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INTRODUCTION TO 2017 RESIDENTIAL RESALE PURCHASE CONTRACT

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FOURTH QUARTER 2016 | ARIZONA BROKER/MANAGER QUARTERLY

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Introduction to 2017 Residential Resale Purchase Contract

BY 2015 ARIZONA REALTORS® RISK MANAGEMENT CHAIR MARTHA APPEL

On behalf of me and fellow work group Chairs Gerry Russell and Jim Sexton, I am happy to unveil the revised Residential Resale Real Estate Purchase Contract ("Purchase Contract"), to be released on February 1, 2017.

The revision of the Purchase Contract was truly a team effort, beginning in January of 2016 with the formation of three sub-workgroups. Each of these groups were charged with formulating proposed revisions to specific sections of the Purchase Contract, and each consisted of a number of REALTORS® and industry partners from across Arizona. I thank them profusely for their hard work and dedication.

Also critical to this process were those members of the "loop," consisting of more than 3,500 Arizona REALTORS® who volunteered their time to review the first draft of the Purchase Contract and provide feedback. Their suggestions led to a number of additional revisions and, as a result, the finished product is significantly better than the workgroup's initial draft. I cannot emphasize strongly enough the importance of member feedback and the critical role it played in this process.

The Purchase Contract has been successfully used by thousands of REALTORS® in thousands of transactions throughout the years. Nonetheless, in revising the Purchase Contract this past year, the workgroups discussed, considered and debated a seemingly endless number of issues. While it is not possible to anticipate every scenario that may transpire, the workgroups used lessons learned from prior transactions to eliminate ambiguous provisions, add clarification when needed, and create new provisions to ensure that the Purchase Contract mirrors the realities of today's real estate market.

With these goals in mind, the Arizona REALTORS® Risk Management Committee approved the final workgroup's recommendations and eliminated warranted items, decreased the time frame for delivery of the Seller's Property Disclosure Statement to three (3) days, clarified what happens when the buyer seeks to cancel the contract without identifying items disapproved, defined "fixtures," and divided the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA) language into two separate sections to better identify the different obligations of buyers and sellers. These were just a few of the many changes that have been implemented, all of which warrant your attention.

I am confident that the revised Purchase Contract is a positive step forward. I encourage you to carefully review the document, read the frequently-asked-questions published by Arizona REALTORS® General Counsel Scott Drucker and take classes from instructors trained by the state association to teach this form, along with some of the revised ancillary forms also affected by the Purchase Contract changes.

On behalf of the committee, Arizona REALTORS® staff and all of the volunteers that assisted with this process, I look forward to a successful implementation of the revised Residential Purchase Contract on February 1, 2017 and I wish you all continued success.

https://www.aaronline.com/2016/11/introduction-to-2017-residential-resale-purchase-contract/

Residential Resale Real Estate Purchase Contract (Updated February 2017)

Sample of Contract: https://www.aaronline.com/wp-content/uploads/2016/11/Residential_Resale_Real_Estate_Purchase_Contract_Form_2-2017-SAMPLE.pdf

2017 Residential Resale Purchase Contract FAQs

In February of 2017, a revised Residential Resale Real Estate Purchase Contract will be released for use by all Arizona REALTORS®. A copy of the new contract can be found here and for ease of reference, a copy highlighting the revisions can be found here.

In conjunction with your review of the new contract, AAR has prepared the below list of frequently asked questions (FAQs), along with answers and pertinent analysis.

Please be sure to review these FAQs to better understand the changes that have been made, along with the Risk Management Committee's rationale.

Q1: Why did the Risk Management Committee elect to revise the Residential Resale Real Estate Purchase Contract ("Purchase Contract")?
A1: Other than the TILA-RESPA Integrated Disclosure (TRID) revisions made to the Financing Section in September 2015, the Purchase Contract had not been substantially revised since February 2011.

To ensure that the form remains current and continues to meet the needs of Arizona REALTORS®, the Risk Management Committee asked that a work group be formed to review the Purchase Contract and recommend revisions.

Q2: Line 11 asks the parties to identify the amount of Earnest Money. Is Earnest money required?
A2: No, Earnest Money is not required under Arizona law in order to create a valid and enforceable contract.

Q3: Why was a blank line added after "Earnest Money" on line 11 and what goes there?
A3: The parties are not required to include any verbiage on line 11 other than the amount of the Earnest Money, if any. However, the workgroup received several requests asking that a blank line be provided should the parties wish to document any special instructions regarding the Earnest Money or memorialize where the Earnest Money will be applied.

Q4: Line 18 now reads, "Upon acceptance of this offer, Earnest Money, if any, will be deposited with: □ Escrow Company □ Broker's Trust Account." Previously, the Purchase Contract stated that "Earnest Money has been received by Broker," but that language has been removed. Why was this change made?
A4: The Risk Management Committee decided to remove the statement that "Earnest Money has been received by Broker" because, in many instances, the Broker never touches the Earnest Money. For example, Earnest money is often conveyed via wire transfer. Alternatively, Buyer may deposit the Earnest Money directly with the Escrow Company.

