ARIZONA

SPRING 2014

BROKER MANAGER

QUARTERLY

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DODD-FRANK

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REAL SOLUTIONS. REALTOR® SUCCESS.

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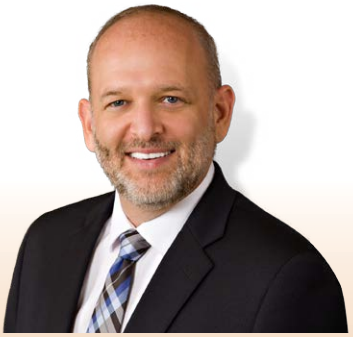

Evan Fuchs, ABR, CRS, GRI, AAR 2014 President

A MESSAGE FROM 2014 AAR PRESIDENT EVAN FUCHS

I've been a designated broker for almost 15 years now and one of my biggest challenges is making sure that my agents are up-to-date and informed of any important changes in our industry. Whether it's the latest implications of the Dodd-Frank Act or new legislation that affects the way we conduct business, if it affects Arizona REALTORS®, I want my agents to know. Having my agents be the best prepared with the highest standards is what sets us apart.

The new *Arizona Broker/Manager Quarterly* is your answer. This year, we've combined the *Broker/ Manager Risk Management Update* with the *Arizona REALTOR® Quarterly* to create a new, digital publication that helps brokers and managers learn about new resources created just for you, along with easy-to-share articles that make preparing for staff meetings a lot easier. ❇

Take a look around and let us know what you think!

COMMERCIAL FORMS AT A DISCOUNTED RATE

As an AAR member, you are entitled to commercial real estate forms at a steep discount. AIR Commercial Real Estate Association (AIR) produces these forms and each one has been "localized" for Arizona law and are utilized by commercial agents and brokers across Arizona.

WHERE TO FIND AIR FORMS

You can review sample AIR forms here. Please note that these forms are "generic", not the Arizona-specific forms. To review the Arizona-specific forms, you need to install the AIR program. After the program is installed, you may review every AIR form and even print them with the word "DRAFT" across the form. If you want to actually use the form without "DRAFT", you must use AIR tokens. Depending on complexity, each AIR form costs zero to eight tokens.

http://www.airea.com/FORMS/SampleForms.aspx
http://www.airea.com/FORMS/DownloadPurchaseForms.aspx?v=1&s=AZ

HOW TO BUY AIR FORMS AND TOKENS

Typically, agents would be charged $399 for AIR forms (with 200 tokens). As noted earlier, each form has a certain number of tokens associated with it ranging from zero to eight, depending on the complexity of the form. All lease and purchase agreements are eight-token forms. A user can create and modify as many "DRAFT" versions of a form as desired, only being charged the appropriate tokens once a "FINAL" copy is created. New tokens are issued at $.50 each, with a minimum purchase of 100 tokens.

To get started, AAR members may choose from five different pricing tiers:

AAR DISCOUNTED PRICE	QTY OF TOKENS INCLUDED
$299	200
$199	155
$99	100
$49	40
$24	15

To purchase a starter package or additional tokens, AAR members should call 866-946-2472. You will need your NRDS number handy to validate your REALTOR® membership. (Find your NRDS number.) ❇

https://reg.realtor.org/roreg.nsf/retrieveID?OpenForm

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ARIZONA association of REALTORS®

BROKER & MANAGER

THE BEST FROM JANUARY, FEBRUARY & MARCH 2014 *ARIZONA REALTOR®* MAGAZINE
PLUS EXCLUSIVE BROKER / MANAGER CONTENT!

SPRING 2014 | ARIZONA BROKER/MANAGER QUARTERLY

IN THIS ISSUE

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

Tips for Using Überflip®

Welcome to a new publication and a new way of reading, sharing and bookmarking.
We hope you find this format easy to navigate. Here's a brief introduction into how each button works:

THE BUTTONS ON THE MENU PERFORM THE FOLLOWING FUNCTIONS:

- displays previews of all the pages in the issue — click on a preview thumbnail to open that page for reading
- displays a list of the articles in this issue — click on an article to go directly to that page
- displays a list of the links in this issue — click on a link to go directly to it
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2013 YEAR IN REVIEW

MEMBERSHIP

ARIZONA ASSOCIATION OF REALTORS®

WAS ESTABLISHED IN **1920**

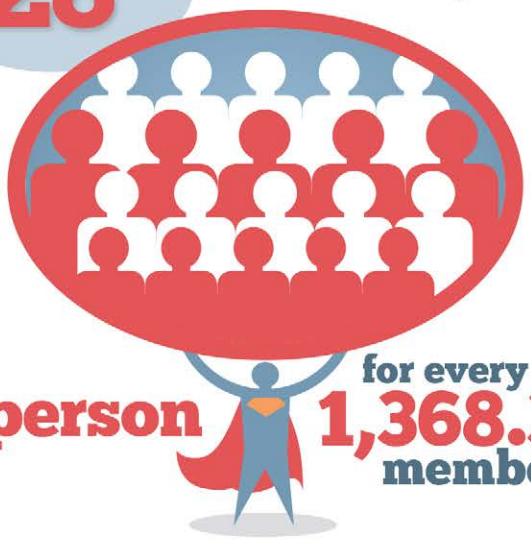
and has grown
to become one of the largest professional-membership associations in Arizona.

There are **21 LOCAL REALTOR® ASSOCIATIONS** divided into **FIVE REGIONS**

In **2013**, **AAR** served **38,313 MEMBERS.**

That means **1,171 PEOPLE** in Arizona were an AAR Member & an Arizona REALTOR®.

We have **28** staff members,



1 person for every **1,368.32** members.

IN 2013,

AAR General Counsel Scott Drucker PARTICIPATED IN **55 speaking engagements** across the **STATE OF ARIZONA.**

IF YOU ADDED THEM UP, SCOTT WOULD HAVE TALKED FOR **4 days & 11 hours straight!**

ARIZONA association of REALTORS®

As we close the book on 2013, we celebrate with a retrospective look at the incredible year the Arizona Association of REALTORS® had...

AAR IN THE COMMUNITY

This year, ARIZONA REALTORS® donated

$23,000

to the **Arizona Disaster Assistance Foundation**

to help aid the victims of the Yarnell Hill Fire.

VOICE AT THE CAPITOL

$4,324.00
Amount raised to fund **ISSUE MOBILIZATION FUND**

= THE TYPICAL COST TO OWN A CAR FOR ONE YEAR.

$373,358.91
AMOUNT RAISED FOR REALTORS® OF ARIZONA POLITICAL ACTION COMMITTEE FUNDS

AAR Exceeded our Major Investor Goal in 2013!

MAJOR INVESTORS: 12 GOLDEN Rs, 9 CRYSTAL Rs, 72 STERLING Rs

EFFICIENT Business TOOLS

Total number of AAR eSign USERS: **4,955**

This year AAR went **Java-free** WITH THE ROLLOUT OF zipForm Plus

Number of transactions CLOSED WITH ESIGN **176,153**

= 35.55 transactions per user

STAY Informed

AAR INTRODUCED A NEW WEBSITE IN JANUARY 2013.

TOP 3 SEARCH TERMS:

1. eSign
2. Forms
3. Buyer Advisory

AAR'S FANS, FOLLOWERS & LIKES:

- 5,541
- 5,590
- 38
- 785

Want real-time updates to the Buyer Advisory?

Sign up for the RSS feed here:
www.aaronline.com/2013/01/buyer-advisory

AAR posted 432 photos on its flickr page.

MANY OF THEM FEATURED AAR 2013 PRESIDENT SUE FLUCKE

INCREASE Knowledge

AAR DELIVERED **33 education classes** in 2013 = over **300 hours of C/E credit.**

In 2013, AAR celebrated with **91 GRI DESIGNEES.**

GRI DESIGNEES EARN ~ $20,000 A YEAR MORE THAN REALTORS® WITHOUT THE GRI DESIGNATION.

