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INTEGRATED DISCLOSURE RULE IMPLEMENTATION

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TILA-RESPA Integrated Disclosure Rule Implementation

BY JAN STEWARD, ARIZONA ASSOCIATION OF REALTORS® MANAGER, RISK MANAGEMENT

In preparation for the TILA-RESPA Integrated Disclosure (TRID) rule implementation, AAR's General Counsel, Scott M. Drucker, Esq., has published a synopsis/summary article titled Close of Escrow Changes, addressing the changes that will impact mortgage related transactions beginning August 1, 2015.

At the direction of AAR's Risk Management Committee, workgroups have been formed to review and revise forms effected by the TRID rules. The Residential Resale Purchase Contract, the Pre-Qualification Form, the Loan Status Update, and the Vacant Land/ Lot Purchase Contract are among the forms impacted. The revised forms are expected to be released in July, prior to the August 1 implementation date. As with all AAR forms, you can expect a detailed accounting describing the changes and best practice tips when using the revised forms.

Continue to monitor AAR's website www.aaronline.com for timely information on Risk Management issues.

Questions or Comments: editor@aaronline.com | Excluding author photos (or if otherwise indicated), images are © iStockphoto LP.

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SECOND QUARTER 2015 | ARIZONA BROKER/MANAGER QUARTERLY

IN THIS ISSUE

F.A.Q. August 1, 2015 CLOSE OF ESCROW CHANGES

By Scott Drucker, Esq. Arizona Association of REALTORS® General Counsel

The Consumer Financial Protection Bureau has published revised final rules and forms that combine disclosures that consumers receive in connection with applying for and closing on a mortgage loan under the Truth in Lending Act (TILA) and the Real Estate Settlement Procedures Act (RESPA).

The new forms include a Loan Estimate and a Closing Disclosure. The Loan Estimate replaces the Truth in Lending statement and Good Faith Estimate, and it must be provided within three business days of a lender's receipt of a mortgage loan application. The three-page document includes terms and estimated costs that consumers can use to comparison shop. The new five-page Closing Disclosure provides detailed information on all costs associated with the loan. This form must be given to borrowers three business days before loan consummation, and it replaces the HUD-1 Settlement Statement.

The effective date for the new TILA-RESPA Integrated Disclosure rules is now just months away. As REALTORS® begin preparations for implementation of the new rules, a number of excellent questions have been posed to Arizona Association of REALTORS® staff. Below are some the most frequently asked questions, along with answers and pertinent analysis.

Q: I heard that the effective date for the new closing procedures is August 1, 2015. If my clients are closing escrow after August 1st, does that mean they will use the new Closing Disclosure form and not the HUD-1 Settlement Statement?

A: Not necessarily. For transactions in which the lender receives a loan application prior to August 1st, the HUD-1 Settlement Statement will still be used at close of escrow, even if the closing takes place after August 1st. Stated differently, the Closing Disclosure form will be used only →

for those transaction in which the lender receives the loan application after August 1st.

Q: Will my buyer be able to submit a completed loan application to their lender before identifying a specific property?

A: No. As of August 1, 2015, a loan application must contain all of the following six pieces of information: 1. The consumer's name; 2. The consumer's income; 3. The consumer's social security number; 4. The property address; 5. An estimate of the value of the property; and 6. the mortgage loan amount sought. Therefore, a loan application cannot be complete without the identification of a property address.

Q: What does the lender have to do after receiving a loan application?

A: The lender is responsible for ensuring that it delivers or places in the mail the Loan Estimate form no later than the third business day after receiving the consumer's application for a mortgage loan.

Q: What is the Loan Estimate?

A: The Loan Estimate, which replaces the current Good Faith Estimate and the current Truth in Lending Disclosure, presents the costs and risks of the potential loan using plain language and in a simplified format. The interest rates, monthly payment, loan amount and closing costs are clearly spelled out on the first page. On the remaining two pages, the form offers information about taxes, insurance, and other costs. The form also clearly identifies loan features some consumers might want to avoid such as a prepayment penalty, a balloon payment, or a potential increase in the loan balance after close of escrow.

Q: If the Loan Estimate meets with the buyer's approval and they want to continue with the loan transaction, what do they need to do?

A: Under such circumstances, the buyer must affirmatively indicate an "intent to proceed" with the loan transaction. Unless a particular manner of communication is required by the lender, this may include: 1. Oral communication in person; 2. Oral communication over the phone; 3. Written communication via email; or 4. Signing a pre-printed form. The buyer's silence is not indicative of intent to proceed, which can only be conveyed after the buyer's receipt of the Loan Estimate.

Q: Does the buyer's execution of the Loan Estimate qualify as their "intent to proceed" with the loan transaction?

