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SECOND QUARTER 2016

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SECOND QUARTER 2016 | ARIZONA BROKER/MANAGER QUARTERLY

IN THIS ISSUE

Make Sure to Use the Most Current Forms

BY SCOTT M. DRUCKER, ESQ. AND NICK CATANESI, VICE PRESIDENT, BUSINESS SERVICES AND TECHNOLOGY

The Arizona Association of REALTORS® (AAR) creates standard real estate forms for use by AAR members. As laws change or industry practice evolves, the forms are revised and updated. New and revised forms are released three times a year, on or about February 1, June 1 and October 1, unless law or regulation mandates an earlier release. Once released, the forms library contained on all of AAR's forms licensing platforms, such as zipForm® and dotloop®, are automatically updated.

For a number of reasons, it is important for Arizona REALTORS® to ensure that they are always using the most current version of each form. **Last month alone, April, 2016, outdated versions of the Residential Resale Real Estate Purchase Contract (RPC) were used 621 times.** In light of the fact that the RPC was updated in October 2015 to ensure compliance with the TILA-RESPA Integrated Disclosure Rule, use of the most recent version of the form can prove critical. To protect their interests, as well as the interests of their clients, Brokers should make certain that any form presented for their review and approval is up-to-date. (A list of form revisions can be found at https://www.aaronline.com/2012/04/form-revision-updates/.)

Generally speaking, there are two ways that outdated forms continue to be used: 1) forms are printed out in large quantities and used until the supply is gone; and 2) transactions in zipForm® are reused.

Printed forms – When forms are printed out in large quantities for use when needed, there is no way for an agent to know when a form has been updated. So while it may be handy to have a supply of forms in the trunk to grab whenever needed, the form may be out of date.

Reused zipForm® transactions – When using zipForm® to obtain forms for a new transaction, listing or purchase, a new transaction should be created. Do not reuse previous transactions. By creating a new transaction, forms added to the transaction are pulled from the current library, thereby ensuring that each form used is the most up-to-date version. Unfortunately, forms used in prior transactions remain fixed, meaning that they are not updated. When pulling a form from a prior transaction, there is no guarantee that the form represents the most recent version.

Form updates are made to minimize your risks and ensure legal compliance. Don't take a chance with outdated forms.

***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.*

The Perils of Social Media

BY NIKKI SALGAT, ESQ.

If you are active on social media, you have followers – potential clients, competitors, family, friends, etc. Your followers undoubtedly read your blog, Facebook posts, reviews, and hold discussions in open or closed forums.

While social media can be ideal for building and maintaining business and relationships, it can also prove dangerous and detrimental.

Imagine…right before you are about to tend to your social media site, one of your transactions has a hiccup. Whether it is something you have never dealt with before, something that gets your blood boiling, or a topic you find interesting enough to talk about on social media.

So, you do what most people do nowadays and share your experience on social media by writing about the incident or recording a YouTube video discussing it.

Think before acting. Am I disclosing confidential information? Am I about to share too much information about a transaction? Can my rant be viewed in a negative light and incite or offend people? Am I acting in the best interest of my client? Will there be liability if I post this exhibit or information?

Commissioner's Rule R4-28-1101 states "A licensee owes a fiduciary duty to the client and shall protect and promote the client's interests. The licensee shall also deal fairly with all other parties to the transaction."

Are you protecting and promoting your client's best interest when you post a snarky comment about your client (without naming them)? What about the other party or agent? What if your comments include intimate details about the transaction? These could all be perceived as a breach of your fiduciary duty.

Also, remember the Code of Ethics; it is always applicable. Article 1 is essentially the Commissioner's rule discussed above. Article 15 states "REALTORS® shall not knowingly or recklessly make false or misleading statements about other real estate professionals, their businesses, or their business practices."

A social media post that expresses your dismay with another professional could very well cross the line and you could find yourself explaining your actions to a Hearing Panel. Ask yourself, are the potential consequences worth a post? Not only do you have to think about violating the Commissioner's rules and potential ethical violations before you post, there are federal rules such as antitrust and intellectual property infringement that may come into play.

As a professional that enjoys being active on social media, you need to take all of these things into consideration before you decide to hit enter, upload, or comment. Before you choose to share your thoughts consider whether posting information about a transaction, client or another agent could land you in hot water or, worse yet, a lawsuit.

Nikki J. Salgat, Esq. *is associate counsel to 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.*

Revised Residential Lease Agreement

A common clause in most contracts is the jurisdiction clause in which the parties to a contract agree at the outset of their contractual relationship which courts are to have legal authority ('jurisdiction') to hear disputes arising from that contract.

On June 1st, AAR will release a revised Residential Lease Agreement (Lease). The revision to the Lease consists of the addition of a jurisdictional provision which is currently incorporated in other AAR forms. The provision may be found at line 235 and reads as follows:

Arizona Law: This Agreement shall be governed by Arizona law and jurisdiction is exclusively conferred on the State of Arizona.

The reason for the addition of this provision is to promote consistency and ensure that: (i) the Lease is governed by Arizona law; and (ii) litigation can brought only in a court located within the State of Arizona.

