broker will assist and advise the buyer throughout the entire home buying process within the scope of the broker's expertise and licensing.**

5. **Builds trust with the buyer through education and transparent up-front conversations.**

6 **Obtains the buyer's agreement to act in good faith, provide the information necessary to acquire the property and conduct any inspections/investigations that the buyer deems material and/or important.**

7 **Protects both the broker and the buyer by avoiding misunderstandings. Managing expectations is an important risk management practice.**

8 **Assures the buyer's broker that the buyer is serious about buying a home and assures the buyer that the buyer's broker is serious about finding them a home and guiding them to close of escrow.**

9 **Satisfies the legal requirement that a buyer's broker must have a written employment agreement with a buyer to be paid a commission by the buyer. Real estate brokers may sue to recover compensation due under a real estate employment agreement only if there is a written agreement that complies with both the Statute of Frauds, A.R.S. §44-101(7), which requires a written signature of the party to be charged, and the real estate employment agreement statute, A.R.S. §32-2151.02(A), which requires that all real estate employment agreements be signed by all parties to the agreement and:**

- be written in clear and unambiguous language
- fully set forth all material terms, including the terms of broker compensation
- have a definite duration or expiration date, showing dates of inception and expiration

10 **Is an enforceable contract that can be helpful in the event of a commission dispute or in a dispute with a buyer.**

Some buyers may be reluctant at first when asked to sign a Buyers Broker Agreement. View this reluctance as an opportunity to educate the buyer about the value of your services and build trust. As you review the Buyer Broker Agreement, explain your duties and obligations to the buyer and reinforce that you are a professional who follows the NAR Code of Ethics and that the Buyer Broker Agreement ensures the buyer has a dedicated and knowledgeable advocate representing them in the transaction.

FOR ADDITIONAL INFORMATION ON BUYER BROKER AGREEMENTS:

NAR Window to the Law: Benefits of Using a Buyer Representation Agreement

How Buyer Agreements Boost Your Value, Fend Off Claims (NAR.REALTOR)

Avoid a Bad Practice That Can Deprive You of a Commission

Hey! That was "My Buyer" and "My Commission!"

Real Estate Tales From the Courtroom: The Buyers' Broker's Signature

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.

MEETINGS AND EVENTS 2023-2024

2023

December 14
RAPAC Major Investor Gala
Phoenix, AZ

December 15
2023 Trends Summit
Phoenix, AZ

2024

January 9
REALTOR® Day At the Capitol
Phoenix, AZ

February 9
Broker Summit
Chandler, AZ

February 14
Professional Standards Workshop
Phoenix, AZ

March 18-21
NAR President's Circle
Miami Beach, FL

March 26-28
Spring Conference
Chandler, AZ

April 3-4
Region XI Conference
Jackson Hole, WY

May 4-9
NAR Legislative Meetings
Washington, D.C.