Manage Risk

13 INTRODUCED **NEW FORMS**

10 ADJUSTED **FORMS**

AAR Helps Arizona Property Owners

MAINTAIN THE RIGHT TO USE **"For Sale" Signs in HOAs.**

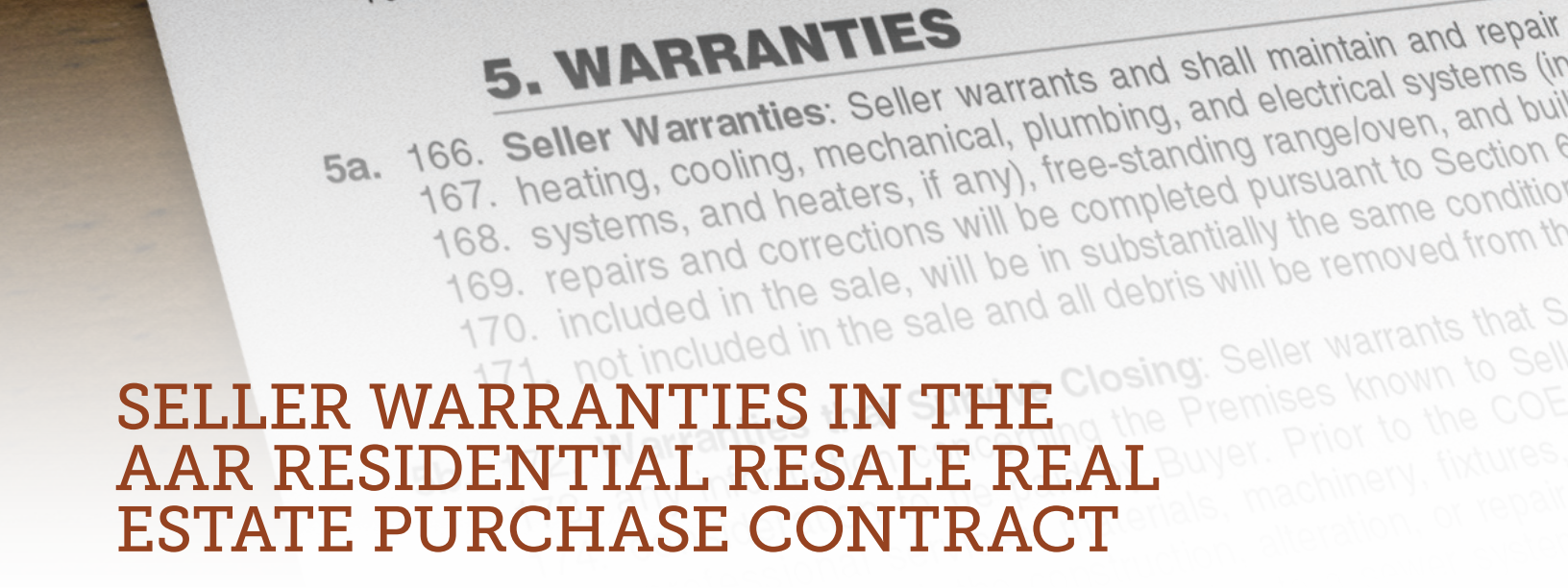
With AAR's legal help the Arizona Court of Appeals upheld these statutes as constitutional, holding that A.R.S. § 33-441 "plainly invalidates" CC&Rs such as those of Pine Canyon that seek to prohibit "For Sale" signs.

Dual Agency Restriction Pulled From HUD Mortgagee Letter AAR and NAR teamed up to explain why the subject restriction is harmful to Arizona REALTORS® and FHA borrowers throughout our state. As a result of these efforts HUD reported to NAR that it will reissue Mortgagee Letter 2013-23 and remove all dual agency language.

RESOLVE Disputes

AAR received **79 ethics complaints** IN 2013; only **21%** of the complaints received went to a hearing.

The others were either **dismissed** or solved via mediation or an Ombudsman.



SELLER WARRANTIES IN THE AAR RESIDENTIAL RESALE REAL ESTATE PURCHASE CONTRACT

BY K. MICHELLE LIND, ESQ., AAR CHIEF EXECUTIVE OFFICER

Questions have recently arisen regarding the Seller Warranties Section (5a) of the AAR Residential Resale Real Estate Purchase Contract (02/11) (contract). This article will attempt to answer some of the most frequently asked questions about the seller warranties provision in the contract.

BACKGROUND

The Seller Warranties Section was added to the contract almost 20 years ago and has remained substantially unchanged since that time. In July 1994, the seller warranties provision of the contract stated: "Seller warrants and shall maintain and repair the premises so that at the earlier of possession or close of escrow: (1) the premises shall be in substantially the same condition as on the effective date of this contract, (2) the roof has no known leaks, (3) all heating, cooling, mechanical, plumbing and electrical systems and built-in appliances will be in working condition, and (4) if the premises has a swimming pool and/or spa, the motors, filter systems, and heaters, if so equipped, will be in working condition . . ." The roof warranty was eliminated from the contract in 1996.

A requirement that the buyer provide the seller notice of non-working warranted items during the inspection period was added to the contract in 1996. The purpose of this requirement was to allow the seller to evaluate the cost of requested inspection period repairs along with the cost of any necessary warranted item repairs.

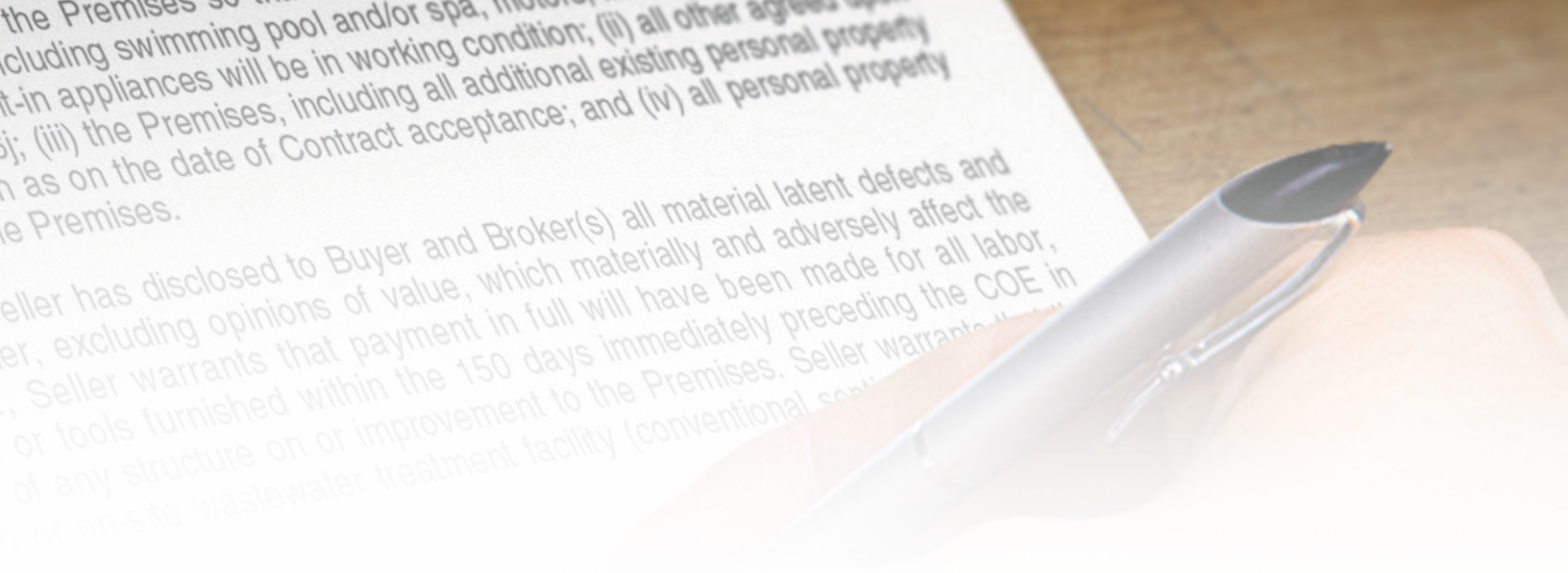
In 2005, a section was added to the AAR Buyer Inspection Notice and Seller Response (BINSR) form to address the problem of buyers combining the notice of non-working warranted items along with requested repairs of inspection period items disapproved.

SELLER WARRANTIES SECTION IN THE CURRENT CONTRACT

The Seller Warranties Section of the current contract states: "The seller warrants and is obligated to maintain and repair the premises so that, at the earlier of possession or close of escrow:

(i) all heating, cooling, mechanical, plumbing and electrical systems (including swimming pool and/or spa, motors, filter systems, cleaning systems and heaters, if any), free-standing range/oven, and built-in appliances will be in working condition; (ii) all other agreed upon repairs and corrections will be completed pursuant to Section 6j; (iii) the premises, including all additional existing personal property included in the sale, will be in substantially the same condition as on the date of contract acceptance; and (iv) all personal property not included in the sale and all debris will be removed from the premises."

Pursuant to Section 6k of the contract, the buyer is obligated to provide the seller with notice of any non-working warranted item(s) of which the buyer becomes aware during the inspection period or the seller's warranty for that item(s) will be waived. The contract makes it clear that the buyer's notice does not affect the seller's obligation to maintain or repair the warranted item(s). The contract states that: "Delivery of such notice shall not affect the seller's obligation to maintain or repair the warranted item(s)."



Frequently Asked Questions

Question: Why does the contract include seller warranties?

Answer: There are a variety of reasons why seller warranties have been included in the AAR contract for so many years. One reason is to give a buyer some assurance that the major property systems (heating, cooling, mechanical, plumbing and electrical) are functional. As a result, the agreed upon price includes working major property systems. Therefore, the seller warranties may reduce price negotiations or price adjustments for property systems that virtually every buyer will require. Lender requirements are another consideration. Some lenders require that the property systems function as a condition of approving the buyer's loan.

Question: Why aren't all "heating, cooling, mechanical, plumbing and electrical" system components specifically listed in the contract?

Answer: The contract revision workgroups have determined that it would be extremely difficult, if not impossible, to describe and create a "laundry list" of every type of system and related components that may be in a home. A system is defined by the Board of Technical Registration Standards of Professional Practice for Home Inspectors as a "combination of interacting or interdependent *components* assembled to carry out one or more functions." In other words, all the parts required to operate. For example, a heating system may have a number of components, such as: operating controls, safety controls, chimneys, flues and vents, fans, pumps, ducts, dampers, fan coil units, and convectors. See: www.btr.state.az.us/regulations/home_inspectors.asp#System.

Question: What constitutes "working condition"?

Answer: "Working condition" is generally defined as functioning as intended or operational. However, the terms does not equate to "new", "unused" or "perfect" condition. The contract revision workgroups have considered alternatives to the term "working condition," but have not agreed upon a term or phrase that that would eliminate all ambiguity.

Question: What should the seller do if the seller does not want to warrant the listed items to be in working condition?

Answer: If the seller does not want to warrant any of the listed items, one option is to utilize the AAR "AS IS" Addendum. Pursuant to the AAR "AS IS" Addendum, the buyer waives the seller warranties. Therefore, the seller has no obligation to make any repairs to ensure that heating, cooling, mechanical, plumbing, and electrical systems and other listed items are in working condition. However, the seller is obligated to maintain and repair the premises so that the premises is in substantially the same condition as on the date of contract acceptance, and all personal property not included in the sale and all debris will be removed. See, www.aaronline.com/2012/12/the-great-as-is-debate.