A: No. When the buyer signs page three of the Loan estimate, they are only confirming receipt of the form. The buyer's signature on the form does not evidence their "intent to proceed."

Q: What does "consummation" mean? Is it the same as close of escrow? Why is this term important?

A: Consummation is defined as the time that a consumer becomes contractually obligated to the lender on the loan, i.e. – execution of the promissory note and deed of trust. Consummation is not the same as close of escrow, which the Residential Resale Real Estate Purchase Contract defines as the time when the deed is recorded at the appropriate county recorder's office. The reason this term is important is because the buyer must receive the Closing Disclosure form no later than three business days before they can consummate the loan.

Q: I know that the loan cannot be consummated less than three business days after the Closing Disclosure form is received by the buyer. But can't the borrower just waive this three-day waiting period?

A: Although the technical answer to this question is "yes," obtaining such a waiver will likely prove exceptionally difficult. In order to waive or modify the three-day waiting period, the consumer must establish a "bona fide personal emergency." Under these circumstances, the consumer must provide the lender with a dated written statement that describes the emergency, requests a waiver of the waiting period, and is signed by all of the consumers who are primarily liable for the loan payments. The creditor is prohibited from providing the buyer with a pre-printed waiver form and it is expected that lenders will be extremely reluctant to approve any waiver of the three-day waiting period.

For more information on what to expect come August 1st, go to: http://files.consumerfinance.gov/f/201311_cfpb_tila-respa_detailed-summary.pdf

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.

A Dwelling Has to Be Completed on Property for Anti-Deficiency Protection

NIKKI J. SALGAT, ESQ. ARIZONA ASSOCIATION OF REALTORS® ASSOCIATE COUNSEL

Throughout the years, Arizona's anti-deficiency statute has been litigated to determine under what circumstances the statute is applicable. Of particular interest has been the phrase "utilized for a . . . dwelling." The statute, A.R.S. §33-814, states:

1. If trust property of two and one-half acres or less which is limited to and utilized for either a single one-family or a single two-family dwelling is sold pursuant to the trustee's power of sale, no action may be maintained to recover any difference between the amount obtained by sale and the amount of the indebtedness and any interest, costs and expenses. (emphasis added.)

One of the first litigated cases to consider what "utilized for a . . . dwelling" entailed occurred in 1986 in the case of *Northern Arizona Properties v. Pinetop Properties Group*. In this case, the parties argued over whether an investment property was afforded deficiency protection under Arizona law when the property was occasionally utilized by the owners. While a structure existed and was in fact utilized, the lender argued that the term "dwelling" as used in the statute required permanent residency, not property held for investment purposes. Contrary to the lender's position, the Court of Appeals held that "dwelling" did not constitute a permanent residence. Accordingly, as long as a structure was lived in or occasionally occupied by a person, the borrower would be afforded deficiency protection under Arizona law.

In 1991, in *Mid Kansas Fed. Sav. and Loan Ass'n of Wichita v. Dynamic Dev. Corp.*, a developer who built and sold residential and commercial property defaulted on its loans and the lender pursued the deficiency. Amongst other issues, the parties argued over whether Arizona's anti-deficiency statute applies when the encumbered properties are not actually used as residences. The Supreme Court of Arizona held that the anti-deficiency statute did not apply to houses owned by a developer that had never been utilized as dwellings and were not yet susceptible of being utilized as dwellings.

Approximately 20 years later, in 2011, the Court of Appeals in *M&I Marshall & Ilsley Bank v. Mueller* made a drastic change to how the statute had previously been interpreted when it determined that intent to live in a residence upon its completion was sufficient to fulfill the "utilized for a . . . dwelling" requirement. In *Mueller*, the borrowers purchased vacant land and had not completed construction of a residence on the property when the lender foreclosed and pursued them for the deficiency. Thus, while the previous cases established that a structure must exist and be utilized, the holding in *Mueller* eliminated that requirement by extending deficiency protection to a borrower based on the borrower's intent to utilize an uncompleted property.

On January 23, 2015, the Arizona Supreme Court in the case of *BMO Harris Bank, N.A. v. Wildwood Creek Ranch, LLC* overruled *Mueller* when it held that the anti-deficiency statute does not apply until a dwelling is completed on a property. In analyzing the anti-deficiency statute and the cases previously mentioned, the Supreme Court noted that the *Mueller* holding could inappropriately extend deficiency protection to a vacant lot owner in the event the owner intended to construct and utilize a residence not yet built on the property. Accordingly, in overruling *Mueller*, the Supreme Court restored the former understanding that a home must be completed in order to be "utilized for a . . . dwelling." Stated differently, the court restored the law to what it had been from the statute's inception through the *Mueller* decision in 2011.