Q5: Why did the Committee decline to draft additional language addressing when the Earnest Money must be deposited?
A5: Line 18 of the Purchase Contract already dictates when the Earnest Money must be deposited, which is "upon acceptance" of the offer. Pursuant to Section 8o, this occurs when the Purchase Contract is signed by Seller and a signed copy is delivered and received by Broker named in Section 8q.

Q6: If the Earnest Money is not deposited upon acceptance of the offer, can Seller issue a Cure Period Notice?
A6: Yes. If the Earnest Money is not deposited upon acceptance or at the first reasonable opportunity thereafter (ie., when the Escrow Company is next open for business), pursuant to Section 7a Seller can deliver to Buyer a notice specifying the non-compliance, providing Buyer with an opportunity to cure their potential breach of contract. →

Sellers should be mindful of the fact that even if a wire transfer is initiated upon contract acceptance, it may take time for the funds to convey. It is therefore recommended that listing agents inquire with Buyer's agents as to the status of the Earnest Money before proceeding to issue a Cure Period Notice.

Q7: In the event of an all cash sale, what's changed in the Purchase Contract?
A7: Now, in the event of an all cash sale, Buyer is obligated to attach to their offer either a Letter of Credit or a source of funds from a financial institution documenting the availability of funds to close escrow. See lines 19-20. As a result of this change, lines 26-29 of the Additional Clause Addendum are no longer necessary and have been deleted.

Q8: Why are forms such as the Buyer Advisory and Market Conditions Advisory not included in Section 1f?
A8: Section 1f identifies addenda that are incorporated into the Purchase Contract. The Buyer Advisory and Market Conditions Advisory are not addenda in that they do not change or supplement the terms of the Purchase Contract. In fact, these forms are not contractual agreements between Buyer and Seller and are therefore not referenced in Section 1f.

Q9: As was previously the case, Section 1g titled Fixtures and Personal Property addresses outdoor landscaping. However, a change has been made to the specific language. What does the change entail?
A9: Outdoor landscaping, as set forth on lines 46-47, has been clarified to specifically reference the fact that shrubbery and trees constitute fixtures that convey with the property.

The language also explains that "unpotted plants" are included in the sale, meaning they cannot be removed by the Seller. However, potted plants, even if connected to the irrigation/drip system do not convey and can be removed by the Seller unless otherwise agreed to in writing.

Q10: Lines 49 and 50 under Fixtures and Personal Property make reference to "garage door openers and remote controls." If Seller has lost the garage door openers, is Seller required to obtain new ones and convey them to Buyer at close of escrow?
A10: No. Section 1g pertains to "existing" "means to operate fixtures and property." Therefore, if the item is not in Seller's possession, there is no obligation that it be conveyed to Buyer.

Q11: Line 65 requires Seller to deliver to Buyer a notice of all leased items within three days after contract acceptance. How does Seller comply with this requirement?
A11: To satisfy this obligation, Seller can convey to Buyer a notice as defined in Section 8m. However, the preferred method is for Seller to identify all leased items in the Seller's Property Disclosure Statement ("SPDS").

Q12: Additional verbiage has been added to Section 2c, titled Unfulfilled Loan Contingency. Has anything changed?
A12: No. The manner in which Buyer issues notice of inability to obtain loan approval and recovers the Earnest Money has not changed. However, additional language has been added to Section 2c in an effort to further clarify this process.

As has always been the case, if Buyer fails to deliver notice of inability to obtain loan approval, Seller may issue a Cure Period Notice to Buyer. If prior to expiration of the Cure Period Buyer delivers notice of inability to obtain loan approval, Buyer shall be entitled to a return of the Earnest Money.

Q13: It is one day before the COE Date and Buyer has failed to sign the loan documents or deliver either: (i) notice of loan approval without PTD conditions; or (ii) notice of inability to obtain loan approval. Seller issues a Cure Period Notice citing Buyer's failure to comply with Section 2b of the Purchase Contract. The day after the scheduled COE Date, prior to expiration of the Cure Period, Buyer delivers notice of inability to obtain loan approval. Who gets the Earnest Money?
A13: Buyer is entitled to the Earnest Money under this scenario. Buyer's failure to comply with Section 2b constitutes a potential breach of contract. Pursuant to Section 7a, a party shall have an opportunity to cure their potential breach. In this case, by issuing notice of inability to obtain loan approval prior to expiration of the Cure Period, Buyer has cured the potential breach and is entitled to the Earnest Money.

Q14: If Buyer is obligated to provide compensation to Broker(s), can the funds come from Seller concessions?
A14: Seller concessions, as described in Section 2j, include only the following, "Buyer's loan costs, impounds, Buyer's Title/Escrow Company costs, and recording fees."

Q15: Previously, the Purchase Contract contained a Section (2k) titled "VA Loan Costs." Why has that been removed?
A15: The former Section (2k) titled "VA Loan Costs" required the Seller to pay the escrow fee, along with an amount for other loan costs not permitted to be paid for by the Buyer. Upon researching current VA loan regulations, it was determined that, depending on the loan product, a Veteran may pay the escrow fee.