If the seller does not want to warrant a specific item, the seller has the option to specifically exclude the item in the Additional Terms and Conditions Section of the contract. For example, if the property has a non-functioning evaporative cooler, in addition to the HVAC, that the seller does not intend to warrant or repair, the seller should specifically exclude the evaporative cooler from the warranted items in the contract.

Question: Must a licensed contractor be utilized to make all repairs?

Answer: No, unless required by law or the buyer has written this requirement into the contract under Additional Terms and Conditions. Generally, a contractor's license is required by statute for work that exceeds $1,000 in value. Thus, to the extent that any repairs exceed $1,000, the seller should hire a licensed contractor to make those repairs. See A.R.S. §32-1112(4) for details on the statutory exemptions from contractor licensure for work that does not exceed $1,000.

Question: Why doesn't the contract require a licensed contractor for all repairs?

Answer: The contract revision workgroups have considered, but ultimately decided against, requiring a licensed contractor for all repairs. Many common minor repairs (leaking faucets, small drywall repairs, paint touch-up, cabinet/door adjustments, etc.) can be adequately performed by the homeowner or a handyman in a more cost-effective manner. However, agreed-upon repairs must be made in a workmanlike manner.

Question: If the buyer gives notice of a non-working warranted item, is the seller entitled to refuse to repair the item?

Answer: No. When the buyer and seller enter into the contract, the seller agrees that the warranted items will be in working condition at close of escrow. The buyer's notice that one of these items is not working does not open the issue to negotiation or change the seller's obligation to repair the item and deliver it in working condition at close of escrow.

Question: What happens if the buyer discovers a non-working warranted item during the inspection period but does not notify the seller?

Answer: The seller warranty for that item is waived. In other words, the seller is not obligated to repair the item.

Question: What if there is a non-working warranted item that the buyer discovers after the inspection period, but prior to close of escrow?

Answer: The seller is obligated to repair the item and deliver it in working condition at close of escrow.

Question: If the buyer gives notice to the seller of a non-working warranted item under "items disapproved," rather than under the "Notice of Non-working Warranted Items" of the BINSR, is the seller entitled to refuse to repair the item?

Answer: No. When the buyer and seller enter into the contract, the seller agrees that the warranted items will be in working condition at close of escrow. The buyer's notice in the wrong section of the BINSR does not relieve the seller of their obligation to repair the item and deliver it in working condition at close of escrow. However, the proper procedure for providing this notice is to check the "Notice of Non-working Warranted Items" box on page one of the BINSR and specify the non-working warranted item(s) on page two.

Question: If the buyer gives notice to the seller of a non-warranted item under the "Notice of Non-working Warranted Items" of the BINSR, how should the seller respond?

Answer: As discussed above, the buyer's notice in the wrong section of the BINSR form does not change the parties' contractual obligations. The seller can address the error in the seller's response section of the BINSR and indicate whether the seller is willing to correct the item disapproved by the buyer.

Question: What should a buyer do if a warranted item is not in working condition at close of escrow?

Answer: The buyer should immediately deliver a cure notice to the seller, for example by way of box two on the Buyer Pre-Closing Walkthrough form. The buyer

may then delay closing for up to three days to allow the seller the opportunity to cure the non-compliance and repair the warranted item. Alternatively, the buyer may close escrow subject to the potential breach and if the seller fails to make the repair within three days, pursue the seller for the breach. If the buyer wants to cancel the contract or pursue the seller for a breach, the buyer should consult independent legal counsel for guidance.

Question: Where can I find more information on these issues?

Answer: Visit the AAR website at: www.aaronline.com/2012/11/legal-hotline-q-a-contracts/.

Question: If I have suggested revisions to the seller warranties section of the contract, how can I get my suggestions considered by the contract revisions workgroup?

Answer: Email your suggestions to Jan Steward, AAR Risk Management manager. All forms suggestions are compiled and reviewed by a workgroup when the form is under revision. Form revisions must be approved by the AAR Risk Management Committee and the Executive Committee before being released for use by the membership. ❇

jansteward@aaronline.com

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K. Michelle Lind, Esq.

*AAR Chief Executive Officer, K. Michelle Lind, is a State Bar of Arizona board-certified real estate specialist and the author of **Arizona Real Estate: A Professional's Guide to Law & Practice**. This article is of a general nature and may not be updated or revised for accuracy as statutory or case law changes following the date of first publication. Further, this article reflects only the opinion of the author, is not intended as definitive legal advice, and you should not act upon it without seeking independent legal counsel.*

WHAT IS CONSIDERED WARRANTED OR NON-WARRANTED?

BY K. MICHELLE LIND, ESQ., AAR CHIEF EXECUTIVE OFFICER

The Seller Warranties Section of the AAR Residential Resale Real Estate Purchase Contract requires that all heating, cooling, mechanical, plumbing and electrical systems (including swimming pool and/or spa, motors, filter systems, cleaning systems and heaters, if any) be in working condition. If there is a dispute, the determination of whether an item is in "working condition," generally presents a question of fact for a jury at trial. Although a jury could differ based upon the facts, AAR Legal Hotline Attorney Richard Mack, AAR General Counsel Scott Drucker, and I have compiled a short list expressing our opinion on the more common warranted and non-warranted items:

WARRANTED

- leaking faucet
- leaking landscape features
- outdoor sprinkler leak
- leaking tub diverter valve
- air conditioner below manufacturers specs on splits
- windows don't open/don't stay up/don't lock
- malfunctioning pool light
- non-working GFI outlet
- ceiling fan will not operate
- water osmosis system not functioning

NON-WARRANTED

- structural pool leaks
- loose or rocking toilet
- ungrounded outlets
- missing GFI outlet
- hot and cold water outlets reversed
- cracked window
- small hole in window
- vacuum seal leaking on dual pane windows
- missing or non-working light bulbs
- roof leaks

If you have questions about whether a specific item in a transaction is a warranted item, please consult with your broker, who can contact the AAR Legal Hotline for further guidance if necessary. ❊

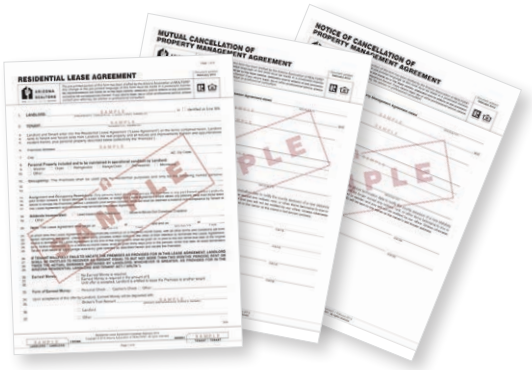
Visit this article on AARonline.com — comment with your thoughts & share to your social networks.

ABOUT THE AUTHOR

K. Michelle Lind, Esq.

*AAR Chief Executive Officer, K. Michelle Lind, is a State Bar of Arizona board-certified real estate specialist and the author of **Arizona Real Estate: A Professional's Guide to Law & Practice**. This article is of a general nature and may not be updated or revised for accuracy as statutory or case law changes following the date of first publication. Further, this article reflects only the opinion of the author, is not intended as definitive legal advice, and you should not act upon it without seeking independent legal counsel.*

AAR INTRODUCES NEW AND REVISED PROPERTY MANAGEMENT FORMS



BY LISA SUAREZ, CRS

Taking the spotlight this month is the revised Residential Lease Agreement (RLA). Last updated in 2008, these new revisions offer members of the Arizona Association of REALTORS® additional clarification, an improved structure, along with amplification of many important terms and conditions. For a highlighted copy of the changes and additions to the RLA, click here.

http://www.aaronline.com/wp-content/uploads/2014/01/NEW-FORMS-SAMPLE_Residential-Lease-Agreement_1-28-2014.pdf

http://www.aaronline.com/wp-content/uploads/2014/02/Residential-Lease-Agreement_January2013_RED-HIGHLIGHTS-2.pdf

Notable revisions include:

1. **Reference to the Residential Lease Owner's Property Disclosure Statement, if any, on the tenant attachment page;**
2. **Requirement that personal property included in the lease agreement be maintained in operational condition by landlord;**
3. **Reference to the Move-In/Move-Out Condition Checklist as a possible incorporated addenda;**
4. **Express exclusion of assistive and service animals to the definition of pets;**
5. **Revision of the Crime-Free Provision to include state, federal or other municipality criminal activity;**
6. **Requirement that the landlord notify tenant in writing within five-days of receipt of a Notice of Trustee's Sale or other notice of foreclosure on the premises; and**
7. **Permission for the prevailing party in any dispute arising out of the lease agreement to additionally be compensated for costs and fees incurred as a result of any collection activity.**

In addition to these revisions, AAR also introduced two new property management forms this month. They are the Mutual Cancellation of Property Management Agreement and the Notice of Cancellation of Property Management Agreement. Both forms were developed to help owners and property managers with a simple solution for navigating the termination of a property management agreement. These forms offer a simple solution to ensure that the proper notice is given.

http://www.aaronline.com/wp-content/uploads/2014/01/NEW-FORMS-Mutual-Cancellation-of-Property-Management-Agreement_1-28-2014.pdf

http://www.aaronline.com/wp-content/uploads/2014/01/NEW-FORMS-Notice-of-Cancellation-of-Property-Management-Agreement_1-28-2014.pdf

The updated Residential Lease Agreement and new Mutual Cancellation of Property Management Agreement and Notice of Cancellation of Property Management are available in zipForm® now. ❇

Visit this article on AARonline.com — comment with your thoughts & share to your social networks.
http://www.aaronline.com/2014/02/2014-property-management-form/

AAR would like to thank the following members of the Property Management Forms Workgroup for all of their hard work: Lisa Suarez (chair), Tammy Billington, Sue Flucke, Jeff Hockett, Elly Johnson, Jacquie Kellogg, Michael Mumford, Alberta Shantz, Brad Snyder, Larry Stover, Dave Stringham, Scott Drucker, Cynthia Frey, Christina Smalls and Jan Steward.