August 26-27
NAR Leadership Summit
Chicago, IL

August 22
REALTOR® Caucus
Phoenix, AZ

September 11
Industry Partners Conference
Phoenix, AZ

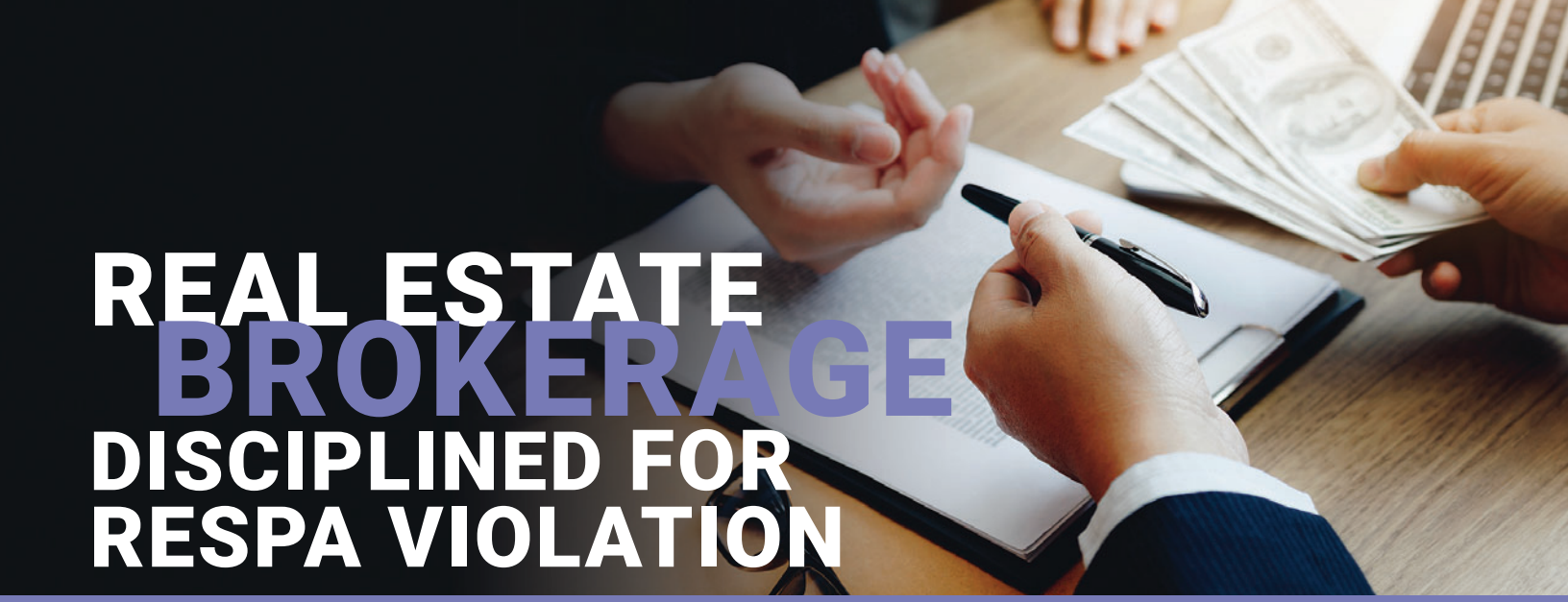
October 16-18
Leadership Conference
Phoenix, AZ

October 22
Women's Conference
Phoenix, AZ

October 23
Success Through Diversity Event
Phoenix, AZ

November 6-11
NAR NXT The REALTOR® Experience
Boston, MA

November 22
Broker Summit
Chandler, AZ



REAL ESTATE BROKERAGE DISCIPLINED FOR RESPA VIOLATION

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

It has been some time since federal regulators have imposed sanctions for violating the Real Estate Settlement Procedures Act commonly known as RESPA. However, on August 17, 2023, the Consumer Financial Protection Bureau ("CFPB") took action against Realty Connect USA Long Island ("Realty Connect") for accepting numerous illegal kickbacks from Freedom Mortgage Corporation ("Freedom Mortgage"). Specifically, Realty Connect is ordered to pay a $200,000.00 fine and cease its unlawful activity.

RESPA is a federal law enacted in 1974 to ensure that buyers are provided with sufficient information about the nature and cost of financing and closing escrow on a home purchase. Importantly, RESPA also prohibits "kickbacks" (anything of value) for referrals sent to settlement providers as they tend to increase the cost of financing and settlement charges. 12 U.S.C. § 2607(a). The CFPB is charged with enforcing RESPA since it was created in 2011.

Realty Connect violated RESPA by accepting "kickbacks" from Freedom Mortgage in exchange for referrals in three (3) ways. First, Freedom Mortgage hosted parties and provided tickets to events for real estate agents of Realty Connect at no cost. Freedom Mortgage would supply the food, beverages, alcohol, and entertainment for Realty Connect hosted events. Freedom Mortgage also provided free tickets to sporting events, charity galas, and the like. Second, Realty Connect accepted valuable industry subscription services from Freedom Mortgage at no cost. Over 2,000 Realty Connect agents received monthly access to property reports, comparable sales, foreclosure data and other information for free while Freedom Mortgage paid thousands in subscription fees. Finally, Realty Connect was paid $6,000 per month pursuant to a Marketing Service Agreement (MSA). While MSAs can be lawful if they are bona fide compensation for goods or services actually performed, Realty Connect failed to complete many of the tasks it was paid for.

Freedom Mortgage was fined $1,750,000.00 for its illegal acts. In addition to paying Realty Connect pursuant to an MSA, it also compensated other real estate brokerages under similar agreements via monthly payments totaling $90,000.00 per month for services never provided.

It is evident that the CFPB is making RESPA enforcement a priority. Brokerages are encouraged to review their MSA practices to ensure the structure and implementation are RESPA compliant. Payments cannot be based on the number of referrals received or the quantity of business referred. Likewise, compensation must be given for services or goods actually provided and must not exceed their market value. Finally, brokers may choose to decline free gifts if it appears they might be illegal "kickbacks" for referrals.

The CFPB's announcement of its action against Realty Connect can be found **HERE**.

More information on compliant MSAs can be found **HERE** and **HERE**.

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

A RESOURCE FOR BROKERS NEEDING LEGAL INFORMATION

The Arizona REALTORS® Legal Hotline is designed...