Rejecting Prospective Residents Based on Criminal History May Violate Fair Housing Laws

BY SCOTT M. DRUCKER, ESQ.

Throughout the United States, individuals with criminal records, regardless of whether they pose little or no threat, face significant barriers when seeking to buy or rent a home.

Amazingly, between 70 million and 100 million Americans, or as many as one in three American adults, have some type of criminal record. And while many have been convicted of only minor offenses, having a criminal record carries a lifetime of consequences. This often includes an inability to secure housing.

The Federal Fair Housing Act prohibits discrimination in the sale, rental, or financing of dwellings and in other housing-related activities on the basis of race, color, religion, sex, disability, familial status or national origin. Ex-convicts and individuals with a criminal history are not explicitly identified by the Act as a protected class. Nonetheless, the United States Department of Housing and Urban Development (HUD) recently opined that housing providers rejecting tenants or buyers based on their criminal records may violate the Fair Housing Act.

At its core, the issue is whether exclusionary polices based on criminal background checks have an unfair or disparate impact on certain racial minorities who are protected under federal laws governing housing.

On April 4, 2016, HUD's Office of General Counsel issued guidance concerning how the Fair Housing Act applies to prospective buyers and tenants with criminal records. According to the opinion, landlords and sellers must differentiate between arrests and convictions, and must steer clear of blanket policies that restrict access to housing solely on the basis of criminal history.

HUD's opinion does not mean that housing providers are entirely prohibited from considering criminal records. However, they must now ensure that their screening policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest.

As HUD notes, "A housing provider must, however, be able to prove through reliable evidence that its policy or practice of making housing decisions based on criminal history actually assists in protecting resident safety and/or property." To meet this burden, housing providers must consider factors like the nature and severity of the crime, as well as the length of time since the conviction. By conducting this analysis, housing providers can establish that their policy "accurately distinguishes between criminal conduct that indicates a demonstrable risk to resident safety and/or property, and criminal conduct that does not."

At the heart of HUD's opinion lies the doctrine of disparate impact, sometimes referred to as unintentional discrimination. Pursuant to this doctrine, a policy may be considered discriminatory if it has a disproportionate adverse impact against a protected class. For example, a policy that applies to everyone may still prove discriminatory if it tends to affect a protected group or minority more than others.

As applied to its position on criminal history based restrictions, HUD notes that across the United States, certain minorities are arrested, convicted and incarcerated at rates "disproportionate to their share of the general population." As a result, restricting access to housing on the basis of criminal history is likely to have a disproportionate adverse impact on racial minorities which constitute a protected class.

HUD's April 4th guidance also outlines the three steps considered when analyzing claims that housing was denied on the basis of criminal history:

1. Whether the policy or practice has a discriminatory effect;
2. Whether the policy or practice is necessary to achieve a legitimate, nondiscriminatory interest; and
3. Whether there is a less discriminatory alternative.

If nothing else, landlords and property managers should take the time to update and revise their screening policies to ensure that their use of criminal background checks does not act as an arbitrary and overbroad ban on those with criminal records. All criminal records are not alike, and not all ex-convicts pose a risk to safety or property. And now, housing providers who do not take this into account may find themselves on the wrong side of the law.

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Related article: Fair Housing Act: Criminal History-Based Practices and Policies from www.realtor.org

Criminal History-Based Housing Policies And Practices

Do's	Don'ts
✓ Create tailored criminal history-based policies/practices.	× Don't create arbitrary or overly-broad criminal history-based policies/practices.
✓ Be sure to have clear, specific reasoning for the criminal history-based policy/practice that can be supported by evidence.	× Don't maintain a policy/practice, or any portion thereof, that does not serve a substantial, legitimate, nondiscriminatory interest.
✓ Exclude individuals only based on criminal convictions that present a demonstrable risk to resident safety or property.	× Don't create exclusions based on arrest records alone.
✓ Consider the nature and severity of an individual's conviction before excluding the individual based on the conviction.	× Don't create a blanket exclusion of any person with any conviction record.
✓ Consider the amount of time that has passed since the criminal conduct occurred.	× Don't provide inconsistent explanations for the denial of a housing application.
✓ Consider criminal history uniformly, regardless of an individual's inclusion in a protected class.	× Don't use criminal history as a pretext for unequal treatment of individuals of a protected class.
✓ Treat all applicants for housing equally, regardless of protected characteristics.	× Don't use comparable criminal history differently for individuals of protected classes.
✓ Conduct individualized assessments that take into account mitigating factors, such as facts and circumstances surrounding the criminal conduct, age at the time of the conduct, evidence of good tenancy before/after conduct, and rehabilitative efforts.	× Don't make exceptions to a policy or practice for some individuals, but not make the same exception for another individual based on the individual's inclusion in a protected class
✓ Housing providers may exclude persons convicted of the illegal manufacture or distribution of a controlled substance [42 U.S.C. 3607(b)(4)].	× Don't include a blanket prohibition against individuals convicted of drug possession.