Notably, Arizona's anti-deficiency statute was recently revised to clarify when the statute is applicable. Included in part of the revision is that a trust property must be substantially completed in order to receive deficiency protection. See A.R.S. §33-814(H). This is applicable to deeds of trusts originated after December 31, 2014. Id. Consequently, now that *Mueller* has rightfully been overruled, case law and Arizona's anti-deficiency statute are again in-line with each other.

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REALTORS Property Resource® (RPR) Tool Set Serves As Essential Asset for Brokers

Like it or not, big data is taking the world by storm. And the control no longer lies in the hands of a few tech gurus who produce sortable Excel databases on demand. No, the power is now in the hands of the people.

Introducing the RPR Broker Tool Set, a comprehensive, customizable real estate data delivery tool designed to help brokers easily identify, prepare for, and get ahead of market curves. With more than 166 million U.S. properties and 1.7 million active listings, RPR's Broker Tool Set is this generation's most powerful analytical asset. The Broker Tool Set offers four, easily accessed components:

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Statistical reports on market conditions, productivity trends, listing and sales metrics, and market share. Data from multiple MLS is compiled into a single feed, allowing brokers to compare offices to each other and to the market.

Broker AVM
Highly accurate and customizable AVM displayed directly on the broker's website or Intranet.

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A custom-branded site for individual companies, as well as company branding automatically featured on reports generated by agents.

Affiliated Services
The option to promote mortgage, title, home warranty, insurance or other specialized services to agents on the branded platform, as well as in consumer-directed reports.

Learn more about this NAR member benefit, provided to brokers at no additional cost, by visiting blog.narrpr.com/broker/.

A Baker's Dozen Risk Management Tips

BY K. MICHELLE LIND, ESQ., ARIZONA ASSOCIATION OF REALTORS® CHIEF EXECUTIVE OFFICER

Minimizing risk is a legitimate goal in any situation. The following tips should assist a broker in better serving the client and reducing the possibility of costly and time-consuming litigation.

1. Get to Know Your Client—The disclosures, advice and counsel required of the broker, depend upon:
   - The facts of each transaction
   - The knowledge and the experience of the client
   - The questions asked by the client
   - The nature of the property
   - The terms of sale

2. Read & Understand the Purchase Contract & Related Forms—Understanding these documents is pivotal to giving competent advice

3. Educate Your Client—On the contract, CC&Rs, title report, public report and any other important matters

4. Avoid Shortcuts—Shortcuts such as incorporating the MLS or listing form into the contract, giving the buyer a list of properties to see at open houses unaccompanied and failing to write contingencies out completely all lead to ambiguity and the potential for disputes

5. Handle Offers Properly—Submit all offers promptly

6. Practice Within Your Area of Expertise—Both in practice area and geographically

7. When in Doubt, Disclose—Focus on common issues. If you have actual knowledge of a material defect—disclose it. If you notice a suspicious condition—point it out to the client and recommend the appropriate technical or professional investigation.

8. Assist the Client with Disclosures & Due Diligence—Recommend inspections and attend the inspections and walk through when possible. Supply the buyer with the tools to obtain information.

9. Think Before You Speak—Don't speculate or guess. Identify the source of any information provided and direct your client to the source if possible.

10. Verify Information—If you have reason to question the accuracy of information being provided in a transaction or where the client has questioned the accuracy of the information.

11. Follow Through—Get the buyer pre-approved for financing. Review the title report and all other pertinent documents.

12. Document the Transaction
    - Take contemporaneous notes
    - Confirm important issues in writing
    - Keep a complete and organized file

13. Communicate
    - Promptly return calls to clients and the other broker
    - Provide updates even if nothing is happening
    - Handle complaints promptly

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Dispute Resolution in 2014

Our Risk Management and Dispute Resolution team was busy last year, helping members avoid and resolve conflicts. Wonder how we did? Here are just a few highlights for 2014 along with some information on our dispute resolution services!

Ombudsman

Trained REALTOR® Ombudsman assist in identifying and clearing up any miscommunication between the parties, explain customary Arizona real estate business practices, and discuss available options without judgment.

91%
OMBUDSMAN SUCCESS RATE WITH 57 REQUESTS

Arbitration

Mediating and arbitrating contractual or specific non-contractual disputes regarding compensation may be a REALTOR® obligation according to Article 17 of the Code of Ethics.

Mediation

Arizona Association of REALTORS® appoints REALTOR® members as Mediators who are specifically trained to be objective listeners and encourage communication between the parties involved in an ethics complaint or arbitration dispute.