Furthermore, even if the loan product does not allow the Veteran to pay the escrow fee, the fee may still be paid for from Seller Concessions. As a result, the Risk Management Committee decided to remove the Section titled "VA Loan Costs" so that all offers are viewed equally with the Veteran's offer being just as competitive as that of a buyer not utilizing a VA loan.

Q16: Section 2l explains that if the Premises fails to appraise for the purchase price, Buyer has five days after notice of the appraised value to cancel the Purchase Contract and receive a refund of the Earnest Money. The words "unless otherwise prohibited by federal law" were added to the end of this section. Why?
A16: When purchasing a home with an FHA or VA loan, the lender must ensure that the property serves as sufficient collateral for the amount it lends. FHA and VA therefore require an amendatory clause be made part of the sales contract.

The FHA/VA Amendatory Clause states in part:
"It is expressly agreed that notwithstanding any other provisions of this contract, the purchaser shall not be obligated to complete the purchase of the property described herein or to incur any penalty by forfeiture of earnest money deposits or otherwise unless the purchaser has been given in accordance with HUD/FHA or VA requirements a written statement by the Federal Housing Commissioner, Department of Veterans Affairs, or a Direct Endorsement lender setting forth the appraised value of the property of not less than $_____."

The added verbiage reflects this language and highlights the fact that Buyer may cancel the transaction without penalty pursuant to the FHA/VA Amendatory Clause regardless of language contained in Section 2l.

Q17: The lender performs an appraisal, which reveals items that must be repaired before it will agree to fund the loan. At Buyer's request, Seller agrees to perform the repairs. After the repairs are made, the lender requires an inspection to confirm that the repairs have been completed to the lender's satisfaction. Who pays for the cost of the inspection?
A17: The Buyer. Verbiage has been added to Section 2m stating that "Any appraiser/lender required inspection cost(s) shall be paid for by Buyer." NOTE – "Appraisal costs" and "inspection costs" represent two different fees.

Q18: Why was Section 3b revised to explain that, if Buyer is married and intends to take title as their sole and separate property, a disclaimer deed may be required?
A18: Married Buyers often believe that by taking title as their sole and separate property, their spouse is not required to sign any closing or transactional documents. This belief is frequently incorrect and can prove problematic if the spouse is unwilling to sign.

The Risk Management Committee therefore thought it was important to notify married Buyers at the start of the transaction that their spouse may be required to sign a disclaimer deed, even when taking title only in their own name.

Q19: Section 4a now requires Seller to deliver and complete a Seller's Property Disclosure Statement (the "SPDS") within three days after contract acceptance. Why was this change made and why did the time for delivery of the insurance claims history not also move to three days after contract acceptance?
A19: To maximize the productivity of Buyer's inspection period, the Risk Management Committee deemed it beneficial for Seller to convey the SPDS earlier in the transaction. In other words, having the SPDS within three days of contract acceptance, as opposed to five, will provide Buyers more time to conduct due diligence with the SPDS in hand.

As for delivery of the insurance claims history, unlike the SPDS, Sellers must rely on a third party to assist them with this disclosure. Because this process is not entirely within Seller's control, the Committee deemed the five-day period appropriate.

Q20: Why was the IRS and FIRPTA Reporting Section in the prior version of the Purchase Contract divided into two separate sections in the new Purchase Contract and why are they not located in Section 3, Title and Escrow?
A20: Buyers and Sellers have separate and distinct obligations under FIRPTA. The obligations applicable to Sellers were moved to Section 4, Disclosure, and the obligations applicable to Buyers were moved to Section 6, Due Diligence. It is the hope of the Risk Management Committee that by moving the language into sections largely applicable to Seller and Buyer respectively, each party will take greater note of their individual FIRPTA obligations.

Q21: Why were warranted items removed from the Purchase Contract?
A21: A home consists of thousands of components, making it impossible to develop an all-encompassing list of warranted items. Without such a list, some Buyers and Sellers struggled to identify and agree on which components are warranted.

Furthermore, the term "working condition" was subject to different interpretations. Even when the parties agreed that an item is warranted, they may have still disagreed on whether the component was in working condition. To eliminate any perceived ambiguities, the Risk Management Committee elected to remove warranted items from the Purchase Contract, leaving all repairs subject to negotiation.

Q22: Pursuant to Section 5a, the Premises are now being sold in its "present physical condition as of the date of contract acceptance." Does this mean that there is no longer a need for AAR's As-Is Addendum?
A22: The change to Section 5a has eliminated the need for AAR's As-Is Addendum, which will be removed from AAR's library of forms when the revised Purchase Contract takes effect. Since the As-Is Addendum will no longer exist, reference to the form was removed from Section 1f, Addenda Incorporated.