Do's & Don'ts from NAR's website: http://www.realtor.org/articles/fair-housing-act-criminal-history-based-practices-and-policies

What is the Arizona Entity Restructuring Act?

ADRE Employing Broker licensees wishing to convert to a different entity type should consult a professional about the benefits, if any, to their company, and how to maintain all of the rights, obligations and privileges of the converted entity. Any changes to the employing broker license must comply with the ADRE pursuant to A.A.C. § R4-28-303.

The **Arizona Entity Restructuring Act** ("the Act") went into effect on January 1, 2015, A.R.S. §§ 29-2101 through 29-2703. The Act streamlines the reorganization/restructuring process for all types of business entities. For ADRE licensing purposes, business entities include the employing broker license types and the Professional Corporation and professional limited liability license types for salespersons, associate brokers, and certain designated brokers. For statutory references on the Act, go to www.azleg.gov or click here.

According to the Arizona Corporation Commission (A.C.C.), some highlights of the Act are:

- Applies to all entity types, i.e., corporations, LLCs, partnerships, etc.;
- Streamlined procedure for filing with respect to mergers and domestications;
- Allows conversion of one entity type to another (e.g., corporation to LLC);
- Changed share exchange to interest exchange;
- Allows division.

Any documents submitted for a merger, interest exchange, conversion, domestication, or division must comply with the filing requirements set forth in the Act. The A.C.C. Corporations Division offers online forms for the Statements required to be filed under the Act on its website at www.azcc.gov. Use of the A.C.C. forms is not required – applicants may submit their own filing.

*Article republished from the Arizona Department of Real Estate's Quarterly Bulletin Volume 2016, Issue 1.

Professional Corporation (PC) or Professional Limited Liability Company (PLLC) Guidelines

*******Only Active licensed agents can utilize a PC or PLLC*******
***** Pursuant to A.R.S. § 32-2125(B) and 32-2101(24), a Self-Employed Broker may **NOT** use a PC or PLLC***** R4-28-303 (F)

Name of the PC or PLLC

- The name of the PC or PLLC shall reflect the exact legal name as on the real estate license(s). Only licensed individuals may be a part of the PC or PLLC.
- The terms "Real Estate", "Team", "Group", "Associates" ETC. shall not be used at any time. A PC or PLLC is not a name change. It is an entity to which the Employing Broker shall pay to, and it is neither an extension nor a legal change of a licensee's given name.

Name Examples

- If legal name is John William Doe it will reflect as *John W Doe PLLC*.
- If legal name is Jane B Doe-Smith it will reflect *Jane B Doe-Smith PC*.
- If Mr. Doe and Ms. Doe-Smith share a PC or PLLC the name it will reflect *Doe & Doe-Smith PLLC or J W Doe & J B Doe-Smith PC*.

Designated Brokers

- Cannot share a PC or PLLC at any time nor can any other person be listed within said entity.

PC Or PLLC Purpose

- The purpose with the Arizona Corp. Com. of said PC or PLLC shall state **REAL ESTATE SERVICES ONLY**. Any other verbiage or terms will not be accepted
- the purpose of said PC or PLLC **CANNOT** be amended from time to time
- A PC or PLLC can only pay real estate licensees named as members of PC or PLLC.

Advertising

- At no time shall a PC or PLLC be utilized for advertising purposes.
- Said entity is strictly used by the Employing Brokerage where licensee(s) is employed at the time of the release of commissions, and/or real estate service monies. No customer shall ever directly pay a PC, PLLC... all payments must be paid through Employing Broker.

Submittal Checklist

New PC or PLLC Submittal

- LI-231 PC / PLLC form
  - One for each licensee listed within the articles as member, manager, or officer of said entity.
  - The licensee and current DB must sign and date.
  - Copy of the Original Articles of Organization or Original Articles of Incorporation stamped "FILED" by the Arizona Corporation Commission (ACC).
  - Copy (if any), of any and all AMENDED articles stamped FILED by the ACC.

Changing PC or PLLC Submittal

- LI-231 PC / PLLC form--one for each licensee
  - The licensee and current DB must sign and date.
  - Only one set of amended articles are required if submitting multiple forms for processing.

Delete, Terminate, or Remove PC Or Pllc Submittal

- LI-231 PC / PLLC form one for each licensee
  - The licensee and current DB must sign and date.

*Article republished from the Arizona Department of Real Estate's Quarterly Bulletin Volume 2016, Issue 1.

Title Insurance Under TRID

BY ARIZONA REALTORS ON MARCH 24, 2016

Submitted by guest blogger Chris Hyman, public relations chair, Land Title Association of Arizona

There has been a great deal of discussion within the real estate community about provisions in the new consumer finance laws regarding the optional purchase of owner's title insurance in the closing of a transaction.

Pursuant to the Arizona Association of REALTORS® (AAR) Residential Resale Real Estate Purchase Contract, the buyer and seller agree that an owner's policy of title insurance will be provided to the buyer at the seller's expense at closing.