SINCE IMPLEMENTING A "MANDATORY MEDIATION" POLICY IN 2012 WE'VE SEEN ARBITRABLE DISPUTES DECLINE. **23** in 2013 and **16** in 2014

Interview with ADRE Commissioner Judy Lowe: Part Three

JIM SEXTON, ARIZONA ASSOCIATION OF REALTORS® PRESIDENT

AAR President Sexton recently spent time with ADRE Commissioner Lowe discussing industry issues. This is the third in a series of articles on what they discussed. Make sure to read parts one and two as well!

Teams, Transaction Coordinators, and Assistants
The ADRE is focused on teams, transaction coordinators, and unlicensed assistants. If you are a part of a team or utilize the services of a transaction coordinator or assistant, make sure that you comply with the ADRE rules.

When it comes to team names, there are no regulations as far as the ADRE is concerned. In other words, real estate teams are not officially recognized entities in either Arizona statute or rule. Consequently, naming conventions and rules pertaining to teams are left to the broker. The ADRE is nonetheless clear that team names must not create the impression that the team is an independent entity or separate from the employing broker. The use of the words "Group" or "Associates" should be avoided because it creates the impression of a brokerage rather than a team. Furthermore, in choosing a team name, the Commissioner's Rules dictate that the team name cannot be deceptive as salespersons and brokers are prohibited from creating misleading impressions.

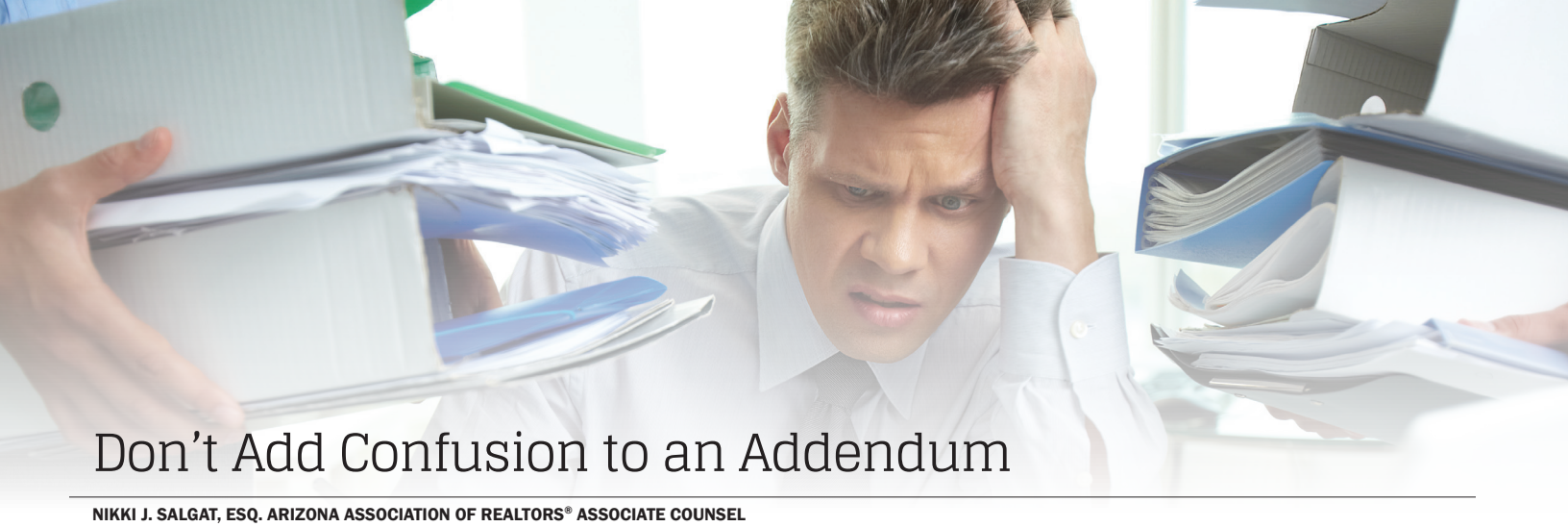
The same advertising rules apply to teams and individual licensees, meaning that all team advertising must clearly and prominently display the employing broker's name. For more information on real estate advertising guidelines review the Real Estate Advertising Rules & Guidance. In addition, the ADRE Substantive Policy Statement (SPS) on Advertising can be found on the ADRE website here.

The ADRE has received multiple inquiries and questions in regards to using non-local transaction coordinators. Transaction coordinators can only work for one brokerage as they need to be a licensee and a licensee can only hang their license with one broker. Can the coordinator live out of state? Yes, but they must be licensed in Arizona. It is possible to share a transaction coordinator, but all licensees must be members of the same brokerage firm.

The ADRE is also seeing numerous incidents of unlicensed assistants completing tasks that require a real estate license. Review the SPS on unlicensed assistants on the ADRE website here for what an unlicensed assistant can do. To help with these questions, AAR will be working on additional materials and resources to educate members on the dos and don'ts of utilizing assistants.