Q23: Even though the Premises are being sold in its "present physical condition as of the date of contract acceptance," can Buyers request repairs?
A23: Yes. As stated in Section 5a, Buyers and Sellers "may, but are not obligated to, engage in negotiations for repairs/improvements to the Premises." AAR's Buyer's Inspection Notice and Seller's Response form remains available for this purpose, as set forth in Section 6i.

Q24: What happens if a Buyer, within the inspection period, delivers to Seller a notice electing to cancel the contract as permitted in Section 6j, but fails to identify items disapproved?
A24: Section 6j(1)(b) addresses this scenario and explains that if Buyer's notice fails to specify items disapproved as permitted in the contract, the cancellation will remain in effect but Buyer has failed to comply with a provision of the contract and Seller may deliver to Buyer a cure notice. If Buyer fails to cure before expiration of the cure period, Buyer shall be in breach and Seller shall be entitled to the earnest money.

Q25: Line 444 is identical to line 445 and line 458 is identical to line 459. Why have identical lines been added?
A25: It is becoming increasingly common for Buyers and Sellers to be represented by more than one agent, especially when the agents are members of a real estate team. The Risk Management Committee hopes that the aforementioned changes to Sections 8q and 9a make it easier for more than one agent to be identified on the Purchase Contract when appropriate.
NOTE: According to the Arizona Department of Real Estate, the agent in direct contact with the consumer must be identified on the Purchase Contract.

Q26: Lines 467 and 468 were revised to state that, in the event a Counter Offer is attached and incorporated by reference, "Seller must sign and deliver both this offer and Counter Offer." Why?
A26: Arizona's Statute of Frauds, ARS § 44-101(6), states in part: *"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: Upon an agreement for…the sale of real property or an interest therein."*

As such, the Purchase Contract and Counter Offer are to be signed by Buyer and Seller.

The 2017 Residential Resale Purchase Contract FAQ's can also be found online at:
https://www.aaronline.com/2016/11/2017-residential-resale-purchase-contract-faqs/

AZ Court of Appeals Looks at Independent Contractor Status of RE Agents

BY SCOTT M. DRUCKER, ESQ., GENERAL COUNSEL

Do Arizona's real estate statutes and regulations establish that the relationship between real estate brokers and their salespersons is one of employer and employee?

At a time when the United State Congress and Department of Labor continue to focus on workers that are misclassified as independent contractors, this was the question presented to the Arizona Court of Appeals in the case of *Santori v. MartinezRusso, LLC. dba RE/MAX Professionals* (CA1 8/23/16).

Regrettably, this case stems from a tragic automobile accident that resulted in a wrongful death lawsuit. The accident occurred when an agent licensed with Defendant was returning from a real estate sales appointment. As part of the lawsuit, Plaintiffs allege that Defendant was vicariously liable for its agent's negligence. The trial court disagreed, granting summary judgment in Defendant's favor based on its conclusion that the agent was an independent contractor, not an employee of the Defendant. Plaintiffs appealed in part on the basis of A.A.C. R4-28-1103(D), which provides that "[a]n employing broker is responsible for the acts of all…salespersons…acting within the scope of their employment."

An examination of Arizona real estate law, A.R.S. § 32-2153(A)(21), provides that a broker must supervise the activities of their salespersons. Similarly, as noted above, A.A.C. R4-28-1103(D) renders an employing broker responsible for the acts of its salespersons. But do these obligations render a salesperson an employee? To answer this question, the Court needed to determine the scope of these laws.

Upon close examination, the Court noted that the regulations are narrowly tailored, applying only to the broker's responsibility to supervise agents in: 1) their real estate transactions; 2) the use of disclosure forms and contracts; and 3) the filing, storing and maintaining of real estate transaction documents. This is of great significance due to the fact that a salesperson's driving "does not relate in any way to documenting a transaction." The Court's interpretation of these real estate laws is of further significance as the limited scope of the regulations led the Court to conclude that a broker's responsibilities do not arise to the level of supervision required by an employer over an employee.

Continuing with its analysis, the Court cited Arizona case law in support of the proposition that "[w]hether an individual is an employee or an independent contractor is fundamentally a question of control."

In this case, the salesperson maintained near total discretion in the "time, manner, and means" in which he traveled as part of his business. He was not required to maintain specific hours and was free to choose the territory in which he worked, the clients he represented, as well as the manner in which he serviced his clients. Paid strictly by commission, the level of control exercised by an employer was simply not present in this case, especially considering that the conduct at issue involved driving, a task unrelated to the "substance and documentation of the real estate transaction itself."

It is this analysis that led the Court to conclude that Arizona's real estate laws do not establish the requisite control over aspects of a salesperson's activities such as driving a car and, as such, do *not* dictate an employer-employee relationship as a matter of law.

The case of *Santori v. MartinezRusso, LLC. dba RE/MAX Professionals* represents a positive step in maintaining the independent contractor relationship enjoyed by salespersons and the brokerages with whom they are affiliated. Nonetheless, brokers should continue to monitor and evaluate their policies and procedures to ensure that the brokerage does not assume control over the time, manner and method of an agent's job performance.