* As a member benefit for Designated REALTORS® (Designated Brokers) to have direct access to a qualified attorney who can provide information on real estate law and related matters.
* To answer legally related questions about the many diversified areas of today's real estate industry.

The Hotline is provided by the attorneys at Zelms, Erlich & Mack

Primary access to the Hotline is for Designated Brokers, who may also give access to one REALTOR® or REALTOR-ASSOCIATE® member per office and/or branch.

For More Information

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

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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.

AN ARIZONA COURT ORDER IS REQUIRED TO CONVEY TITLE HELD BY AN ESTATE EVEN IF A COURT ORDER IN A DIFFERENT STATE HAS ALREADY BEEN ISSUED

FACTS: The owner of the Arizona property passed away in Texas. The owner's son was appointed as the estate's personal representative by a Texas court. The son wants to sell the Arizona property for the benefit of the estate. The son requested that a local agent list and sell the Arizona property. The son claims that since he is the appointed personal representative of the estate by a Texas court that no Arizona judicial intervention is required.

ISSUE: Is an Arizona court order necessary to sell the property?

ANSWER: Yes.

DISCUSSION: The Texas court does not have jurisdiction over Arizona property. As a result, a proof of authority issued by an Arizona probate court is needed to give the power of sale to the Texas personal representative. Once a certified copy of the Arizona proof of authority is obtained, the personal representative in Texas is authorized to sell the Arizona property. ARS § 14-4205.

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 expense 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.

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 REALTOR® 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 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 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) . 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.

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 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.

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 REALTOR® 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 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.

A TEXT FROM AN AGENT DOES NOT CONSTITUTE AN OFFER TO PURCHASE REAL PROPERTY

FACTS: Apparently based on the posting of the property in the MLS, an agent texted the listing agent advising that he had a seller who would pay the list price for the property ($750,000) in cash and close escrow in 15 days.

ISSUE: Is the text from an agent an offer that the listing agent is obligated to deliver to the seller?

ANSWER: See Discussion.

DISCUSSION: Generally, a listing agent is required to disclose all offers to a seller. See Arizona Administrative Code R4-28-802(B). However, an offer to purchase real estate must contain all material terms and be signed by the potential buyer. See Savoca Masonry Co. Inc. v. Homes & Son Const. Co, Inc., 112 Ariz. 392, 542 P.2d 817 (1975); See ARS § 44-101(6). Here the text does not contain all material terms, nor is it a writing signed by the buyer as required by the statute of frauds. The text is not an offer that must be delivered to the seller.

The listing agent may advise the seller of the text received and/or ask the agent to present a lawful offer on behalf of his buyer-client.

BUYER FOUND MOLD AT FINAL WALKTHROUGH

FACTS: The buyer and seller entered into an Arizona REALTORS® Residential Resale Real Estate Purchase Contract (the "Contract"). A few days before the close of escrow, the seller moved all of his belongings out of the house. Thereafter, the buyer conducted his final walkthrough. At the final walkthrough, the buyer found mold behind/where the washing machine was during the inspection. The mold was not disclosed. The buyer now wants to cancel the Contract.

ISSUE: Can the buyer cancel the Contract and retain the earnest money?

ANSWER: See Discussion.

DISCUSSION: Upon discovering the mold, the seller was

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required to update the SPDS, updating the previous disclosures pursuant to Section 4f of the Contract. The buyer then has five (5) days from the updated SPDS to disapprove of the changed disclosure to cancel the Contract and receive the return of the earnest money

AGENTS SHOULD NOT ADVOCATE FOR A CLIENT AFTER CLOSING

FACTS: The buyer purchased the property with a tenant in possession and a residential lease in place. The contract provided that the seller would deliver the security deposit to the buyer after the close of escrow. Escrow has now closed and the seller refuses to deliver the security deposit to the buyer.

ISSUE: Should the agent issue a cure notice on the buyer's behalf addressing the seller's refusal to deliver the security deposit?

ANSWER: No.

DISCUSSION: After the close of escrow, the agent's duties are at an end and the agent should therefore refer the buyer to independent legal counsel.

A TAIL PROVISION IN THE ARIZONA REALTORS® LISTING CONTRACT IS GENERALLY ENFORCEABLE

FACTS: The seller and agent entered into an Arizona REALTORS® Residential Listing Contract Exclusive Right to Sell/Rent ("Listing Contract"). The tail clause in lines 66-70 was for a period of 90 days after expiration of the Listing Contract. During the term of the listing, the ultimate buyer viewed and made an offer to purchase. The ultimate buyer's offer was rejected at the time because there was a higher competing offer that was accepted instead. The first contract cancelled and the listing expired a few weeks later. Two weeks after the listing expired, the ultimate buyer closed escrow on the property. No agent participated in the closing between the ultimate buyer and seller. The agent discovered the closing and demanded her listing commission. The seller refused to pay the commission.