This concludes the articles arising from the first meeting between President Sexton and Commissioner Lowe, but each have the intention of making these conversations a regular event. This would lead to both parties being able to discuss current and future needs and issues.

Stay tuned for more updates and information and many thanks to Commissioner Lowe for her time and help in educating our members.



Don't Add Confusion to an Addendum

NIKKI J. SALGAT, ESQ. ARIZONA ASSOCIATION OF REALTORS® ASSOCIATE COUNSEL

The purpose of an addendum is to include additional terms and conditions to a contract. More specifically, an addendum may accomplish the following: (1) provide further explanation to the terms in the contract; (2) modify existing terms in the contract; or (3) present new considerations to the contract.

While an addendum should only affect those items addressed in the addendum, an ambiguous addendum may lead to a variety of problems such as creating loopholes or unintended consequences. Additionally, a poorly drafted addendum may fail to take into consideration other issues surrounding the new or modified terms. These problems may lead to potential liability for the drafter. Accordingly, real estate agents should strive to clearly and concisely draft addendums.

Drafting an Addendum

If an addendum is properly drafted, the parties' rights and obligations are clear to anyone that reads the addendum. Put differently, the addendum does not create questions as to what the parties intend to occur. As a result, this enables agents to manage their clients' expectations and the transaction to progress smoothly.

When drafting an addendum make sure to do the following:

- Refer the addendum back to the original contract and specify the effective date of the addendum;
- Confirm the new verbiage does not already exist in the contract as adding verbiage will supersede the pre-printed portion of the contract;
- Be as specific as possible by referencing parts of the contract that are changing, what the changes are and when the changes are to occur (if necessary); and
- Make sure all parties sign the addendum.

Good practices for drafting addendums are:

- Have a third-party read the addendum to see if they understand what the parties are agreeing to;
- Look for loopholes – read the addendum as if you are on the other side and trying to get out of the contract;
- If there are multiple addenda, re-draft the addenda into one addendum; and
- Consider consulting an attorney.

AAR Offers Pre-Printed Addendums

Don't reinvent the wheel! AAR offers addendums that address many different incidents in a transaction. One addendum that addresses many common transactional occurrences is the Additional Clause Addendum (ACA). More specifically, the ACA considers the following: (1) back-up contracts; (2) signature of absent buyer; (3) relocation; (4) cash sale; (5) non-refundable earnest money; (6) appraisal waiver; (7) surveyed property; (8) tax-deferred exchange; and (9) water rights. Because these are common occurrences, a real estate agent does not need to draft an addendum. Rather, the agent can use the pre-printed form which thereby lessens the agent's chances of drafting an ambiguous addendum.

Alternatively, if the real estate agent does not want to use the ACA in its entirety, the agent can utilize that portion of the ACA that is specific to their transaction by lifting the verbiage from the ACA and drafting it into a separate addendum. Not only can this same technique be used with the ACA, but it can also be used with verbiage from other pre-printed AAR addendums. However, the agent should be cautious to make sure the agent is utilizing the verbiage correctly and may want to have their broker review the verbiage before the addendum is signed by the parties.

All Interested Parties Should Receive a Copy

Addendums are invaluable if properly drafted/used and submitted to the appropriate parties. In determining who the appropriate parties are, you should consider who the interested parties are by who the addendum directly affects. For the most part, the interested parties tend to be the buyer, seller and their agents, the Title Company, escrow, the lender (if any) and appraiser. Because these parties are usually directly involved in the transaction, they should receive a copy of any addenda incorporated into the contract.

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REALTOR® SAFETY PROGRAM

www.realtor.org/topics/realtor-safety/safety-resources

Safety Resources for Arizona REALTORS®

Safety Articles

Safety Tips for Showing a Home (CLICK HERE)

Arizona REALTOR® Safety Series Featuring Paula Monthofer (CLICK HERE)

Keeping Yourself Safe (CLICK HERE)

Safety Alerts

REALTOR® Safety Alert: Man Claims to Be Reflexologist (CLICK HERE)

All of these REALTOR® Safety Articles, Video and Alerts can be found under Risk Management at:
www.aaronline.com/manage-risk/realtor-safety/

ARIZONA ASSOCIATION OF REALTORS®

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A RESOURCE FOR BROKERS NEEDING LEGAL INFORMATION

The AAR 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 Manning & Kass

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, AAR 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.

Commission Is Not a"Closing Cost" under Section 2(j) of the Contract

FACTS: Pursuant to lines 77 and 78 of the AAR Residential Resale Real Estate Purchase Contract (the "Contract"), the seller agreed to credit up to 3% of the purchase price towards the buyer's closing costs. The broker, who represents the seller, just received an Estimated HUD-1 Settlement Statement from the title company, which provides that a portion of that seller concession will be applied toward payment of the commission to the buyer's broker pursuant to a separate buyer-broker agreement.