***Scott M. Drucker, Esq.**, a licensed Arizona attorney, is General Counsel for the Arizona Association of REALTORS® serving as the primary legal advisor to the association. 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.*

This article can be found online at:
https://www.aaronline.com/2016/09/az-court-of-appeals-looks-at-independent-contractor-status-of-re-agents/

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For More Information

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

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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.

Move-In Condition Checklist Within Five Days of Occupancy

FACTS: A potential tenant signed a Residential Lease Agreement ("Lease") on June 16, 2016. The Lease term begins July 1, 2016. The landlord is asking for the tenant to sign a Move-In Condition Checklist within five days of signing the Lease.

ISSUE: Does the tenant need to sign the Move-In Condition Checklist within five days of signing the Lease?

ANSWER: No.

DISCUSSION: Line 7 of the Move-In Condition Checklist states: "Complete the move-in section of this form and return it within five days … *after* occupancy." (emphasis added)

Therefore, the tenant should provide the form to the landlord within five days of July 1, when the tenant takes occupancy.

Acceptance Cannot be Performed Before an Offer

FACTS: The seller signed a listing agreement electronically. Included in the listing paperwork was the HOA Addendum (the "Addendum"). The seller and listing agent were not aware that the electronic signing program populated a signature on page 3 of the Addendum at line 103 indicating "SELLER'S ACCEPTANCE."

The Addendum was subsequently placed on the MLS under the documents tab.

When a buyer submitted an offer to the seller, he indicated on the Addendum that the seller would be responsible for paying all fees negotiable on the Addendum, and that the seller was bound to pay all of those fees because the seller already had signed line 103.

ISSUE: Is the seller obligated to pay all HOA fees because he signed line 103 prior to the offer?

ANSWER: No.

DISCUSSION: For a valid contract to have been formed between the parties, there must have been an offer, acceptance of the offer, and consideration. *K–Line Builders, Inc. v. First Fed. Sav. & Loan Ass'n*, 139 Ariz. 209, 212, 677 P.2d 1317, 1320 (App. 1983). Additionally, the parties must have intended to be bound by the agreement. *Goodman v. Physical Res. Eng'g, Inc.*, 229 Ariz. 25, 270 P.3d 852 (App. 2011).

Thus, an offer has no binding effect unless and until accepted by the offeree to whom the offer was directed. *AROK Constr. Co. v. Indian Constr. Servs.*, 174 Ariz. 291, 294, 848 P.2d 870, 873 (App. 1993).

In this case, buyer sent an offer to seller, attached to which was the HOA Addendum. By way of that Addendum, buyer conveyed an offer proposing which party would pay certain HOA fees. The seller could not have accepted the offer before having received it. As such, seller did not accept the terms contained within the HOA Addendum and seller may now accept or reject the offer.

When a Contingency is Met, No Addendum is Needed

FACTS: A buyer and seller entered into a Residential Resale Real Estate Purchase Contract (the "Contract"). Incorporated into the Contract was a Buyer Contingency Addendum (the "Contingency"). The box at line 34 was marked, indicating the Contract was contingent on the closing of the buyer's property. Line 37 indicated the buyer's real property must be sold by June 28, 2016.

Subsequently, the buyer's real property **did** close by June 28. The listing agent is now insisting that the buyer must provide an addendum to remove the Contingency.

ISSUE: Must the buyer create an addendum to remove the Contingency after it is satisfied?

ANSWER: No.

DISCUSSION: A contingency is a clause that requires the →

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completion of a certain act before the parties are obligated to perform their contractual obligations.

Here, lines 47-49 of the Contingency indicate that "If Closing [of the Buyer's real property] does not occur by the date specified on line 37 [June 28], this Contract shall be deemed cancelled and earnest money shall be released to Buyer."

However, because the buyer's real property did close by June 28, no further action is needed and all parties may proceed with the Contract.

Advertising Lists of Properties for Sale Must Contain the Name of the Brokerage

FACTS: A licensee regularly sends list of properties for sale to a neighborhood he markets to.

ISSUE: Does the licensee have to display the name of each listing broker?

ANSWER: Yes.

DISCUSSION: "[A] licensee who advertises a property that is the subject of another person's real estate employment agreement shall display the name of the listing broker in a clear and prominent manner." A.A.C. R4-28-502(F). Therefore, the name of each broker must be displayed in a clear and prominent manner.

Disclosure of Commission Rebate

FACTS: A licensee advertises the following ad: "Buy or sell a house with me in the month of January, with a successful close of escrow occurring no later than April 30, 2016, and receive a $500 gift card to Home Depot after close of escrow."

ISSUE: Can the licensee legally give a $500 gift card to a buyer or seller after close of escrow?

ANSWER: Probably not.

DISCUSSION: The issue of commission rebates may seem confusing, however, HUD provides instruction on how a licensee would properly provide a commission rebate:

Q: May a real estate agent rebate a portion of the agent's commission to the borrower? If so, how should the rebate be listed on the HUD-1?