Quick Links:

Residential Lease Agreement

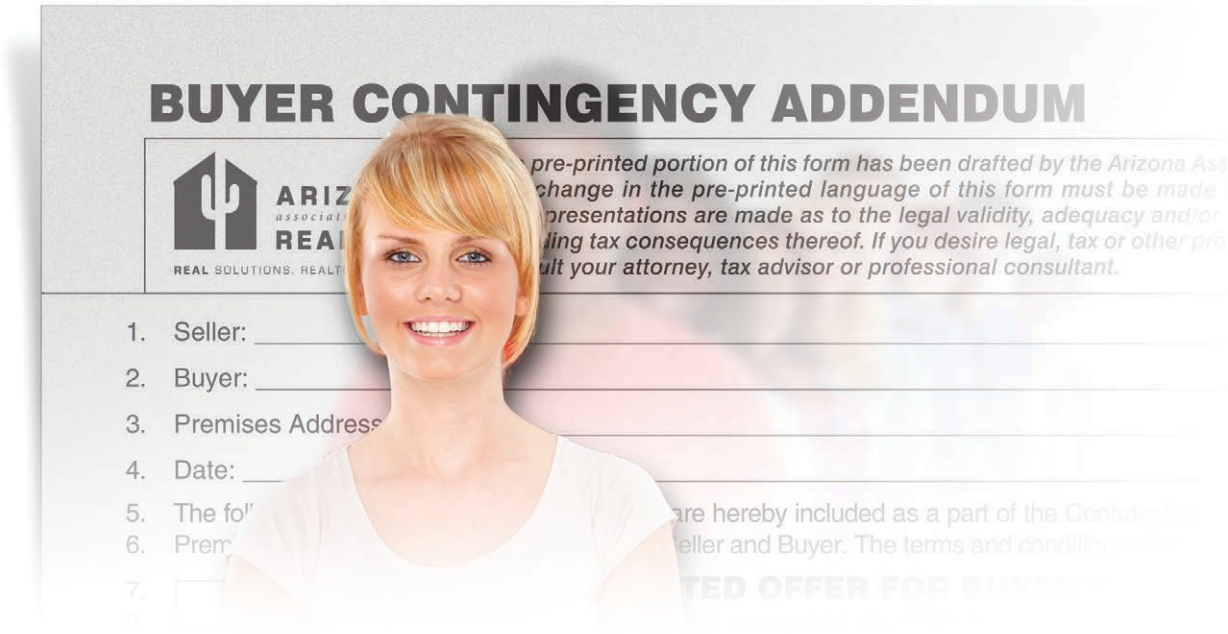
http://www.aaronline.com/wp-content/uploads/2014/01/NEW-FORMS-SAMPLE_Residential-Lease-Agreement_1-28-2014.pdf

Mutual Cancellation of Property Management Agreement

http://www.aaronline.com/wp-content/uploads/2014/01/NEW-FORMS-Mutual-Cancellation-of-Property-Management-Agreement_1-28-2014.pdf

Notice of Cancellation of Property Management Agreement

http://www.aaronline.com/wp-content/uploads/2014/01/NEW-FORMS-Notice-of-Cancellation-of-Property-Management-Agreement_1-28-2014.pdf



AAR INTRODUCES A MORE FLEXIBLE BUYER CONTINGENCY ADDENDUM

BY SCOTT M. DRUCKER, ESQ., AAR GENERAL COUNSEL

Any agent that uses the Buyer Contingency Addendum knows that these transactions can be challenging at times. This month, the Arizona Association of REALTORS® (AAR) re-introduces the Buyer Contingency Addendum, with more flexible options for both buyers and sellers. This newly revised addendum now provides buyers and sellers with more options when choosing a buyer contingency and ultimately helps sellers enter into another contract faster in the event that a buyer's contingent sale falls through.

http://www.aaronline.com/wp-content/uploads/2014/01/NEW-FORMS-SAMPLE_Buyer-Contingency-Addendum_1-29-14.pdf

A request to change the buyer contingency addendum was first introduced in December 2012, when a designated broker contacted AAR to voice concern about the AAR Buyer Contingency Addendum. At the time, her agent was representing a seller who received a purchase offer that was contingent on the buyer's sale of her existing home. In this case, the buyer was under contract for the sale of her home and was waiting for that sale to be completed. Upon close of escrow, the buyer would then be in position to purchase the seller's property.

Approximately two weeks after executing a Residential Resale Real Estate Purchase Contract (purchase contract) along with a Buyer Contingency Addendum, the buyer informed the seller that the purchase contract on her home had cancelled. In response, the seller wanted to cancel his purchase contract with the buyer and enter into a contract with a new buyer that would be in a better position to consummate the transaction. Unfortunately, the Buyer Contingency Addendum did not allow for such a cancellation. The seller was therefore required to wait until the buyer failed to perform by the agreed upon deadline for close of escrow, at which point the buyer canceled the purchase contract based on an unfulfilled contingency and obtained a return of the earnest money deposit.

While the seller had no objection to the buyer recovering the earnest money deposit, the seller desired to immediately sign a contract with a new buyer upon learning that the current buyer was no longer under contract to sell her home. Upon realizing that the seller could not immediately contract with a new buyer, the designated broker brought the issue to the attention of AAR's Risk Management Committee, which voted to create a workgroup chaired by Martha Appel, Coldwell Banker Residential Brokerage, for the purpose of revising the Buyer Contingency Addendum.

In the newly revised Buyer Contingency Addendum, the underlying purchase contract is to be contingent upon one

of the following two scenarios: (1) the buyer accepting an offer to purchase his or her real property; or (2) the closing of the buyer's property that is already under contract.

http://www.aaronline.com/wp-content/uploads/2014/01/NEW-FORMS-SAMPLE_Buyer-Contingency-Addendum_1-29-14.pdf

CONTINGENCY SCENARIO ONE

If the parties select the option identified on line seven of the Buyer Contingency Addendum, the underlying purchase contract shall be contingent upon a buyer accepting an offer to purchase his or her real property and the delivery of the "accepted offer documents" to the seller within three days of receipt, or by an agreed upon date to be identified on line 11, whichever occurs first. Upon receipt of the accepted offer documents, the seller then has five days to review those documents and cancel the purchase contract, at which time the earnest money deposit shall be returned to the buyer.

Even if the seller approves of the accepted offer documents, it is possible that the sale of the buyer's property will fail. Should that occur, the buyer must provide notice to the seller of the buyer's receipt of cancellation within three days, along with evidence of that cancellation. The buyer's notice to seller shall also state the buyer's election to either: (1) immediately cancel the purchase contract and recover the earnest money deposit; or (2) proceed with the purchase contract by removing the buyer contingency.

Finally, under this scenario, the seller has the right to accept another offer in back-up position before the buyer has delivered to the seller the accepted offer documents. Should that occur, the seller may deliver notice to the buyer informing the buyer of the back-up contract. Upon receipt of the seller's notice, the buyer shall have five days to deliver to the seller a written notice removing the buyer contingency. If the buyer decides not to waive the buyer contingency, the purchase contract shall be deemed cancelled with the earnest money deposit released to the buyer.

CONTINGENCY SCENARIO TWO

If the parties select the option identified on line 34 of the Buyer Contingency Addendum, the underlying purchase contract shall be contingent upon the closing of the buyer's property by an agreed upon date to be identified on line 37. In order to select this option, the buyer must already be in possession of an accepted offer. Should the buyer's accepted offer cancel, the buyer must provide notice to the seller of the buyer's receipt of cancellation within three days, along with evidence of that cancellation. The buyer's notice to seller shall additionally state the buyer's election to either: (1) immediately cancel the purchase contract and recover the earnest money deposit; or (2) proceed with the purchase contract by removing the buyer contingency.

The revisions made to the Buyer Contingency Addendum provide a greater level of certainty in the event that the accepted offer for the buyer's property cancels. Under such circumstances, the buyer must now notify the seller of the cancelation within three days and decide whether to immediately cancel the purchase contract or proceed with the purchase contract by removing the buyer contingency. ❄

Visit this article on AARonline.com — comment with your thoughts & share to your social networks.
http://www.aaronline.com/2014/02/2014-buyer-contingency-addendum

AAR would like to thank the members of the Buyer Contingency Workgroup, chaired by Martha Appel, for all of their hard work and assistance. The members of the workgroup include Martha Appel (Chair), Jim Burton, Jerome King, Kerry Melcher, Paula Serven and Becky Taylor. As General Counsel, the author was also involved in the creation of the revised Buyer Contingency Addendum, along with AAR staff members Jan Steward and Christina Smalls.

ABOUT THE AUTHOR

Scott M. Drucker, Esq. *is General Counsel to the Arizona Association of REALTORS® (AAR). He serves as the primary legal advisor to the association. Scott oversees AAR's Risk Management Committee, which includes professional standards administration for 20 of the state's local REALTOR® associations, and the development of standard real estate forms. Please note that this post is of a general nature and may not be updated or revised for accuracy as statutes and case law change following the date of first publication. Further, this post reflects only the opinion of the author, is not intended as definitive legal advice, and you should not act upon it without seeking independent legal counsel.*

Legal Hotline Q&A

BY MACK, WATSON & STRATMAN

The Subdivision Addendum Need Not Be Used For The Sale Of A Single Parcel Within A Subdivision

FACTS:

The seller owns a single parcel of vacant land in a subdivision and wishes to sell this parcel.