ISSUE: Are commissions paid pursuant to a buyer-broker agreement properly included as a seller concession under Section 2(j) the Contract?

ANSWER: No.

DISCUSSION: Lines 77 and 78, when negotiated by the parties, obligate the seller to pay a certain portion of the "Buyer's loan costs including pre-paids, impounds and Buyer's title/escrow closing costs." By its plain language, this section of the Contract does not obligate the seller to pay any additional commissions negotiated between the buyer and the buyer's broker, as such compensation is not properly considered part of the buyer's "loan costs, or Buyer's title/escrow closing costs."Absent further negotiation, this additional compensation would instead be paid by the buyer.

Offer Cannot Be Accepted After Contract Expires

FACTS: The seller sent a counteroffer to Buyer #1 that expired on Monday at 6:00 p.m. On Tuesday, the seller accepted an offer from Buyer #2. Around 2:00 p.m. on Tuesday, Buyer #1 accepted the seller's counteroffer.

ISSUE: Do Buyer #1 and the seller have a binding contract?

ANSWER: No.

DISCUSSION: Lines 13-15 of the AAR Counter Offer provide that if acceptance of the Counter Offer is not signed by all parties and delivered to the seller's broker by the time specified in the Counter Offer, then the Counter Offer is considered withdrawn. Therefore, the seller's counteroffer was considered withdrawn as of 6:01 p.m. on Monday. As a result, there was no counteroffer for Buyer #1 to accept on Tuesday and there is no binding contract between Buyer #1 and the seller

An Unsigned Addendum Does Not Alter The Enforceability Of The Underlying Contract

FACTS: A title issue arose during a pending transaction. In an attempt to resolve the issue, an addendum to the contract was drafted. However, neither the buyer nor the seller signed the addendum. The seller is now claiming that, since an addendum was presented to him, he has a right to unilaterally cancel the contract.

ISSUE: Does the seller have the right to cancel the contract?

ANSWER: See Discussion.

DISCUSSION: When the seller was presented with an addendum, the seller received an offer to amend the contract, which the seller has the right to either accept or reject. Rejection of the proposed amendment does not, however, provide the seller the opportunity to unilaterally cancel the contract. The seller's rejection of the offer to amend merely means the addendum has no legal effect on the contract and the terms and conditions of the original contract remain legally binding.

Seller Must Provide A Three-Day Cure Notice If The Buyer Does Not Produce Loan Documents On Time

FACTS: The buyer has not presented the seller with loan documents three (3) days prior to close of escrow. The seller wants to cancel the AAR Residential Resale Purchase Contract immediately.

ISSUE: Can the seller cancel the contract without issuing a Three-Day Cure Period Notice?

ANSWER: No. In the AAR Residential Resale Purchase Contract there are no automatic breaches. The Cure Period Notice is a pre-requisite to a breach of contract. To declare a

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www.aaronline.com/wp-content/uploads/2015/03/Legal-Hotline-Access-Process-2015-03-31-fillable.pdf

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breach for failure to deliver loan documents the seller must issue the buyer a Cure Period Notice requiring that the buyer perform within three (3) days. If the buyer does not perform, there is a breach and the seller is entitled to earnest money.

A Seller Will Likely Be Relieved Of His Mistaken Acceptance Of An Offer

FACTS: The buyer submitted an offer of $450,000 to the seller. The seller submitted a counter offer of $375,000 which the buyer immediately signed and returned to the seller. The seller stated that he made a mistake and the counter offer should have been $475,000.

ISSUE: Is there an enforceable contract between the buyer and seller at $375,000?

ANSWER: If one party is operating under a mistake of fact when it signs an agreement, the agreement is voidable if the other party knew or should have known that the first party was mistaken (Parrish v. United Bank, 164 Ariz. 18, 20, 790 P.2d 304, 306 (App. 1990)). In this instance, the buyer submitted an offer of $450,000 and the seller countered with $375,000. It is likely that the buyer knew or should have known that the seller made a mistake. As such, the seller has the option of voiding the contract by providing the buyer notice that the contract is void. Independent legal counsel should be consulted.

Buyer Who Disapproves of CC&Rs May Cancel Contract

FACTS: Buyer reasonably disapproves of items contained in the homeowner's association documents.

ISSUE: Can the buyer cancel the contract and recover the earnest money deposit?

ANSWER: Yes, provided that the buyer timely issues a cancellation notice to the seller.