A: Yes, real estate agents may rebate a portion of the agent's commission to the borrower in a real estate transaction. The rebate must be listed as a credit on [the Closing Disclosure or Settlement Statement] and the name of the party giving the credit must be identified. Real estate agent or broker commission rebates to borrowers do not violate Section 8 of RESPA as long as no part of the commission rebate is tied to a referral of business.

Thus, based on HUD's position, the safest course for a licensee would be to offer a commission rebate only in the form of a credit, which is disclosed on the Closing Disclosure or Settlement Statement.

Note: The Arizona Dept. of Real Estate Commissioner's Substantive Policy Statement 2008.06 reflects the same position, but additionally the Commissioner advises the rebate should be disclosed in the purchase contract as well.

Commission Rebate Cannot be Tied to a Referral

FACTS: Jane, a real estate agent, refers a prospective buyer to her husband John, a lender. Jane notifies the buyer that if the buyer uses John as a lender, then Jane will give the buyer a commission rebate.

ISSUE: Can Jane refer a buyer to John with the incentive of a commission rebate?

ANSWER: No.

DISCUSSION: The Real Estate Settlement Procedures Act (RESPA) prohibits kickbacks for referrals.

§1024.14 Prohibition against kickbacks and unearned fees.

(b) *No referral fees.* No person shall give and no person shall accept any fee, kickback or other thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or part of a settlement service involving a federally related mortgage loan shall be referred to any person. A company may not pay any other company or the employees of any other company for the referral of settlement service business.

(f) *Referral.*

(1) A referral includes any oral or written action directed to a person which has the effect of affirmatively influencing the

(Continued on page 12) →

selection by any person of a provider of a settlement service or business incident to or part of a settlement service when such person will pay for such settlement service or business incident thereto or pay a charge attributable in whole or in part to such settlement service or business.

(2) A referral also occurs whenever a person paying for a settlement service or business incident thereto is required to use (see §1024.2, "required use") a particular provider of a settlement service or business incident thereto.

Here, Jane and John are both "settlement service providers." Therefore, the commission rebate is prohibited because it is based on a referral to a settlement service provider.

Tail Clause Exists in Buyer Broker Agreement

FACTS: A buyer signs a Buyer-Broker Exclusive Employment Agreement ("BBEEA") with Agent 1 for a three (3) month period. Before the end of the three (3) month period, Agent 2 contacts Agent 1 stating that the Buyer has now signed a BBEEA with Agent 2. Agent 2 believes that lines 32-34 of the BBEEA allow the Buyer to enter into a new employment contract with Agent 2 by signing a new BBEEA.

ISSUE: Can a Buyer unilaterally cancel a BBEEA based on lines 32-34 of the BBEEA?

ANSWER: No.

DISCUSSION: Lines 32-34 of the BBEEA state:
Buyer agrees to pay compensation if within _____ calendar days after the termination of this Agreement, Buyer enters into an agreement to purchase, exchange, option or lease any Property shown to Buyer or negotiated by Broker on behalf of the Buyer during the term of this Agreement, unless Buyer has entered into a subsequent buyer-broker exclusive employment agreement with another broker.

This clause is similar to the listing agreement clause commonly known as the "Tail Clause." This clause becomes effective only "after" the expiration of the term of the agreement.

Therefore, because the Buyer and Agent 1 are still within the three (3) month period of the first BBEEA, the Buyer is still obligated under the terms of the BBEEA with Agent 1, and may not unilaterally cancel the Agreement.

Independent legal counsel should be obtained.

Out-of-State Broker Must Hold Active License to Receive Referral

FACTS: An Arizona broker was contacted by a licensee in Massachusetts with a referral. The licensee notified the Arizona broker that she does not hold an active license in Massachusetts, but that Massachusetts state law allows an inactive licensee to collect a referral fee.

ISSUE: Can an Arizona broker pay a referral fee to a licensee in Massachusetts who holds an inactive license?

ANSWER: No.

DISCUSSION: Pursuant to A.R.S. §32-2155(B) it is unlawful for a person, firm or corporation…to pay or deliver to anyone compensation…who is not licensed at the time the service is rendered. Therefore, although Massachusetts may allow an inactive licensee to collect a referral fee, Arizona law does not.

Both Buyer and Seller May Issue a Cure Notice

FACTS: A buyer and seller executed a Residential Resale Real Estate Purchase Contract ("Contract"). Close of escrow is scheduled for September 23. Three (3) days before close of escrow, the buyer performs a walk through and notes the seller has not made repairs to two (2) warranted items. Accordingly, the buyer delivers a Cure Period Notice ("Cure Notice") to the seller for failure to make warranted item repairs.

The seller states she will not make the repairs.

The buyer will not sign loan documents unless the repairs are made. Therefore, the seller delivers a Cure Notice to the buyer for failing to sign loan documents three (3) days prior to closing.

ISSUE: Can the seller submit a Cure Notice to the buyer if the buyer has already sent a Cure Notice to the seller?

ANSWER: Yes.