ISSUE: Is the agent entitled to a commission even though the transaction closed after the listing expired?

ANSWER: Yes.

DISCUSSION: The Listing Contract at lines 66 through 69 provides: "After the expiration of this Agreement, the same commissions, as appropriate, shall be payable if a sale or rental is made by Owner to any person to whom the Premises has been shown or with whom Owner or any broker has negotiated concerning the Premises during the term of this Agreement: (i) within (blank) days after the expiration of this Agreement, unless the Premises has been listed on an exclusive basis with another broker...".

Generally, tail provisions like the one contained in the Arizona REALTORS® Listing Contract are enforceable as written. See Hyde Park-Lake Park, Inc. v. Tucson Realty & Trust Co., 18 Ariz. App. 140, 500 P.2d 1128 (App. 1972). Based on the facts presented, the agent has contractually earned the agreed upon commission because the ultimate buyer and seller closed escrow shortly after the listing contract expired, well within the 90-day tail period set forth in the Listing Contract.

RECORDING A LEASE OPTION IS NOT ADVISABLE FOR THE PROPERTY OWNER

FACTS: During negotiations for a lease with an option to purchase, the buyer has indicated a desire to record the option to purchase the property.

ISSUE: Are there any risks to the seller if the buyer records the option? Also, what happens if the buyer breaches the lease and is evicted?

ANSWER: See Discussion.

DISCUSSION: If recorded by the buyer, the option to purchase becomes an encumbrance against the seller's title. The seller's risk is that the buyer does not exercise the option—because the buyer elects against purchasing the property, is unable to qualify, is evicted, or some other reason—and then the buyer fails to release the option from the public records. In this situation, the seller may be forced to commence a quiet title lawsuit against the buyer in order to remove the encumbrance.

Please note also that unless the lease with an option to purchase contains cross-default provisions, a breach of the lease by the buyer and subsequent eviction by the seller may not prevent the buyer from exercising the option to purchase.

ABOUT THE AUTHOR

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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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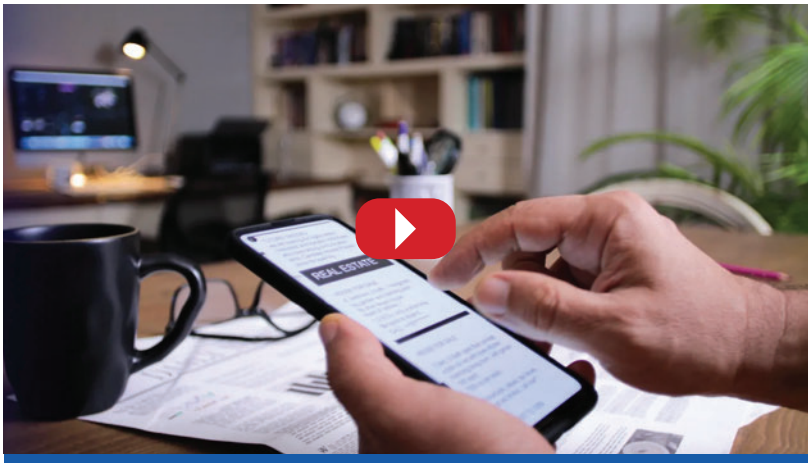

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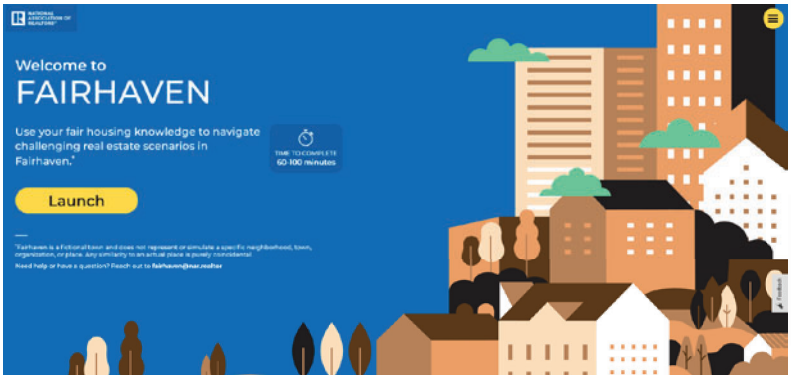

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