In addition, the Purchase Contract calls for the buyer's approval of a title commitment which contains all matters of record a buyer may need to know including any Covenants, Conditions and Restrictions, easements, or items that might restrict the buyer's use and enjoyment of their new property.

A title insurance commitment calls attention to any items that need to be paid off or released prior to closing. The items that could affect the buyer's title include, but are not limited to, liens, loans, back taxes, or assessments.

The commitment will also show the requirements that need to be fulfilled in order for the seller to deliver clear title to the buyer. There are many items that fall into this category such as unreleased prior loans, issues with prior deeds and transfers, contested ownership, prior acts of fraud, etc.

The matters contained in the commitment become the backbone of the owner's title policy.

Some buyers have said, "The lender's title policy also covers the buyer, therefore, I am not going to purchase an owner's title policy." A lender's policy provides no coverage for a property purchaser regarding title, and in the event of a claim, would only pay the lender's loan off or take care of the issue as it pertains to the lender's ability to market their loan. The buyer would not be afforded any coverage and any funds they expended or improvements they have made would be subject to loss. Any additional stress on the buyer due to a title claim would be alleviated by the purchase of an owner's title policy. There are many practical items that would not affect marketability of the lender's loan, but would severely hinder the buyer's potential use and enjoyment of the property such as encroachments, easements, violations of setbacks, or unpermitted structures that could trigger a neighbor dispute.

Despite the best efforts of seasoned escrow officers and title examiners, all of these items can and do happen. In the absence of an owner's title policy, a buyer is going to have to deal with them on their own.

Although there is some consumer protection provided under the new law, the language suggesting that owner's title insurance is optional is, in my opinion, not in the best interest of a new homebuyer. The protection and peace of mind the policy provides far outweighs the cost, if any, to the buyer at closing.

Revised Buyer Advisory to Launch Via Forms Licensing Platforms

BY JAN STEWARD ON MARCH 11, 2016

In April, a revised Buyer Advisory (dated March 2016) was released to Arizona REALTORS® via AAR's forms licensing platforms such as dotloop® and zipForm®.

Advisories for Buyer, Lease Owner, Short Sale Seller and Tenant are updated periodically throughout the year. Due to the release schedule for new and revised forms, it can be challenging for AAR's forms vendors to maintain the most recent version of each advisory. However, updated advisories are promptly posted on AARonline.

Revisions to the March 2016 Buyer Advisory include:

- 5, #17; Foreign Investment in Real Property Tax Act (FIRPTA) – New link to an I.R.S. video addressing FIRPTA withholdings
- 6, #4; Swimming Pools and Spas – New content to assist buyers in investigating swimming pool regulations
- 7, # 8; Soil Problems – New link to the Arizona Geological Survey website, which offers a viewer/map for Earth Fissures, Active Faults, Earthquake Epicenters, Flood Potential and Fire Risk Index

An itemized list of changes to the form can be found here. As with all advisories, website addresses (links) have been updated throughout to assist and encourage consumers to further research issues of importance to them. When your client clicks this link, they will automatically view the current version on file.

To keep apprised of all advisory changes, AAR has developed a way for members to be automatically notified of any updates. To access this feature, login to AAROnline, go to My Account and click on the Subscriptions tab. If you are already logged in, click here to add or change a subscription.*

AAR will notify members via email whenever there is updated information concerning the topic(s) you have selected, including new and revised forms. In the meantime, if you have suggestions about any of AAR's advisories or discover a broken link, please contact Jan Steward.

*Note: Changing the email to where updates are sent does not change your membership email address.

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* 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

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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.

Buyer Must Identify Reasons for Cancellation of a Contract

FACTS: The buyer and seller executed an AAR Residential Resale Real Estate Purchase Contract ("Contract"). Before the end of the inspection, the buyer submitted a Buyer's Inspection Notice and Seller's Response ("BINSR") which provides on page 1 in the Buyer Election section: "Buyer chooses not to take huge penalties to withdraw needed funds to close. Buyer's other Arizona property was to close prior to this close." There is no language in the BINSR addressing any disapproval of the premises. There are no provisions in the contract documents addressing the sale of a different Arizona property nor withdrawal penalties the buyer may have to pay.

The seller claims that this is not a valid cancellation of the Contract and has demanded the earnest money. The buyer contends that the Contract is now cancelled.

ISSUE: Was the Contract cancelled by way of the BINSR?

ANSWER: No.

DISCUSSION: Section 6(J) of the Contract allows the buyer to cancel if he "disapproves of items as allowed herein." In this transaction, there are no provisions in the contract allowing the buyer to cancel based on penalties for withdrawing funds or the sale of another Arizona property. As such, the attempted cancellation by the buyer is ineffective and the earnest money should be disbursed to the seller.

Practice Tip: There are multiple provisions in the AAR Contract allowing the buyer to cancel, in his "sole discretion," for instance, inspection, financing, title review, etc. However, the contract also requires that the buyer "deliver to Seller notice of the items disapproved" for a proper cancellation. Thus, to avoid disputes about cancellation and the disposition of the earnest money, every time a buyer cancels, they are contractually obligated to identify the items disapproved that form the basis for the cancellation.