DISCUSSION: Pursuant to Contract line 278, "A party shall have an opportunity to cure a potential breach of [the] Contract." Further, lines 282-283 state, "In the event of a breach of Contract, *the non-breaching party* may cancel [the] Contract and/or proceed against the breaching party in any claim or remedy." (emphasis added)

Therefore, nothing in the Contract prohibits a party from providing a Cure Notice, even if that party has already received a Cure Notice.

Note: The Buyer Pre-Closing Walkthrough form should be utilized in this instance, as checking the second box and listing item(s) not corrected also serves as a Cure Notice.

Multiple Counter-Offer Does Not Cancel Out Negotiations

FACTS: A Seller receives an offer from Buyers A, B, and C.

Seller sends a Multiple Counter-Offer (Counter-Offer #1) to Buyers A, B, and C. →

All buyers send a Counter-offer (Counter-Offer #2) to the Seller.

The Seller sends a Counter-offer (Counter-Offer #3) to Buyers A, B, and C.

All buyers accept the Seller's final Counter-Offer #3.

The Seller now wishes to proceed with Buyer B, but does not want to sign line 43 of the Multiple Counter-Offer because the language on lines 40-42 reads in part:

"Seller revokes all other counter offers by separate notice and agrees to sell the Premises to the Buyer subject to the terms and conditions contained herein."

The Seller believes Counter-Offer #3 will be revoked if she signs line 43, and delivers the Multiple Counter-Offer to Buyer B.

ISSUE: Should the Seller sign line 43 of the Multiple Counter-Offer?

ANSWER: Yes.

DISCUSSION: The Seller must remember lines 7-11 of the Multiple Counter-Offer state:

Acceptance of this Multiple Counter Offer by Buyer shall not be binding unless and until it is subsequently finally accepted by Seller and the final acceptance is delivered per Section 8m of the Contract to the Buyer's Broker within the time specified ("Final Acceptance"). Until Final Acceptance, the parties understand that the Premises can be sold to someone else and/or either party may withdraw any offer/counter offer to buy or sell the Premises.

Lines 40-42 of the Multiple Counter-Offer refer to the negotiations between Seller and Buyers A and C. Therefore, Seller should sign line 43 and deliver the executed document to Buyer B. Additionally, the Seller should send written notice to Buyers A and C that the Seller is withdrawing the Counter-offer and will not enter into a contract with them.

These situations are fact-specific. A broker should consult with counsel about the specific situation before taking action.

ABOUT THE AUTHOR

Richard V. Mack

Richard V. Mack is a partner at Manning and Kass, which provides the AAR 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.

Announcing Mack in Minute Videos: In addition to the AAR Legal Hotline, AAR is rolling out videos addressing Legal Hotline topics. Each month, we will post one—60 second video. These are another great resource for your office meetings. Choose a topic, click the link and get up-to-date information with: Mack in a Minute

How Does the Election Affect Your Real Estate Business?

K. MICHELLE LIND, ESQ., CHIEF EXECUTIVE OFFICER

With 2016 being an election year, the Arizona Association of REALTORS® (AAR) has been focused on protecting issues of importance to REALTORS® and homeowners, as well as electing pro-REALTOR® candidates to office.

The REALTORS® of Arizona Political Action Committee (RAPAC) financially supports candidates running for local, state and federal office whose position on real estate regulation and a free-market business environment most closely represent the initiatives of the Arizona REALTORS®.

RAPAC channels resources into races that will have the most impact on the real estate industry. In addition, AAR provides Arizona REALTORS® with professional lobbying, legislative analysis and long-term political relationships.

RAPAC has endorsed 74 candidates for the Arizona legislature in the general election (see member's only voter guide) and has traditionally had a 96-percent or higher successful endorsement rate and we anticipate we will maintain that record.
In the last legislative session, AAR actively monitored 166 of the 1,300 bills introduced at the Arizona Legislature. AAR successfully passed bills prohibiting cities from restricting short term rentals except for health and safety reasons, and eliminated unfair restrictions on real estate licensees applying for a fingerprint clearance card.

For the second year in a row, AAR successfully defeated legislation brought forward by a for-profit institution of higher education to lower its property taxes at the expense of homeowners.

Other examples of how your business would change without AAR's legislative advocacy efforts include:
- Arizona homeowners would pay $20.2 million dollars more in property taxes
- Brokers and agents would pay $80-$150 for additional business licenses in each city or town in which they do business
- Arizona would likely have a real estate transfer tax
- Arizona would likely have a professional services tax
- Arizona's anti-deficiency law protection would be significantly weakened
- For Sale and For Rent signs could prohibited, open houses could be limited and rentals restricted in HOAs and condominium associations.

AAR anticipates that the next legislative session will bring more efforts to shift tax burdens to property owners and additional HOA legislation. However, AAR will continue to protect the interests of Arizona REALTORS® and homeowners alike.