ISSUE:

Is the seller required to utilize the Vacant Land/Lot Purchase Contract Addendum regarding subdivided or un-subdivided Land (the Subdivision Addendum)?

ANSWER:

No. The Subdivision Addendum is used to comply with the disclosure requirements of the Subdivision Laws and should be used where the seller has created or owns six or more fractional interests in land. Here, the seller does not own six or more fractional interests in the subdivision. Rather, the seller only owns a single parcel of land in the subdivision. As such, the Subdivision Addendum is not required.

Note: The use of an AAR form by a party to a contract is not "required" in any event. ❇

Arizona REALTOR® Magazine — January 2014 | Disclosure
http://www.aaronline.com/legal-hotline-q-a-disclosure

The Seller Must Provide An Affidavit Of Disclosure When The Property Is Not Subdivided In An Unincorporated Area

FACTS:

The seller owns a 36-acre parcel of land located in an un-incorporated area of Maricopa County, Arizona.

ISSUE:

Is the seller required to provide an Affidavit of Disclosure?

ANSWER:

Yes. A.R.S. § 33-422(A) provides that a seller of five or fewer parcels of land, other than subdivided land, in an unincorporated area of a county must furnish a written affidavit of disclosure to the buyer, at least seven days before the transfer of the property, and the buyer shall acknowledge receipt. Simply put, a seller is required to provide an affidavit of disclosure in accordance with § 33-422 if: (i) the seller is selling five or fewer parcels, (ii) the parcels are not subdivided land, and (iii) the parcels are located in an unincorporated area of the county.

In this instance, the seller is selling a single a 36-acre parcel located in an unincorporated area of Maricopa County, Arizona. That being said, the only issue left to resolve is whether the parcel is subdivided. Pursuant to A.R.S. § 32-2101(56)(a) subdivided land means "improved

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ABOUT THE AUTHOR

Richard V. Mack

Richard V. Mack is a shareholder at Mack, Watson & Stratman, 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.

http://www.mackwatsonstratman.com

or unimproved land or lands divided or proposed to be divided for the purpose of sale or lease, whether immediate or future, into six or more lots, parcels or fractional interests." In this case, the seller owns one 36-acre parcel that has not been divided into six or more lots or parcels. As such, the parcel is considered un-subdivided and therefore an Affidavit of Disclosure is required. ❊

Arizona REALTOR® Magazine — January 2014 | Disclosure
http://www.aaronline.com/legal-hotline-q-a-disclosure

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 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. ❊

Arizona REALTOR® Magazine — January 2014 | Contracts - Cancellation
http://www.aaronline.com/legal-hotline-q-a-contracts-cancellation/

Buyer May Generally Compel Specific Performance

FACTS:

The buyer and seller executed an AAR Residential Resale Purchase Contract. While escrow was pending the seller advised the buyer, through their respective agents, that he no longer wanted to sell the property. The buyer still wants to move forward and close escrow.

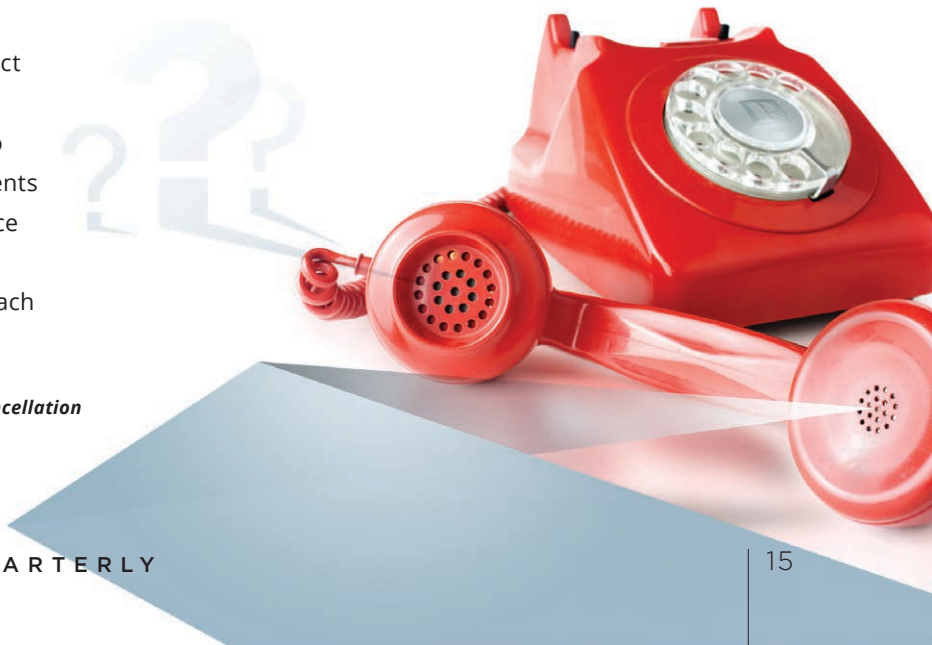
ISSUE:

May the buyer force the seller to close the transaction?

ANSWER:

Generally, a contract for the purchase of real property is enforceable by way of specific performance because each parcel of real property is unique. Accordingly, the buyer should be able to compel the seller to move forward and close escrow. Independent legal counsel should be consulted. ❊

Arizona REALTOR® Magazine — January 2014 | Contract – Breach/Damages
http://www.aaronline.com/legal-hotline-q-a-contracts-breachdamages/



Short Sale Buyer May Cancel Based On Lender's Restrictions On Re-Sale

FACTS:

The seller enters into a Residential Resale Purchase Contract with the buyer, which also includes the standard Residential Short Sale Addendum. Before the lender issued an approval of the short sale and before the seller issued a short sale Agreement Notice, the lender provided, as a condition of approval, an Affidavit to be signed by the buyer. The affidavit restricts the buyer from selling the subject property within 90-days from close of escrow. The buyer now wants to cancel the contract. The seller is alleging that the buyer cannot cancel because under line 36 of the Short Sale Addendum, the buyer agrees to cooperate with the lender and sign additional lender disclosures or execute additional addenda.

ISSUE:

Can the buyer, pursuant to the contract (which includes the Short Sale Addendum), cancel the contract?

ANSWER:

Yes. As stated in line 40 of the Short Sale Addendum, the "Buyer may unilaterally cancel the contract by notice to seller at any time before receipt of a short sale agreement notice from seller." Pursuant to line 36 of the Short Sale Addendum, the buyer must cooperate with the lender and sign additional disclosures and addenda; however, such cooperation is conditioned on the premise that signing the additional disclosures and/or addenda will not result in the buyer incurring additional costs or liabilities. Here, the buyer agreeing to the affidavit will prohibit the buyer from selling the property within 90-days from the close of escrow. This limitation on selling the property after close of escrow will increase the costs to the buyer associated with upkeep and maintenance of the property, among others. ❊

Arizona REALTOR® Magazine — January 2014 | Short Sales
http://www.aaronline.com/legal-hotline-q-a-short-sales

The Death Of The Owner Generally Terminates The Listing Agreement

FACTS:

A property is listed with brokerage A. The owner of the property passed away and now his daughters want to list the property with brokerage B.

ISSUE:

Is the listing with brokerage A still valid?

ANSWER:

Probably not. The general rule is that upon the death of a party to a personal services contract (e.g., upon the death of either the seller or the listing broker in a listing agreement), the personal services contract is terminated. Therefore, absent extenuating circumstances, the daughters are entitled to enter into a new listing agreement with a new broker after the death of their father. ❊

Arizona REALTOR® Magazine — January 2014 | Listings
http://www.aaronline.com/legal-hotline-q-a-listings

Meet AAR's New Associate Counsel,

Nikki Salgat, Esq.

Nikki Salgat recently joined Arizona Association of REALTORS® as associate counsel. She will be working with AAR General Counsel Scott Drucker on forms development and assisting AAR members better manage the risk that comes with today's complex real estate transactions.

Nikki brings a wealth of real estate knowledge to her role. She is an alum of Phoenix School of Law (now called Arizona Summit Law) and received her undergrad degree at Central Michigan University. Prior to joining AAR, Nikki was a lawyer for Mack, Watson & Stratman. While there, Nikki worked in the short sale department and litigated cases; she also answered calls on the AAR legal hotline, assisting Arizona brokers' with their toughest legal questions.

In her personal life, Nikki spends her time with her husband, Courtney and their two-month-old son, Corbin. She was born in Korea, grew up in, Michigan and has lived in the Valley for 10 years. Nikki and her family take full advantage of all that Arizona has to offer and enjoy hiking and running.

Please welcome Nikki to AAR!

Brokerage Should Have No Liability For Agent's FSBO

FACTS:

A real estate agent licensed with the brokerage firm owns a six-plex and is selling the property as a For Sale By Owner (FSBO). The brokerage firm will not be handling the sale of the property. However, the brokerage firm is concerned about liability for the acts of the real estate agent while selling the six-plex.

ISSUE:

Does the brokerage firm have any liability for the acts of the real estate agent selling her own property as a FSBO?