DISCUSSION: Pursuant to Section 3(c) of the Purchase Contract, the buyer has five days after receipt of the Title Commitment, which includes the association's Conditions, Covenants, and Restrictions ("CC&R's"), to provide notice of any items disapproved. In turn, Section 6(j) of the Purchase Contract provides that the buyer can elect to immediately cancel the contract and recover his or her earnest money deposit for any disapproved items, which would include the items referenced in Section 3(c). A buyer may therefore cancel the contract and recover the earnest money deposit based upon the buyer's reasonable disapproval of the CC&R's, as long as the buyer delivers the notice of disapproval and cancellation to the seller within five days after the buyer's receipt of those documents.

Cancellation Based on Updated SPDS

ISSUE: After the inspection period the buyer and his contractor went to the home to analyze the type of improvements that the buyer was going to make after the close of escrow. Mold is discovered. The buyer wants to cancel the contract because of the mold. The seller intends to remediate the mold. Can the buyer cancel the contract after the discovery of the mold?

ANSWER: Yes. The seller is required to update the SPDS to disclose the mold. The buyer then has five days to cancel the contract. If the seller does not update the SPDS, the buyer can issue a Three-Day Cure Period Notice requiring the updated SPDS, and then the buyer can cancel the contract if the seller does not deliver the updated SPDS within three days.

Buyer Can Cancel if Seller Does Not Make Repairs Required by HOA

ISSUE: The buyer and the seller signed the Contract which included the HOA Addendum. After the inspection period expired the buyer received the required documents from the HOA. These documents included a copy of a notification to the seller that the flower pots needed to be moved. Buyer then gave the five-day notice to the seller to correct the problem as provided for in paragraph I of the HOA Addendum. If the seller does not agree to correct the problem with the flower pots within five days, can the buyer cancel the Contract?

ANSWER: Yes. After the buyer gives the five-day notice to the seller the buyer is entitled to cancel under lines 236-249 of the Contract if the seller does not agree to correct disapproved items, such as the flower pots.

Air Conditioner For Garage Is Warranted Item

ISSUE: Are garage A/C units considered warranted items under Section 5(a) of the AAR Residential Resale Real Estate Purchase Contract (the "Contract")?

ANSWER: See Discussion.

DISCUSSION: Pursuant to Section 5(a) of the Contract, all heating, cooling, mechanical and plumbing systems on the →

Premises, among other items, are considered warranted items. The "Premises" are separately defined on lines 3-4 of the Contract to include "all improvements, fixtures, and appurtenances [on the property] or incidental thereto, plus the personal property described [in the Contract]." Accordingly, a garage A/C unit is considered a warranted item notwithstanding the fact that it is not located within the living areas of the home since the Contract states that "all" cooling systems are warranted.

Disclosure Requirements Of A Group Home Depend On Specific Circumstances

ISSUE: Is a real estate licensee representing a seller in the listing of the seller's residence required to disclose to a buyer the presence of a homecare facility for troubled teenagers in the neighborhood?

