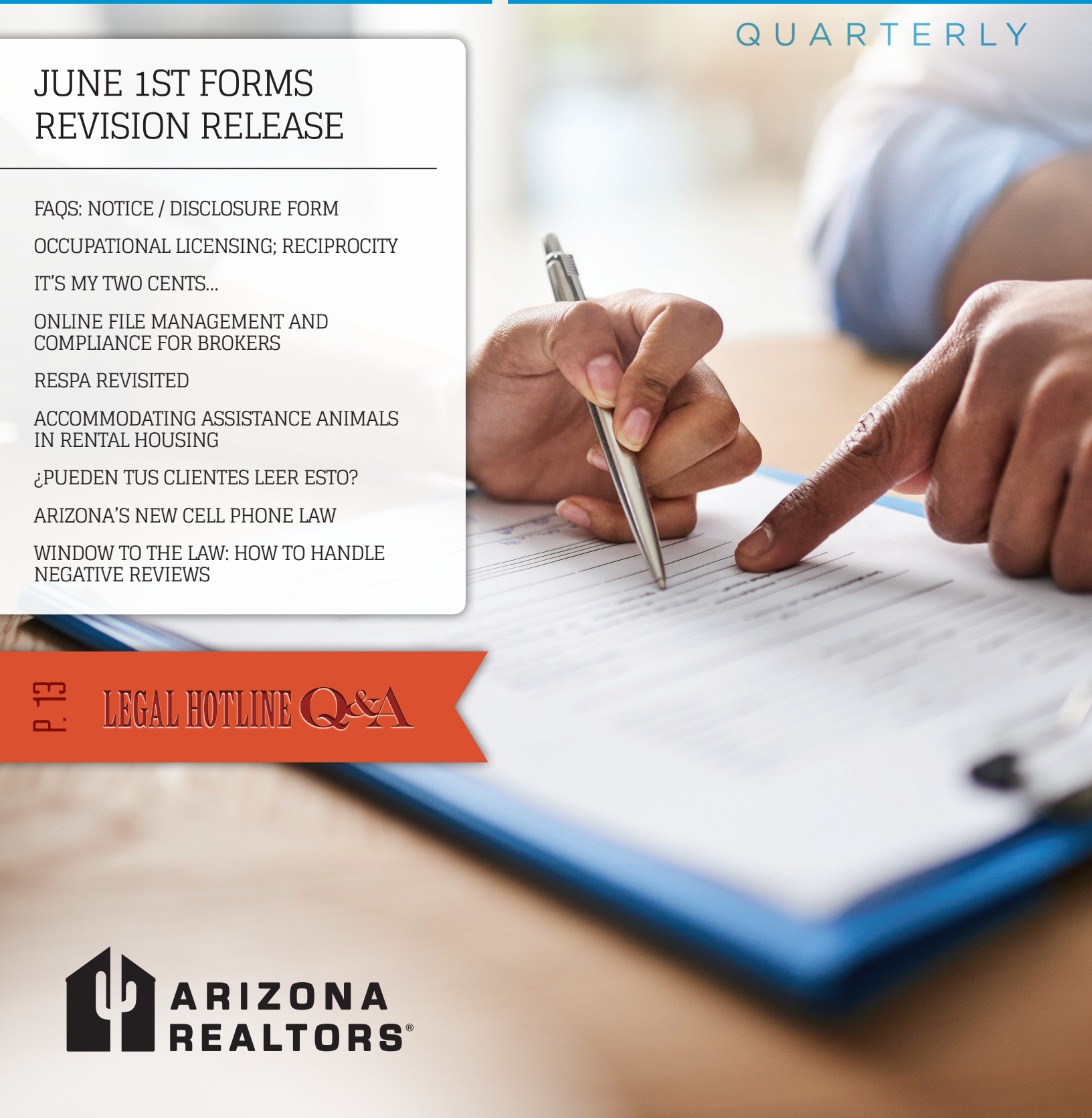
ARIZONA REALTORS®

SECOND QUARTER 2019

BROKER & MANAGER

QUARTERLY

JUNE 1ST FORMS REVISION RELEASE



ARIZONA REALTORS®

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ARIZONA REALTORS®

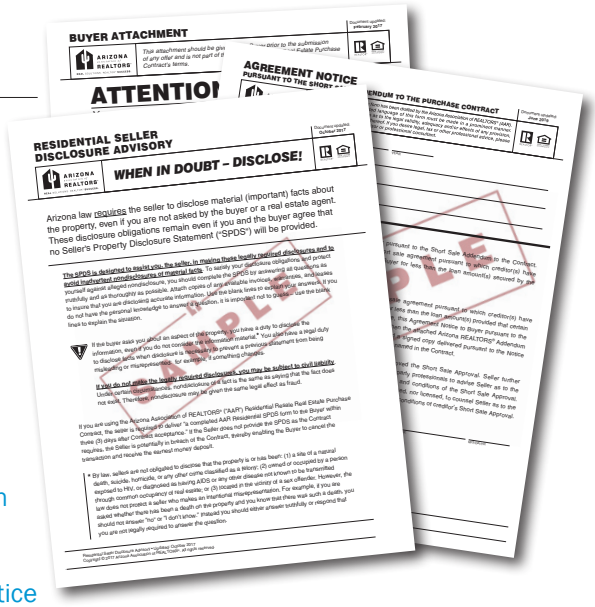
BROKER & MANAGER

SECOND QUARTER 2019 | ARIZONA REALTORS® BROKER/MANAGER QUARTERLY

IN THIS ISSUE

June 1st Forms Revision Release

BY NIKKI SALGAT, ESQ.



In addition to the June 1st release of Arizona REALTORS® new Notice / Disclosure form are revisions to the following forms: (1) Residential Seller Disclosure Advisory page, which serves as the cover page to the Residential Seller's Property Disclosure Statement; (2) Buyer Attachment page to the Residential Resale Real Estate Purchase Contract; and (3) Agreement Notice Pursuant to the Short Sale Addendum to the Residential Resale Real Estate Purchase Contract.

The revisions are as follows:

Residential Seller Disclosure Advisory page: The current cover page to the Residential Seller's Property Disclosure Statement (SPDS) instructs the seller to "Attach copies of any available invoices, warranties, inspection reports, and leases to insure that you are disclosing accurate information." This verbiage caused some confusion and lead some members to conclude that sellers are required to convey prior inspection reports in seller's possession to the buyer. Redline version here.

While the seller is required to disclose known facts materially affecting the value of the property that are not readily observable, the seller is not obligated to provide new buyers with a copy of prior inspection reports. Accordingly, "inspection reports" has been removed from that sentence.

Buyer Attachment page to the Residential Resale Real Estate Purchase Contract: Additional verbiage has been added near the bottom of the Purchase Contract cover page warning buyers to beware of wire transfer fraud and to independently confirm wiring instructions prior to wiring any money. Additionally, to address issues with buyers supplying information which contains bank account numbers and other personal information, verbiage has been added to remind buyers not to email or transmit documents that show bank account numbers or personal identification information. Redline version here.