ANSWER:

No. If the real estate agent is acting as a FSBO without any involvement from the brokerage firm, e.g., using the brokerage signage, making telephone calls, meeting prospective buyers at the brokerage firm, distributing her business card, or using brokerage firm stationery, the brokerage firm should have no liability to the buyer for the acts of the real estate agent in the FSBO sale of her own property. ❇

Arizona REALTOR® Magazine – February 2014 | Agency
http://www.aaronline.com/legal-hotline-q-a-agency

Buyer May Not Deliver Multiple BINSRs In A Single Transaction

FACTS:

Before the expiration of the 10-day inspection period, the buyer provides to the seller the Buyer Inspection Notice and Seller's Response ("BINSR") with items disapproved of and elects to provide the seller with an opportunity to correct these disapproved items.

ISSUE:

Can the buyer, before the seller responds to the BINSR, amend the BINSR to add additional repair requests?

ANSWER:

No. Under Section 6i, Lines 234-35, of the AAR Residential Resale Real Estate Purchase Contract (the contract), the buyer must conduct all desired inspections and investigations prior to delivering the BINSR to the seller and all inspection period items disapproved shall be provided in a **single notice**. Here, the buyer has already delivered to the seller its "single notice" to the seller. Therefore, the buyer is precluded by Section 6i of the Contract from amending his or her notice, i.e., the BINSR, to include additional disapproved items. ❇

Arizona REALTOR® Magazine – February 2014 | Contracts
http://www.aaronline.com/legal-hotline-q-a-contracts

HOA Must Provide Notice Of Known Violations Before Closing

FACTS:

There are 142 units in a particular community. Following close of escrow, the homeowners association (HOA) sent the buyer a letter advising the buyer of violations based on alterations to the home that needed to be corrected. The HOA was aware of the violations prior to close of escrow, but did not give notice to the buyer of the violations before escrow closed.

ISSUE:

Is the HOA required to give notice to the buyer of known violations prior to close of escrow?

ANSWER:

Pursuant to A.R.S. § 33-1806(A)(3)(e), within 10 days after receipt of written notice of a pending sale, an association with fifty or more units, shall mail or deliver to a purchaser or a purchaser's authorized agent a dated statement containing "whether the records of the association reflect any alterations or improvements to the unit that violate the declaration. . . . Nothing in this community relieves the seller of a unit from the obligation to disclose alterations or improvements to the unit that violate the declaration, nor precludes the association from taking action against the purchaser of a unit for violations that are apparent at the time of purchase and that are not reflected in the association's records." Thus the HOA (and the seller) should have disclosed the alteration to the buyer before the close of escrow. ❇

Arizona REALTOR® Magazine – February 2014 | Miscellaneous
http://www.aaronline.com/legal-hotline-q-a-miscellaneous

Seller May Not Unilaterally Cancel a Listing Agreement

FACTS:

The seller and agent execute a one-year listing agreement. After three months, the seller wants to unilaterally cancel the listing agreement because she says she is unhappy with the agent and thinks that more should be done to market the property.

ISSUE:

Can the seller unilaterally cancel the listing agreement?

ANSWER:

No. A listing agreement is a binding bilateral contract between the listing brokerage and the seller. Any cancellation of the listing agreement requires the consent of both the seller and the listing broker, unless the listing agent has materially breached the agreement. ❇

Arizona REALTOR® Magazine – February 2014 | Listings
http://www.aaronline.com/legal-hotline-q-a-listings

Both Spouses Must Sign A Contract To Sell The Marital Residence

FACTS:

A husband and wife own their home as community property with rights of survivorship. The husband and wife are in the middle of a divorce. The wife wants to sell the property and the husband does not. The wife has approached the agent to market and sell the property.

ISSUE:

Should the agent accept the listing?

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AAR General Counsel Scott Drucker, Esq. addresses three member questions this month, all regarding what to include and what to avoid in real estate marketing.

Watch the video
http://www.aaronline.com/manage-risk/askscott/

ANSWER:

Generally, approval from the court will be required for a listing where the parties are in the midst of divorce proceedings. Additionally, under community property laws, both the husband and wife must sign the purchase contract for the sale of the property before it will be enforceable. The agent should therefore obtain the consent of both spouses and/or court approval before taking the listing and expending the time and money necessary to market the property. ❇

Arizona REALTOR® Magazine – February 2014 | Contracts
http://www.aaronline.com/legal-hotline-q-a-contracts

Where Full Disclosure Is Made, Agent Should Have No Liability For Leaky Roof

FACTS:

Pending close of escrow, the home inspection report identified water stains on the ceiling and recommended that a roof inspection be performed. The buyer subsequently obtained a roof inspection which identified various repairs that should be made. The seller paid for the recommended repairs prior to the close and the repairs were made by a licensed contractor. After closing, the roof leaked during a substantial rain. The buyer has demanded that the buyer's agent pay to repair the roof.

ISSUE:

Is the buyer's agent obligated to repair the roof?

ANSWER:

No. Based on the facts presented, the roof problems were discovered prior to the close of escrow. Additionally, certain repairs were undertaken by a licensed contractor prior to the close. Because the agent was not involved in those repairs, the agent should have no liability.

Note: Generally, agents do not have a responsibility to inspect for defective conditions. *See Aranki v. RKP Invs., Inc.,* 194 Ariz. 206, 979 P.2d 534 (App. 1999). ❇

Arizona REALTOR® Magazine – February 2014 | Brokerage
http://www.aaronline.com/legal-hotline-q-a-brokerage

The Dodd-Frank Act Does Not Prohibit A Balloon Payment In A One-Time Seller Financing Transaction

FACTS:

The buyer and seller entered into a purchase contract for the residential real property where the seller is going to finance the transaction. This is the only seller finance transaction the seller will originate in a 12-month span. The seller wants to include a seven year balloon payment in the loan documents.

ISSUE:

Does the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) prohibit a balloon payment in this transaction?

ANSWER:

No. If the seller is going to originate only one seller financed consumer credit transaction in a 12-month period, the loan documents may include a balloon payment without violating the Dodd-Frank Act. *See* 12 CFR § 1026.36(a)(5). ❇

Arizona REALTOR® Magazine – February 2014 | Financing
http://www.aaronline.com/legal-hotline-q-a-financing

After A Sale Is Cancelled, Can Another Buyer Access The Home Inspection

FACTS:

During the inspection period, the buyer retained a home inspector who produced a written report identifying a property defect of which the seller was previously unaware. Pursuant to lines 194 – 195 of the Arizona Residential Resale Real Estate Purchase Contract (purchase contract), the buyer provided the seller with a copy of the inspection report and then timely canceled the purchase contract based on the results of the home inspection. Thereafter, the seller entered into a contract with a new buyer.

ISSUE:

Must the seller provide the new buyer with a physical copy of the first buyer's home inspection report?

ANSWER:

No. Although sellers have a duty to disclose known facts materially affecting the value of the property that are not readily observable, the seller is not obligated to provide the new buyer with a copy of the first buyer's home inspection report. In fact, the better practice is for the seller to update their Seller's Property Disclosure Statement (SPDS) to ensure that it includes the information contained on the inspection report, and then provide the updated SPDS to the new buyer. Although Arizona statute does not preclude the seller from conveying the actual report, doing so may lead the buyer to rely on that report and not obtain their own independent inspection. Since the first home inspector owes no duty to the new buyer, it is best for the buyer to obtain their own home inspection. ❇

Arizona REALTOR® Magazine – February 2014 | Disclosure
http://www.aaronline.com/legal-hotline-q-a-disclosure

Trustee Generally Has The Authority To Sign On Behalf Of A Trust

FACTS:

A husband and wife deeded the property into a revocable living trust when they purchased it. The husband died and the death certificate was recorded.

ISSUE:

Who is the rightful owner of the property entitled to sign the listing agreement?

ANSWER:

The listing agreement is a contract between the broker and the seller and must be signed by the actual owner of the property. Here, the trust is the owner of the property. Generally, the trustee of a trust is the person with signing authority for a trust. Accordingly the trustee should sign the listing agreement. ❇

Arizona REALTOR® Magazine – *March 2014*
Title & Interest in Property
http://www.aaronline.com/legal-hotline-q-a-title

Contract Requiring That Appraisal Fee Be Paid By Seller As Part Of Seller's Concessions Is Enforceable

FACTS:

The buyer and the seller have entered into an AAR Residential Resale Purchase Contract (the contract). The contract calls for the seller to pay the appraisal fees out of the seller concessions. The buyer is refusing to proceed with ordering the appraisal unless the seller pays for the appraisal up front. The seller refuses to pay for the appraisal up front as the contract calls for payment in the seller concessions.

ISSUE:

Can the seller refuse to pay for the appraisal fee up front if he agreed to pay for the appraisal fee out of the seller concessions?

ANSWER:

Yes. The language of the contract executed by the buyer and the seller calls for the seller to pay for the appraisal fee out of the seller concessions, which are included in the closing costs. The buyer agreed to this term in the contract and cannot refuse to perform if the seller does not pay for the appraisal fees up front. ❇

Arizona REALTOR® Magazine – *March 2014*
Contracts (Breach/Damages)
http://www.aaronline.com/legal-hotline-q-a-contracts-breachdamages

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Broker May Pursue A Buyer For A Commission With A Properly Executed Buyer-Broker Exclusive Employment Agreement (Buyer-Broker Agreement)

FACTS:

The agent agreed to represent the buyer. As part of the representation, the buyer signed a Buyer-Broker Agreement. The agent also signed and delivered a fully-executed copy of the agreement to the buyer. During the term of the Buyer-Broker Agreement, the buyer stopped communicating with the agent and ultimately purchased the property through her sister, who was an agent.

ISSUE:

May the agent sue the buyer for the commission based on the Buyer-Broker Agreement?