Delivery of Unsigned Email Does not Constitute Contract Acceptance

FACTS: A licensee, representing himself as a buyer, submitted an offer on Thursday to purchase seller's property. The seller sent a Counter Offer to the buyer on Friday. The buyer then emailed the listing agent, stating he was going out of town on a camping trip, and therefore could not sign the Counter Offer, but asked if his email could serve as his acceptance.

The listing agent did not respond to the email. The seller continued to receive offers from other buyers.

On Saturday, the listing agent emailed the buyer notifying him that other offers were being received and that she needed to hear back from him regarding whether he was going to send over the signed Counter Offer.

On Monday, the buyer was back in town and tried to open escrow, insisting he had a contract because he accepted the Counter Offer by email.

ISSUE: Does the buyer have a contract with the seller?

ANSWER: No.

DISCUSSION: The Statute of Frauds holds that a contract for the sale of real property must be in writing and signed by the party to be charged to be enforceable. A.R.S. §44-101(6).

Lines 25-27 of the Counter Offer state:

Time for acceptance: Unless acceptance of this Counter Offer is signed by all parties and a signed copy delivered pursuant to Section 8m of the Contract and received by the originating party's Broker named in Contract Section 8r or 9a as applicable by ... this Counter Offer shall be considered withdrawn (emphasis added).

Therefore, because the buyer did not deliver a signed copy of the Counter Offer to the listing broker within the specified time, a contract was never formed.

Have you signed up for the Legal Hotline?

The Legal Hotline provides all AAR broker members (designated REALTORS®) free access to a qualified attorney who can provide information on real estate law and related matters.

FIND OUT HOW BROKERS CAN ACCESS THE LEGAL HOTLINE
www.aaronline.com/wp-content/uploads/2015/03/Legal-Hotline-Access-Process-2015-03-31-fillable.pdf

BROWSE MORE LEGAL HOTLINE TOPICS ONLINE
www.aaronline.com/manage-risk/legal-hotline

Waste Can Occur with Seller Financing

FACTS: A seller listed his property for sale for $75,000. The dwelling on the land had minimal value. However, on the land there was a horse barn and stalls that were valued at $50,000, which the seller believed was the real value of the property.

The seller then entered into a Residential Resale Real Estate Purchase Contract with a buyer. The seller and buyer also executed a Seller Financing Addendum (Seller Carryback).

Six months after the close of escrow, the seller learns that the buyer has listed the barn and stalls on Facebook and is selling them for $5,000.

ISSUE: Can the buyer sell the barn and stalls when they are considered to be the main value of the property the seller has financed?

ANSWER: Probably Not.

DISCUSSION: The definition of waste as found in 56 Am.Jur., Waste, § 2, Page 450 (1947), reads as follows:

'Waste is . . . the destruction, misuse, alteration, or neglect of premises by one lawfully in possession thereof, to the prejudice of the estate or interest therein of another.'

And at § 4, Page 452:

'Waste is classified as voluntary or actual, and permissive or negligent waste. Voluntary waste may be done by such acts as destroying, altering, or removing buildings, or cutting down timber trees. The failure of the tenant to exercise the ordinary care of a prudent man for the preservation and protection of the estate is permissive waste.'

Jowdy v. Guerin, 457 P.2d 745, 10 Ariz.App. 205 (Ariz. App. 1969)

Here, the buyer is likely committing waste to the property. If the buyer defaulted on the note and the seller had to foreclose to take back the property, the property's value would be greatly diminished.

Generally, Property Managers Should Return Funds Within 35 Days

FACTS: A landlord and a property manager executed an AAR Property Management Agreement on January 1, 2015. In June, the landlord and property manager mutually agreed to cancel the Property Management Agreement. The landlord is making a demand to the property manager that all funds in the broker's trust account be given to the landlord immediately. The property manager knows there is an invoice that will be coming in that will need to be paid for services rendered by a contractor within the past few weeks.

ISSUE: Is a property manager entitled to hold the landlord's funds until all invoices have been paid before remitting the balance to the landlord?

ANSWER: See Discussion.

DISCUSSION: A.R.S. §32-2173(C) states:
On termination of the property management agreement the property management firm shall provide the owner with a final accounting of the property's financial status that includes at a minimum:

1. Within five days, a list of all tenant security obligations.
2. **Within thirty-five days, reimbursement for all monies remaining in the property accounts maintained by the property management firm, except for monies needed for unpaid obligations incurred during the term of the property management agreement.**
3. Within seventy-five days, a final accounts receivable and payable list.
4. Within seventy-five days, a final bank account reconciliation. (emphasis added)

Therefore, the property manager should return all monies to the landlord within thirty-five days, except for the money the property manager estimates will be needed to pay the invoice.

Licensee Must Present All Offers

FACTS: A selling agent submitted an offer to a listing agent. The listing agent notified the selling agent that he was missing a disclosure "sheet" that had been uploaded into the MLS.