K. Michelle Lind, Esq. *is an attorney and Chief Executive Officer for the Arizona Association of REALTORS®. Prior to becoming CEO, she served as General Counsel to the association and has been integral in the development of AAR's contract and transaction forms.*

This article can be found online at:
https://www.aaronline.com/2016/10/how-does-the-election-affect-your-real-estate-business/

What is an HOA Reserve Study and Why is it Important?

BY SCOTT M. DRUCKER, ESQ., GENERAL COUNSEL

According to the Community Associations Institute, there are approximately 338,000 community associations in the United States, housing roughly 68-million Americans. These common-interest communities are prevalent throughout Arizona, meaning that prospective buyers must often consider what it means to live in a community governed by a homeowner's association (HOA).

In evaluating an HOA, buyers should always consider the association's financial viability. While that evaluation should include reviewing the HOA's **reserve study**, many buyers simply do not know what that is and why it is important.

Underfunded HOAs pose a myriad of problems to homeowners within the community. Absent adequate reserves, HOAs may be required to impose a "special assessment," two of the most dreaded words in the minds of HOA owners. Damian Esparza, CEO/Owner of Barrera & Co., performs in excess of 1,200 reserve studies a year on the West Coast.

According to Esparza, roughly 22-percent of those associations are underfunded at the time of the reserve study and projected to impose a special assessment at some point over the next five years. Fortunately, reserve studies performed at appropriate intervals can enable an HOA to anticipate future expenses and budget accordingly.

A typical reserve study consists of two parts: a **physical analysis** and a **financial analysis**. By way of the physical analysis, the condition of common area, building and grounds components are evaluated. The remaining useful life of each component is determined and the repair or replacement cost is estimated. By way of the financial analysis, the reserve study compares the association's current reserve funds to what should be set aside to ensure that the association has adequate funds to cover such repairs and replacements.

The concept by which the amount of reserve funds is estimated is referred to as **percent funded**. Percent funded is the ratio of what an association has set aside for reserves as compared to the total depreciation of all the association's components, known as the fully-funded balance. For potential buyers, percent funded is one of the most important numbers to look at when reviewing an association's reserve study. The higher the percent funded, the more financially stable the HOA.

The ideal amount of money an association should set aside is known as 100% funded. Unfortunately, as the percent funded decreases, the risk of special assessments and deferred maintenance increases. Esparza generally recommends that condo associations place 30 cents of every dollar received into reserves, and that associations comprised of single family homes place 25 cents of every dollar received into reserves.

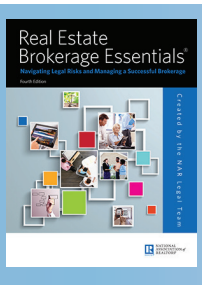
Prudent buyers should consider the amount of the association's reserves, knowing that a lack of reserves is a red flag signaling the potential for onerous assessments. Similarly, the lack of a reserve study may be a signal of poor planning. Arizona maintains no statutes requiring an HOA to prepare a reserve study or fund reserves. Arizona does, however, maintain statutory requirements obligating the association to deliver to a purchaser, or their authorized agent, specific information. This includes, but is not limited to: (i) the total amount of money held by the association as reserves; (ii) a copy of the association's most recent annual financial report; and (iii) a copy of the association's most recent reserve study, if any. See A.R.S. § 33-1806. Prospective buyers should ensure that they receive and review this information.

When HOA assets are properly maintained, property values tend to increase. But it takes money to maintain assets, perform repairs, and replace outdated components. Fortunately, reserve studies performed every three to five years should enable the association to plan accordingly and set aside on enough money an annual basis to offset anticipated reserve expenses.

***Scott M. Drucker, Esq.**, a licensed Arizona attorney, is General Counsel for the Arizona Association of REALTORS® serving as the primary legal advisor to the association. 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.*

Did You Know?

NAR has a wide array of programs, services, and business content to help broker-owners and managers grow and run successful, ethical, and resilient real estate businesses. Check it out: http://www.realtor.org/brokers. NAR also offers an annual Broker Summit which is designed exclusively for brokers to come together and learn from presenters, panels and peer leaders in the industry offering fresh insights on current conditions while looking to the future of real estate. Registration for the 2017 Summit scheduled for February 14-15 in San Diego is now open http://www.realtor.org/events/realtor-broker-summits.



The latest edition of *Real Estate Brokerage Essentials*® is now available from the REALTOR® Store. ***Real Estate Brokerage Essentials®: Navigating Legal Risks and Managing a Successful Brokerage, Fourth Edition* is the most comprehensive business tool for brokers to run their offices efficiently and minimize their risk for legal liability.** This product covers everything from hiring and training employees, licensing issues, dealing with consumers, key intellectual property concepts and how to understand and deal with tough business issues. The product was created by NAR's Legal Team and includes a foreword by NAR General Counsel Katie Johnson. Use code REBEPPS by Nov. 30 to get 10% off. https://store.realtor.org/product/book/real-estate-brokerage-essentials/?cid=PROD01047

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Arizona's REALTOR Convention: Mark Your Calendar for the 2017 Arizona REALTOR Convention, March 28-31 at the Prescott Resort. Information will be coming out in mid-December.