Agreement Notice Pursuant to the Short Sale Addendum to the Residential Resale Real Estate Purchase Contract: The current title of this addendum establishes that it is applicable only to the Residential Purchase Contract. However, the Risk Management Committee voted to make the form universally applicable so that it can be utilized in conjunction with other Arizona REALTOR® purchase contracts, including, but not limited to, the Commercial Real Estate Purchase Contract. In addition to the substantive changes within the form, the name of the form will change to "Agreement Notice Pursuant to the Short Sale Addendum to the Purchase Contract." Redline version here.

About the Author

Nikki J. Salgat, Esq. is associate counsel to the Arizona 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.

FAQs: Notice / Disclosure Form

BY SCOTT DRUCKER, ESQ., ARIZONA REALTORS® GENERAL COUNSEL

On June 1, Arizona REALTORS® will release a new form titled Notice / Disclosure. A copy of the new form that has been approved by both the Risk Management Committee and Executive Committee can be found here. In conjunction with your review of the Notice / Disclosure form, Arizona REALTORS® has prepared the below list of frequently asked questions (FAQs), along with answers and pertinent analysis. Please be sure to review these FAQs to better understand the new form.

Q1 – What was the rationale behind the creation of this new form?
A1 – Throughout the various contracts published by Arizona REALTORS®, parties are instructed to provide notice and make disclosures under a number of different scenarios. To facilitate the conveyance of this information, the Risk Management Committee deemed it beneficial to create a form exclusively for this purpose.