The listing agent said he would not present the offer to the seller until all documents required by the brokerage were sent to the listing agent, with signatures from the buyer.

The buyer had boarded a plane to India that day and could not sign the brokerage disclosure sheet for one week. The listing agent stated the policy of the brokerage was to not present offers to the seller unless all broker required forms were signed.

ISSUE: Can the listing agent refuse to show the offer to the seller?

ANSWER: Probably not.

DISCUSSION: Generally speaking, a listing agent is bound to present any and all offers to the seller unless precluded by law, government rule or regulation, or agreed otherwise in writing between the seller and the listing subscriber. A.A.C. R4-28-802(B).

Therefore, unless the seller has instructed the licensee through the listing agreement to withhold all offers from being presented unless the broker's disclosure sheet is signed by the buyer, the licensee would be obligated to present the offer.

Final Acceptance of Multiple Counter Offers

FACTS: A seller received multiple offers on a property. The listing agent advised the seller to respond with the AAR Multiple Counter Offer form. The listing agent sent the Multiple Counter Offer through an electronic signing program for the seller's signature.

The listing agent and seller failed to realize that a seller's signature box was auto-populated throughout the Multiple Counter Offer wherever the seller could sign. The seller signed the Multiple County Offer electronically, including the signature line on page two, under the "Seller Final Acceptance" section
.
The listing agent then sent the Multiple Counter Offer to two (2) different buyers. Now, both buyers are claiming they have an accepted contract because the seller signed page two, indicating seller gave Final Acceptance.

ISSUE: Did the seller sell the house to two (2) different buyers?

ANSWER: Probably not.

DISCUSSION: 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 seller countered two (2) prospective buyers with a Multiple Counter Offer. It is likely that the buyers knew or should have known that the seller made a mistake and would not have intentionally provided seller's Final Acceptance when initially sending out the Multiple Counter Offer. As such, the seller has the option of voiding the contract by providing the buyers notice that the contract is void.

Dual Agency Is Prohibited If Ownership Interest Exists

FACTS: A licensee lists her house for sale. She decides to hold an open house to try and procure a buyer for the property.

ISSUE: Can a licensee hold an open house to procure a buyer for her own personal property?

ANSWER: See Discussion.

DISCUSSION: First, there is nothing that would preclude the licensee from holding an open house if the licensee is clear that she does not represent any buyer that enters the open house. An agency discussion should be held as soon as possible to clarify agency.

Dual agency imposes restrictions on the conduct of a licensee, such as not favoring one party over another, nor disclosing confidential information. *See Haymes v. Rogers*, 70 Ariz. 408, 222 P.2d 789 (1950). Ordinarily, dual agency is not a problem. In fact, dual agency is authorized by Arizona law with the written consent of both parties. See A.A.C. R4-28-1101(F). However, in some circumstances, dual agency and representation is improper. The Arizona Court of Appeals states that, while dual agency is permitted by Arizona law, judicial skepticism of this arrangement exists. *See Marmis v. Solot Co.*, 117 Ariz. 499, 503, 573 P.2d 899, 903 (App. 1977).

Here, the licensee should be aware that the law of agency prohibits dual agency when a licensee has ownership interest, as it violates a licensee's fiduciary duty to the client. The agent's ownership presents an unwaivable conflict, and the licensee cannot agree to represent herself, and the buyer, equally. For these reasons, an agent should not represent a buyer as a dual agent when the licensee has an ownership interest in the property being conveyed.

Fair Housing Law Protects National Origin

FACTS: A real estate licensee wishes to represent the seller in the sale of his house. However, during the listing presentation, the seller states he does not want to sell his house to anyone that is not a United States citizen.

ISSUE: Can the licensee list the property for sale?

ANSWER: Probably not.

DISCUSSION: 42 U.S. Code § 3604 states it shall be unlawful—

(a) To refuse to … negotiate for the sale … of, or otherwise … deny, a dwelling to any person because of … national origin.

The seller's request is a violation of the Fair Housing Act, and the licensee would be exposed to civil liability and sanctions against his license if he participates in the seller's request. The licensee should notify the seller that he is not interested in taking the listing, as it would violate the Fair Housing Act.

Seller Must Sign and Deliver Final Acceptance Section of Multiple Counter Offer Form to Create a Valid Contract

FACTS: The Seller of a residential property received two offers on her property. The Seller sent out the AAR Multiple Counter Offer form to both Buyer 1 and Buyer 2.

Buyer 2 sent "counteroffer #2" to the Seller.

Buyer 1 did not accept the Seller's Multiple Counter Offer terms.

The Seller wants to proceed with the terms of counteroffer #2 submitted by Buyer 2, but refuses to sign the original Multiple Counter Offer form stating a signature on the Multiple Counter Offer form would negate counter offer #2.

ISSUE: Should the Seller sign the Multiple Counter Offer form?

ANSWER: Yes.

DISCUSSION: Lines 8 – 11 of the Multiple Counter Offer states: **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 states: SELLER FINAL ACCEPTANCE Signature by Seller below and delivery to Buyer or Buyer's Broker as indicated above creates a binding agreement.