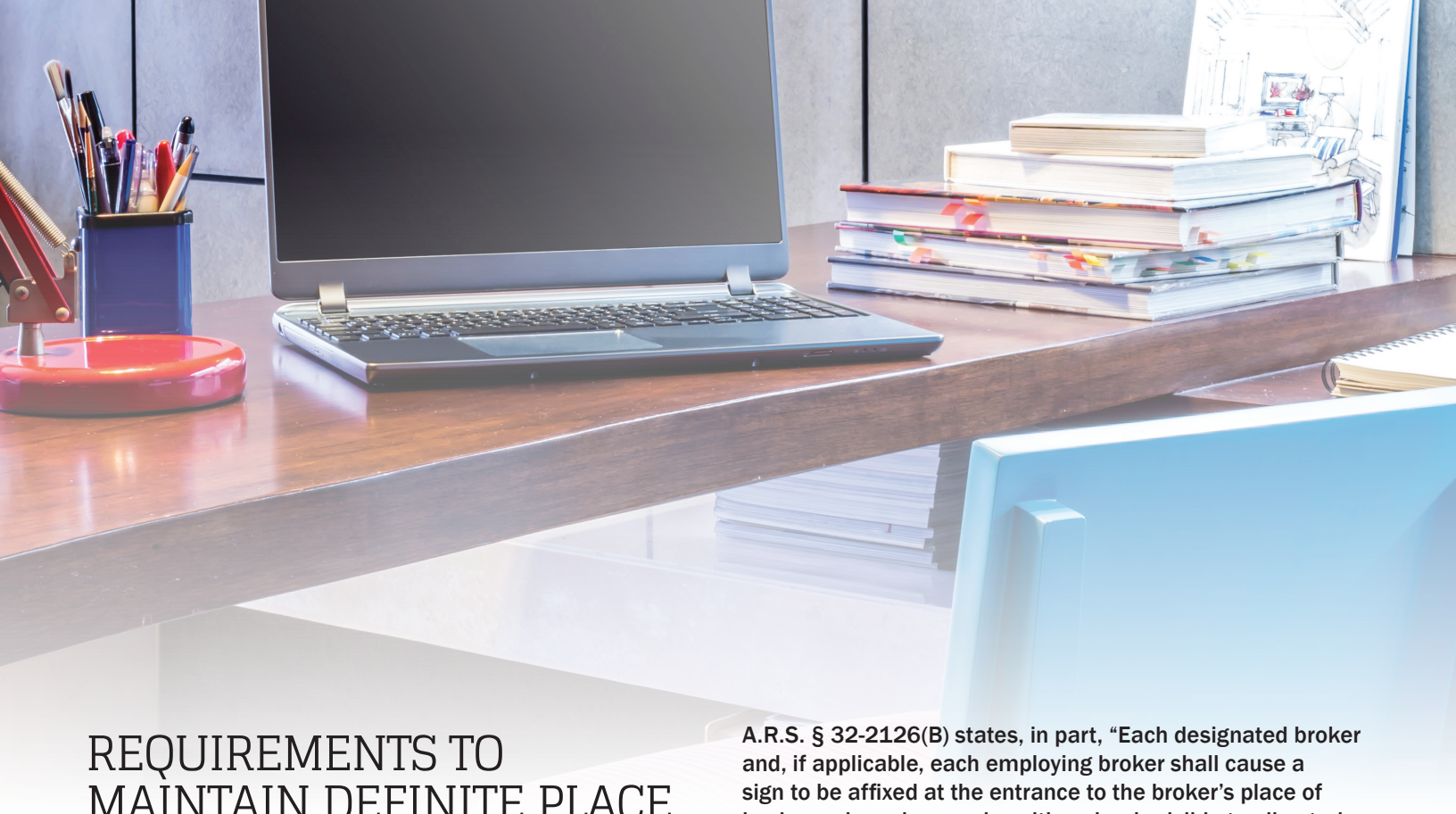
ANSWER: Under the Federal Fair Housing Act (the Act), as amended in 1988, no person shall discriminate against a person with a disability or handicap in connection with the sale or rental of a dwelling. Under the Act, handicap means (1) a mental or physical impairment that substantially limits at least one major life activity; or (2) a record of such impairment; or (3) being regarded as having such an impairment. See 42 U.S.C. § 3602(h). In this instance, the teenagers are described as "troubled." Likely, a "troubled" teenager does not constitute a handicapped or disabled person under the Act. As such, the seller or the seller's agent would be required to disclose this homecare facility. However, if the teenagers are found to suffer from a disability, the Act would prohibit the seller or the seller's agent from disclosing.

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.



REQUIREMENTS TO MAINTAIN DEFINITE PLACE OF BUSINESS

The Broker's Business Location
The Arizona Revised Statute, A.R.S. § 32-2126, requires the employing broker to have a definite place of business, as well as office signage containing specific information.

A.R.S. § 32-2126(A) states in part, "Each employing broker shall have and maintain a definite place of business."

In order to comply with this statute, the employing broker (entity) must have a specific physical location where a client may visit during normal business hours to ask questions, sign documents or pay rent and where the transaction and employment records are maintained. This is the employing broker's business location on file with the Department.

The following scenarios do not meet the statutory requirement for a "definite place of business." The employing broker's business location listed with the Department is:

- A UPS or Mail Boxes, Etc. or other similar mail drop box location.
- An executive suite location in which the broker utilizes an office on an hourly basis or a conference room used by licensees to meet clients, as needed; however, the employing broker maintains no permanent presence at the location and has no leased, dedicated office space within the executive suite.
- A "virtual office" location. The Department licenses only "brick and mortar" office locations.

A.R.S. § 32-2126(B) states, in part, "Each designated broker and, if applicable, each employing broker shall cause a sign to be affixed at the entrance to the broker's place of business, in a place and position clearly visible to all entering the place of business, with the name of the broker, the name under which the broker is doing business if other than the broker's given name, and sufficient wording to establish that the person is a real estate broker..."

- In addition to the above office signage requirements, pursuant to A.R.S. § 32-2127(B), signage for a Branch Office location shall include the words "Branch Office" and at the Broker's discretion, may include the name of the Branch Manager.
- A Broker with a home office is not required to have signage in accordance with the Department's Substantive Policy Statement No. 2005.15

  IF the Broker
  - Maintains a home office in the broker's PRIMARY RESIDENCE,
  - Handles FEWER THAN 3 transactions a year (0, 1 or 2), and
  - Has no real estate related employees licensed or unlicensed.

All other Brokers with a home office must fully comply with the requirements of A.R.S. § 32-2126(B).

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