ANSWER:

Yes. Generally, a Buyer-Broker Agreement must be signed by all parties and delivered to be enforceable. Here, the Buyer Broker Agreement was enforceable and the buyer breached the agreement by utilizing the services of her sister to purchase the property. Accordingly, the agent may pursue the buyer for the commission based on the breach of the Buyer-Broker Agreement. ❊

Arizona REALTOR® Magazine – *March 2014* | *Commissions*
http://www.aaronline.com/legal-hotline-q-a-commissions

The Dodd-Frank Act Does Not Apply To Commercial Transactions

FACTS:

The seller is going to provide the financing for a warehouse facility. The seller owns multiple warehouses and will likely engage in several seller financed transactions this year.

ISSUE:

Do the seller-financing restrictions imposed by the Dodd-Frank Act apply to commercial transactions?

ANSWER:

No. The seller-financed restrictions imposed by the Dodd-Frank Act apply to consumer credit transactions, which 12 CFR § 1026.36(a)(1) defines as credit offered or extended to a consumer primarily for personal, family or household purposes. Because the subject transaction is not a consumer credit transaction, the subject seller-financing restrictions do not apply. ❊

Arizona REALTOR® Magazine – *March 2014* | *Financing*
http://www.aaronline.com/legal-hotline-q-a-financing

CHANGE IN zipForm® STRIKE-OUT FEATURE

In November, the 2013 Risk Management Committee (RMC) passed a motion to disable the strike-out feature on zipForm®. This motion took effect on February 3, 2014.

In contemplating the issue, members of the committee voiced concern over scenarios in which agents strike very small portions of the boilerplate provisions within standard AAR forms. In some instances, single words were being surreptitiously struck that, although frequently unnoticed by the other party to the contract, dramatically changed the meaning of the provision. Since reviewing lengthy forms and observing that a single word has been struck can prove very difficult, the 2013 RMC concluded that any/all changes to the boilerplate provisions of standard AAR forms should be expressly stated under the Additional Terms and Conditions section of the document. This way, agents, brokers and the parties themselves will readily observe the changes as opposed to them being hidden within the document and very difficult to discern. ❊

Buyer's Agent Should Use Unrepresented Seller Compensation Consent Form While Representing A Buyer In A FSBO

FACTS:

The property is listed for sale by the owner, without an agent. The buyer's agent wants to make an offer on the property for the buyer. The buyer's agent has discussed with the parties her potential representation of the seller. The seller has declined and insists that she does not want nor need representation in the transaction, but is willing to pay compensation to the buyer's agent.

ISSUE:

Is there an AAR form available to assist the buyer's agent in the transaction?

ANSWER:

Yes. The AAR Unrepresented Seller Compensation Consent should be used by the agent. This document will confirm that there is no representation provided to the seller. It also confirms the seller's agreement to pay a commission nonetheless. ❊

Arizona REALTOR® Magazine – *March 2014* | *Brokerage*
http://www.aaronline.com/legal-hotline-q-a-brokerage

Listing Agreement Should Not Be Incorporated In The Residential Contract

FACTS:

A buyer has made an offer on the residential property listed for sale by the agent. As part of the acceptance, the seller wants to attach the listing agreement to the contract and indicate that the listing agreement is incorporated by reference into the contract. The broker is concerned with the seller's request.

ISSUE:

Should the listing agreement be attached to and incorporated into the residential purchase contract?

ANSWER:

No. The listing agreement is a contract between the broker and the seller. By contrast, the residential purchase contract is an agreement between the seller and a potential buyer. The rights and obligations of the parties under each contract are separate and distinct. Consequently, there is no need to incorporate the listing agreement into the purchase contract. In fact, such a practice would likely lead to confusion and diminish the certainty of the terms in the various contracts. ❊

Arizona REALTOR® Magazine – *March 2014* | *Contracts*
http://www.aaronline.com/legal-hotline-q-a-contracts

Buyer May Not Submit A BINSR After The Inspection Period

FACTS:

The buyer and seller entered into an AAR Residential Resale Purchase Contract (contract) which allowed for a 10-day inspection period. On the 12th day, the buyer submitted a BINSR form requesting that certain repairs be made.

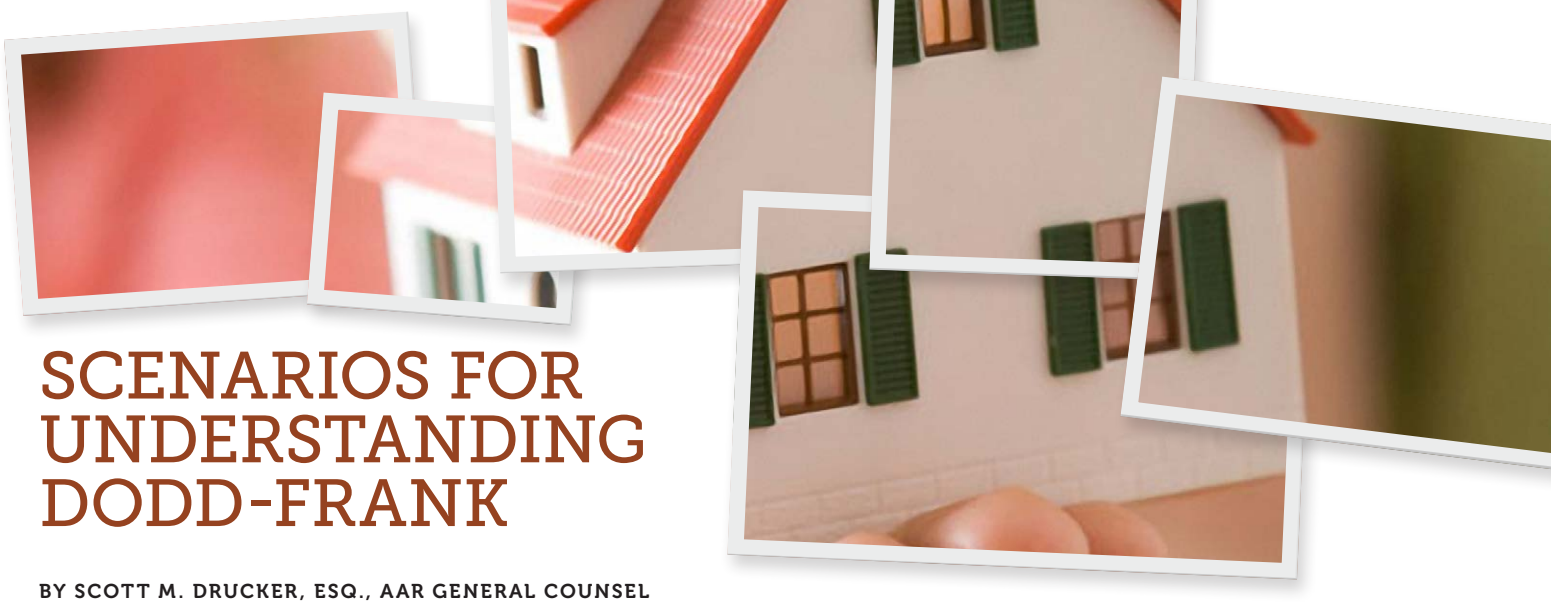
ISSUE:

Is the seller obligated to make any of the requested repairs?

ANSWER:

No. The contract at lines 252-254 provides that if the buyer does not provide timely notice of items disapproved, that it "shall conclusively be deemed buyer's election to proceed with the transaction without correction of any disapproved items." Significantly, the language in lines 252-254 is in all capital letters. Based on the contract, the buyer has waived his right to cancel or request repairs because the inspection period expired. ❊

Arizona REALTOR® Magazine – *March 2014* | *Contracts*
http://www.aaronline.com/legal-hotline-q-a-contracts



SCENARIOS FOR UNDERSTANDING DODD-FRANK

BY SCOTT M. DRUCKER, ESQ., AAR GENERAL COUNSEL

In February, AAR introduced revised seller financing addenda that better reflect the Consumer Financial Protection Bureau's definition of a consumer credit transaction. Following these revisions, AAR's seller financing addenda are now titled as follows:

SELLER FINANCING ADDENDUM; CONSUMER CREDIT TRANSACTION SECURED BY A DWELLING

Seller Providing Financing For Only One Residential Owner-Occupied Property In Any 12-Month Period

SELLER FINANCING ADDENDUM; CONSUMER CREDIT TRANSACTION SECURED BY A DWELLING

Seller Providing Financing For Three or Fewer Residential Owner-Occupied Properties In Any 12-Month Period

SELLER FINANCING ADDENDUM; NON-CONSUMER CREDIT TRANSACTION

To help brokers and managers understand what constitutes a consumer credit transaction and what types of seller financed transactions require the seller to be registered or licensed as a loan originator, AAR has developed the following scenarios. When reading these scenarios, please keep in mind that all questions posed by buyers and sellers concerning their rights and obligations in seller-financed transactions should be directed to legal counsel independently secured by the client.

SCENARIOS

SCENARIO ONE:

By way of a seller-financed transaction, Owner sells a dwelling[1] to Buyer. Buyer will lease the property and will never personally occupy the dwelling. This will be the fifth such transaction that Owner has consummated in the last two months.

QUESTION:

Can Owner offer seller financing to Buyer for this transaction even if Owner is not registered or licensed as a loan originator?

ANSWER:

In this case, Owner can offer seller financing to Buyer even without being registered or licensed as a loan originator. The seller financing provisions of the Dodd-Frank Act apply to consumer credit transactions, not business credit transactions. 12 CFR § 1026.2(a)(12) defines consumer credit as "credit offered or extended to a consumer primarily for personal, family, or household purposes."Comment four to 12 CFR § 1026.3(a) states that "Credit extended to acquire, improve, or maintain rental property (regardless of the number of housing units) that is not owner-occupied is deemed to be for business purposes. This includes, for example...a single-family house that will be rented to another person to live in."