Therefore, the Seller would be required to sign the Seller Final Acceptance portion of the Multiple Counter Offer to be bound to the contract and proceed with Buyer #2.

Disclosure Report (Public Report) Required When Selling Six or More Parcels

FACTS: A property owner (subdivider), who owned six or more parcels in a subdivision, was offering two lots for sale through the Arizona Regional Multiple Listing Service (ARMLS) in 2015. A buyer entered into a contract to purchase one of the parcels. The subdivider, attempting to comply with subdivision laws, offered the buyer a public report from 2005.

ISSUE: Is a public report from 2005 adequate to meet the subdivision disclosures the subdivider must follow?

ANSWER: No.

DISCUSSION: The statutory public report exemption under A.R.S. §32-2181.02 for subsequent owners of six or more lots in a subdivision has several requirements, including a requirement that the original public report be issued "within the past five years."

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

ABOUT THE AUTHOR

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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.

LEGAL HOTLINE Q&A

Why More Canadians May Sell U.S. Properties in 2016

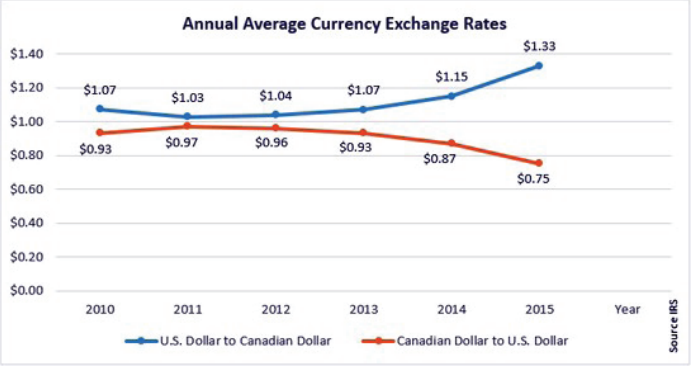
BY FLETCHER R. WILCOX ON MARCH 9, 2016

Many Canadians own residential real estate in Arizona. They are especially attracted to the desert areas of Arizona during the winter when they can soak in the sun rather than shake off the snow.

Many got spectacular deals purchasing residential properties when prices were low and the Canadian dollar was close to being on par with the U.S. dollar.

Changes in the Canadian economy and dollar make it likely that there are now fewer Canadian buyers, but more sellers of their U.S. properties. According to the *Wall Street Journal* on February 25, Canada's economy is under pressure because of a drop in oil prices. In 2015, the Canadian-to-U.S. dollar average was at .75 cents compared to .97 cents in 2011.

Let's look at a scenario as to why more Canadians may sell their U.S. properties this year than in recent years.
If a Canadian bought a house in the U.S. in 2011 and paid $150,000 USD, they would have paid close to $155,000 CAD. In 2015, if that same property, because of appreciation, sold for $225,000 USD, a Canadian seller would receive $300,000 CAD, almost double what they paid in Canadian dollars in 2011. Quite a gain. So far in 2016, the Canadian dollar is even weaker against the U.S. dollar than last year.



If a Canadian or if any foreigner, decides to sell their U.S. residential property, they should be aware of the **Foreign Investment in Real Property Tax Act** known as FIRPTA.

FIRPTA is the mandatory withholding of income tax on the disposition of U.S. real property interests by a foreign person(s) defined as a nonresident alien individual, a foreign corporation, a foreign partnership, trust or estate. According to the IRS, not only are sales under FIRPTA, but so are exchanges, gifts and transfers.

On February 17, the FIRPTA withholding tax rate increased up to 15% as demonstrated in the chart on the next column:

Buyer intends to use property as a residence. (*Seek a qualified tax expert such as a CPA or tax attorney as to residence qualifications*)	Yes	No
Sales price $300,000 and under	0	15%
Sales price $300,001 - $1,000,000	10%	15%
Sales price over $1,000,000	15%	15%

According to FIRPTA, what is the buyer's responsibility? A buyer is solely responsible for the FIRPTA withholding tax from a seller.

When the seller is a foreign person? The IRS states:
"In most cases, the transferee/buyer is the withholding agent. If you are the transferee/buyer you must find out if the transferor is a foreign person. If the transferor is a foreign person and you fail to withhold, you may be held liable for the tax."

To help make buyers and sellers aware of FIRPTA, Arizona REALTORS® has addressed it in the Seller's Property Disclosure Statement (SPDS) and Residential Resale Real Estate Purchase Contract (Resale Contract).

Lines 13 and 14 in the SPDS read:
"Is the legal owner(s) of the Property a foreign person or a non-resident alien pursuant to the Foreign Investment in Real Property Tax Act (FIRPTA)? Yes No. If yes, consult a tax advisor; mandatory withholding may apply."

Lines 135-138 in the Resale Contract read:
"IRS and FIRPTA reporting: Seller agrees to comply with IRS reporting requirements. If applicable, Seller agrees to complete, sign, and deliver to Escrow Company a certificate indicating whether Seller is a foreign person or non-resident alien pursuant to the Foreign Investment in Real Property Tax Act ("FIRPTA"). Buyer and Seller acknowledge that if the Seller is a foreign person, the Buyer must withhold a tax of up to 15% of the purchase price, unless an exemption applies."