Q2 – Why can't I use an Addendum to convey notice and make disclosures? It has plenty of blank lines.
A2 – An Addendum has a very specific purpose, which is to amend the terms of the underlying contract. When notice is being provided or a disclosure is being made, the intent is not to change the terms of the Purchase Contract. As such, use of an Addendum for this purpose is inappropriate and could unintentionally change the nature of the parties' contractual agreement.

Q3 – Can you provide me with an example of when I would use this form to provide notice?
A3 – Lines 65-66 of the Residential Resale Real Estate Purchase Contract require Seller to "deliver notice of all leased items within three (3) days after Contract acceptance." As of June 1st, the Seller can use the Notice / Disclosure form to convey this information.

A second example can be found on lines 91-92 of the Commercial Purchase Contract. This portion of the Contract provides Buyers with an opportunity to deliver "written notice" prior to expiration of the Due Diligence Period or five (5) days after receipt, whichever is later, disapproving of additional Seller disclosures and information.

Q4 – Can you provide me with an example of when I would use this form to make a disclosure?
A4 – Lines 187-188 of the Residential Resale Real Estate Purchase Contract require Seller to immediately notify Buyer of any changes in the Premises or disclosures made herein, in the SPDS or otherwise. In the event that additional disclosures are needed, the Notice / Disclosure form could be used for this purpose.

Q5 – Do I have to use this form to convey notice?
A5 – No. Arizona REALTORS® contracts dictate that notices shall be in writing and also dictate the manner in which notices must be conveyed. The contracts do not require that any specific form be utilized.

Q6 – Line 18 contains a signature line. Should the document be signed by the Buyer, Seller or agent representing the respective party providing the notice or disclosure?
A6 – The Notice / Disclosure form should be signed by the party providing the notice or disclosure, either the Buyer or the Seller. The form should not be signed by the agent.

Q7 – Why is there no signature line for the party receiving the Notice / Disclosure form?
A7 – The Notice / Disclosure form is unilateral in nature. To be effective, it must be signed by the party originating the form and properly conveyed. It does ***not*** need to be signed by the receiving party. Furthermore, if the receiving party's signature was required yet they refuse to sign the form, such a scenario could result in confusion.

Q8 – Why is the form not applicable to rental properties? Why can it be generated only by buyers and sellers, not landlords and tenants?
A8 – The Risk Management Committee spent a lot of time discussing whether the form should be applicable to rental properties and decided against it for two reasons. First, the Arizona REALTORS® library of forms already contains a large number of notice forms to be used by landlords and property managers depending on the situation. Second, even if the tenant was represented at the time the lease was negotiated, that representation terminated upon conclusion of the transaction. Consequently, if a REALTOR® thereafter provides services such as supplying a form to their former client or submitting notice on their behalf, that action may unintentionally reestablish an agency relationship.

Q9 – By what means should this Notice / Disclosure form be conveyed?
A9 – Arizona REALTORS® contracts state that notice shall be deemed delivered and received when: (i) hand-delivered; (ii) sent via facsimile transmission; (iii) sent via electronic mail, if email addresses are provide; or (iv) sent by recognized overnight courier.

About the Author
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.

Occupational Licensing; Reciprocity

Arizona is now the first state to allow for broad recognition of out-of-state licenses with Governor Doug Ducey signing HB 2569: "Occupational Licensing; Reciprocity" into law on April 10, 2019. The legislation, which impacts many professions including barbers, nurses, bus drivers, respiratory therapists, security guards, teacher assistants and, yes, real estate licensees, was sponsored by Representative Warren Petersen.

As your representative at the state capitol, the Arizona REALTORS® were the only industry group to oppose HB 2569, which we opposed because of concerns for public safety. In Arizona, to be a licensed real estate agent an individual must take 90 classroom hours of real estate instruction and satisfactorily pass the state's licensure exam and, most importantly, complete 6 additional hours in contract writing prior to license activation.

Further, it was the Association's position that HB 2569 was unnecessary for the real estate industry because current law, A.R.S. § 32-2124 B and C, already allows the Arizona Department of Real Estate to "waive all or a portion of the prelicensure course requirement, other than the twenty-seven-hour Arizona-specific course, for an applicant who holds a current real estate license in another state."