1 The term "dwelling" as used in this article means a residential structure that contains one to four units.

SCENARIO TWO:

By way of a seller financed transaction, Owner sells a dwelling to Buyer. Buyer will lease the property for 11 months out of the year and will personally reside in the dwelling for the month of July. This is the only seller-financed transaction that Owner will generate over the span of 12 months.

QUESTION:

Can Owner offer seller financing to Buyer for this transaction even if Owner is not registered or licensed as a loan originator?

ANSWER:

In this case, Owner can offer seller financing to Buyer only if Owner qualifies for the one property licensing exemption set forth in 12 CFR § 1026.36(a)(5) or the three or fewer properties exemption set forth in 12 CFR § 1026.36(a)(4). Although the dwelling will be leased for 11 months out of the year, it will be considered owner-occupied and therefore a consumer credit transaction because Owner expects to occupy the dwelling for more than 14 days during the coming year.

SCENARIO THREE:

By way of a seller financed transaction, Owner sells a dwelling to Buyer. Buyer is a corporation. This will be the fifth such transaction that Owner has consummated in the last two months.

QUESTION:

Can Owner offer seller financing to Buyer for this transaction even if Owner is not registered or licensed as a loan originator?

ANSWER:

In this case, Owner can offer seller financing to Buyer even without being registered or licensed as a loan originator. The seller financing provisions of the Dodd-Frank Act apply to consumer credit transactions, not business credit transactions. 12 CFR § 1026.2(a)(11) defines consumer in part as a "natural person to whom consumer credit is offered or extended." Comment nine to 12 CFR § 1026.3(a) explains that a transaction in which the borrower is not a natural person is a business credit transaction and not a consumer credit transaction. Because the buyer in this scenario is not a natural person, it is not a consumer credit transaction.

SCENARIO FOUR:

By way of a seller-financed transaction, Owner sells a dwelling to Buyer. Buyer is a trust that has been created for tax and estate planning purposes. This will be the fourth such transaction that Owner has consummated in the last two months.

QUESTION:

Can Owner offer seller financing to Buyer for this transaction even if Owner is not registered or licensed as a loan originator?

ANSWER:

In this case, Owner cannot offer seller financing to Buyer without being registered or licensed as a loan originator. The seller financing provisions of the Dodd-Frank Act apply to consumer credit transactions, not business credit transactions. 12 CFR § 1026.2(a)(11) defines consumer in part as a "natural person to whom consumer credit is offered or extended." Comment ten to 12 CFR § 1026.3(a) explains that a trust created for tax or estate planning purposes constitutes a natural person rather than an organization. This transaction is therefore a consumer credit transaction. Because Owner in this scenario has already originated three such transactions, Owner cannot offer seller-financing in this scenario without being registered or licensed as a loan originator.

SCENARIO FIVE:

By way of a seller financed transaction, Owner sells a dwelling to Buyer. Buyer is a trust that has been created for tax and estate planning purposes. This will be the first such transaction that Owner has consummated in the last two months.

QUESTION:

Can Owner offer seller financing to Buyer for this transaction even though Owner is not registered or licensed as a loan originator?

ANSWER:

In this case, Owner can offer seller financing to Buyer without being registered or licensed as a loan originator only if Owner qualifies for the one property licensing exemption set forth in 12 CFR § 1026.36(a)(5) or the three or fewer properties exemption set forth in 12 CFR § 1026.36(a)(4). The seller financing provisions of the Dodd-Frank Act apply to consumer credit transactions, not business credit transactions. 12 CFR § 1026.2(a)(11) defines consumer in part as a "natural person to whom consumer credit is offered or extended." Comment ten to 12 CFR § 1026.3(a) explains that a trust created for tax or estate planning purposes constitutes a natural person rather than an organization. This transaction is therefore a consumer credit transaction and Owner must qualify for the one property licensing exemption or the three or fewer properties exemption in order to offer seller financing.

SCENARIO SIX:

By way of a seller financed transaction, Owner sells a dwelling to Buyer who intends to occupy the dwelling as his primary residence. Owner is a small homebuilder that constructed the dwelling.

QUESTION:

Can Owner offer seller financing to Buyer for this transaction even though Owner is not registered or licensed as a loan originator?

ANSWER:

In this case, Owner cannot offer seller financing to Buyer without being registered or licensed as a loan originator. Because this transaction is secured by a dwelling to be used primarily for personal, family, or household purposes, it is considered a consumer credit transaction. The one property licensing exemption set forth in 12 CFR § 1026.36(a)(5) and the three or fewer properties exemption set forth in 12 CFR § 1026.36(a)(4) do not apply when the seller has constructed, or acted as a contractor for the construction of, a residence on the property as part of their ordinary course of business.

SCENARIO SEVEN:

By way of a seller financed transaction, Owner sells a dwelling to Buyer. Owner is a partnership and Buyer is a natural person who intends to occupy the home as Buyer's primary residence. This will be the first such transaction that Owner has ever consummated.

QUESTION:

Can Owner offer seller financing to Buyer for this transaction even if Owner is not registered or licensed as a loan originator?

ANSWER:

In this case, Owner can offer seller financing to Buyer without being registered or licensed as a loan originator only if Owner qualifies for the three or fewer properties exemption set forth in 12 CFR § 1026.36(a)(4). Because this transaction is secured by a dwelling that Buyer will occupy full-time, it is a consumer credit transaction. Owner must therefore be registered or licensed as a loan originator or qualify for one of the two licensing exemptions. Since Owner is a partnership, Owner does not qualify for the one property exemption set forth in 12 CFR § 1026.36(a)(5). Owner must therefore qualify for the three or fewer properties exemption set forth in 12 CFR § 1026.36(a)(4) in order to consummate this seller-financed transaction. ❇

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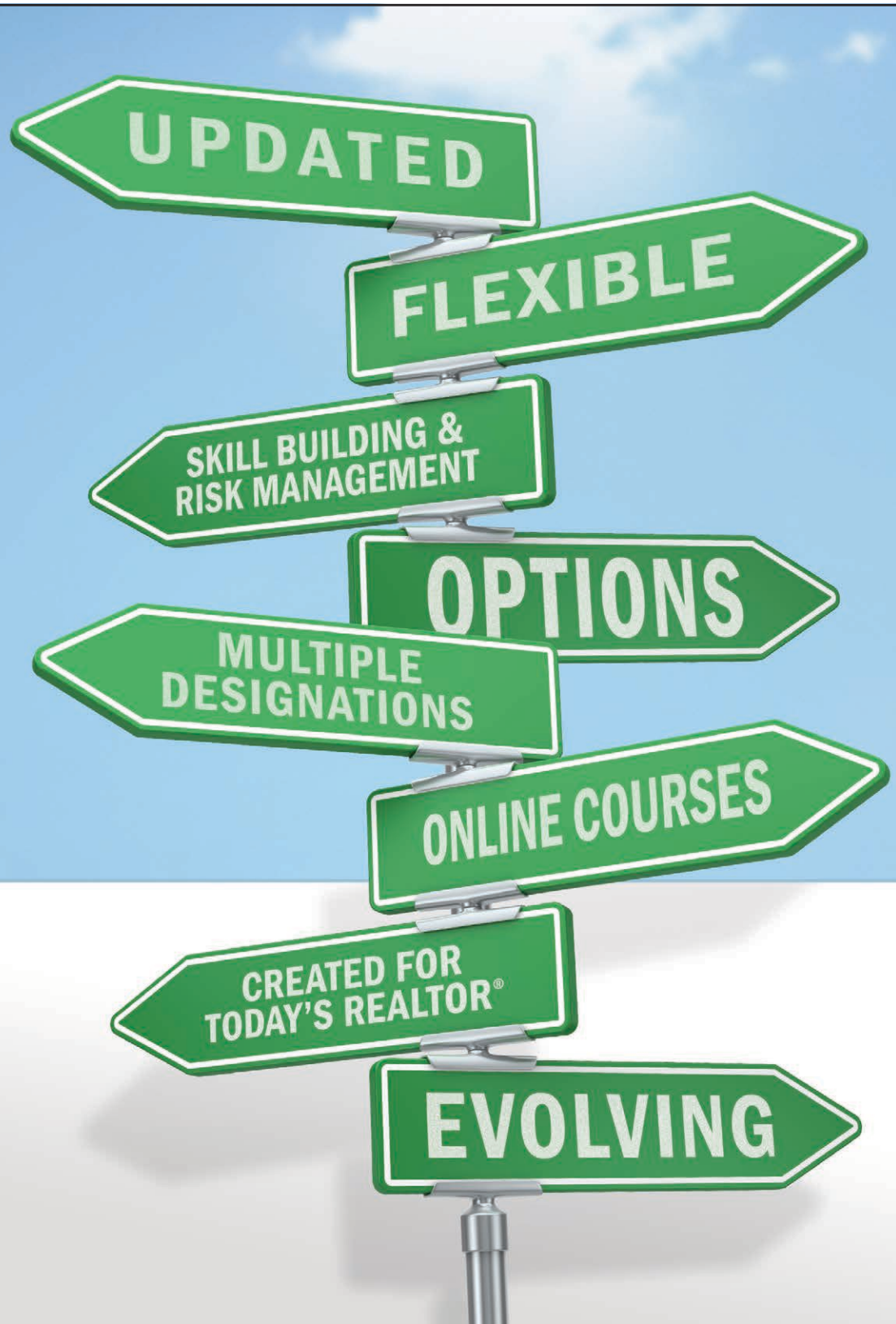

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