The seller in the Resale Contract agrees to comply with FIRPTA if they are a foreign person; if applicable, the buyer must withhold the tax. In the SPDS, the seller must indicate if they are a foreign person or non-resident alien; if they are, they should consult a tax advisor.

While different settlement agents may have different procedures, *escrow officers are not equipped to give tax or legal advice* concerning FIRPTA.

The IRS does *not* require the settlement agent to:
- Determine a seller's status as a foreign person
- Decide how much FIRPTA tax should be withheld
- Decide if the seller qualifies for an exemption, or
- Complete FIRPTA forms

What then may a settlement agent do?
IF a buyer has determined that a seller owes FIRPTA tax, the escrow officer *may* assist them in collecting completed forms and withholding tax from the seller and buyer, and send the forms and taxes to the IRS on behalf of the seller and buyer. (Remember, there is no duty by the escrow officer to complete FIRPTA documents.)

IF a seller applies for an IRS certificate exempting or reducing FIRPTA withholding tax prior to the transaction closing, it is likely that the certificate from the IRS will not be received until post-closing. A settlement agent may agree to hold FIRPTA funds post-closing and send the funds to the IRS if certain conditions are met prior to the closing. If the required conditions are met, then both the buyer and seller will have to sign post-closing holdback instructions.

IF the requirements of a post-closing holdback are not met, the seller and buyer will have one of two options. The settlement agent may collect the proper forms and send in the withholding tax at the time of the closing. Or the seller and buyer mutually agree in writing that the FIRPTA funds may be transferred to an attorney or CPA's trust account. The attorney or CPA will be responsible for the FIRPTA withholding amount.

Tips
If there is a FIRPTA withholding, both the seller and buyer will need either a social security number or a valid U.S. Individual Taxpayer Identification Number (ITIN) in order to process FIRPTA documents. If someone is not eligible for a social security number, they must apply for an ITIN.

Because of the length of time it may take to receive either a social security number or ITIN, it is a good idea to obtain one *before* a property is put on the market.

Also, talk with the escrow officer where the escrow will be processed *prior to contract acceptance* to find out what the officer will do on a FIRPTA transaction and what requirements must be met for a post-closing holdback.

A seller and buyer should always consult with a qualified CPA or tax attorney regarding FIRPTA.

Conclusion
In 2016, the Arizona real estate market will likely see more FIRPTA transactions with foreigners, specifically Canadians, selling their U.S. properties. A knowledge of FIRPTA by both the foreign seller and buyer will help ensure a smother closing.

Fletcher R. Wilcox is vice president of business development at Grand Canyon Title Agency

AAR Webinar Library:

AAR provides an extensive library of recorded webinars available to all Arizona brokers for ongoing learning, training and support. A perfect addition to your office meetings, these brief presentations cover topics such as fair housing, TRID, HOA Addendum, property management, advertising & RESPA, E&O, mechanics liens and recruiting new agents (just to name a few). AAR webinars are available at the click-of-a-mouse and are free of charge.

Link: https://www.aaronline.com/increase-knowledge/webinar-archives/

Upcoming Events and Classes:

REALTOR® Certified Risk Management Specialist – Designed to enhance members' success, the rCRMS (Certified Risk Management Specialist) program increases members' knowledge and allows them to successfully manage real estate transactions for clients while reducing exposure to risk. Earn this certification and give your clients the utmost protection during their transaction!

May 24, Claims & Remedies - Scottsdale Area Association of REALTORS®

May 27, Federal Legal Issues – Phoenix Area Association of REALTORS®

rCRMS link: https://www.aaronline.com/increase-knowledge/certified-risk-management-specialist-rcrms/

More information on upcoming classes, https://www.aaronline.com/calendar/

Save the Date:

Industry Partners Conference – September 14. More information coming soon!
For more info, "LIKE" IPC on Facebook: https://www.facebook.com/IndustryPartnersConference/

Agent Safety Alert Program (ASAP)

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

ASAP
AGENT SAFETY ALERT PROGRAM

Cell Phone Up to Date?

Arizona REALTORS® Get Text Alerts from the Agent Safety Text-Alert System!
AgentSafetyAlert.com

REALTOR® SAFETY PROGRAM

Top 10 Real Estate Agent Safety Tips

1. Careful with personal info
2. Verify customer information
3. Enlist a coworker
4. Announce your showings
5. Scout locations early
6. Keep phone in hand
7. Keep customer in sight
8. Pay attention to exits
9. Take a self-defense class
10. Trust your gut

Find it online at NAR: http://www.realtor.org/field-guides/field-guide-to-realtor-safety
Infographic: House Hunt Network (link is external), (House Hunt, June 17, 2014).

Additional Resources from NAR

- NAR – 103 Safety Tips for REALTORS® by REALTORS® order form
- NAR – REALTORS® Safety Information and Tips