Despite our Association's best efforts to convince the bill sponsor and the Governor's office of the importance of real estate licensees understanding Arizona's unique real estate laws and ability to write contracts, we were unsuccessful in our attempts to amend the bill to provide the protections to the public we believed are necessary.

Since the signing of the legislation, there have been several questions raised by our membership. Below is a quick reference guide to those questions and what this bill may mean for you.

What does this bill mean?
Through the passage of this legislation, an individual must establish residency in Arizona, apply through the Arizona Department of Real Estate, take the state specific portion of the examination at the Commissioner's discretion, pass a background check (verifying that their license is in good standing in their previous state), obtain a fingerprint clearance card, and pay licensing fees.

Keep in mind, this isn't reciprocity in the sense that if an individual is licensed in another state, that individual is automatically permitted to practice here or is given an Arizona real estate salesperson license.

When does the law go into effect?
There is no specific effective date, which means it becomes effective 90 days after the legislative session adjourns. There is no set date for adjournment, but session can't continue beyond June 30, so the latest the bill will become effective is September 28, 2019.

What does this bill mean for brokers?
Brokers still have discretion regarding who they allow to hang their license under them, and they can consider the process by which an individual obtained their license. This is normal practice now and a practice that can continue moving forward.

Why didn't Arizona REALTORS® oppose the bill?
We were the only industry to come out in opposition to the legislation. We lobbied the sponsor, the Governor and staff in the House/Senate/Governor's office to amend the bill to mirror what is current law and the current waiver statutes. Unfortunately, the bill had strong support from other special interests and our elected officials moved ahead and the bill was passed into law without the additional education requirements we requested.

IT'S MY TWO CENTS...

BY SCOTT DRUCKER, ESQ., ARIZONA REALTORS® GENERAL COUNSEL

For almost 20 years, Larry King had a weekly column in USA Today titled "It's My Two Cents." The column consisted of short, random quips, insights and opinions and was perfect for busy readers with not a lot of time to spend on long articles. With Larry King recently in the news, I thought I'd give it a try, Arizona REALTORS® style.

MY TWO CENTS: For the life of me, I can't understand why agents use the term "on or before" when writing contracts... Stop looking for the AS-IS Addendum... Occupational licensing reciprocity is not the end of the world... I'm no expert, but I really question whether an ostrich can be a comfort animal... Yes, the Buyer Contingency Addendum is a complicated form that requires close attention... Facebook is not your Broker... Arizona REALTORS® does not sell your data to Zillow... Reading The Voice will be the most informative 10 minutes of your week... If your list of BINSR repairs is four pages long, something is wrong... This is more difficult than I thought it would be... Even though it's a fix and flip, the seller still knows information about the property... Don't put the lockbox on the side of the house behind the trash can and next to a cactus... RAPAC supports political candidates based solely on their voting record and stance on real property issues regardless of party affiliation... If you have never met your Designated Broker in person, you really should... A Cure Notice is not a declaration of war... If you don't volunteer to be part of the solution, you can't complain about the problem... Your birthday is not a strong password... If you know an agent that is completing the SPDS on behalf of their clients, please have them call me immediately... The public is not familiar with the concept of procuring cause, so you need to be... Most questions can be answered by reading the Purchase Contract... Arizona averages roughly 650 new real estate licensees every month... I can't believe you're still reading this... Why don't more agents use the Additional Clause Addendum... Lockbox CBS codes are not your enemy... Jay Thompson, formerly of Zillow, is really funny and insightful... Take the time to learn TransactionDesk... Mediation works... Designated Brokers should join the Legal Hotline today for the answer they need immediately tomorrow... The 2005 version of the Residential Purchase Contract is outdated... If this is my two cents and it's a penny for your thoughts, I think you owe me money... Remind me never to do this again...

About the Author

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.

VICTORY!

Finally, REALTORS® will soon finally be able to use their commonly known names when conducting business thanks to a bill signed into law last week by Governor Ducey. HB 2371: "real estate; licenses; applications" offers a common-sense solution to an issue that has long been a thorn in many of our REALTOR® members' sides. With this bill, REALTORS® in Arizona will now be able to use the name they are commonly known by in their advertising.

Under current Arizona state law, an application for real estate brokers and salespersons licensure requires that applicants use their legal name. Further rule 4-28-301(D) states "The Department shall issue to a qualified person a license bearing the legal name of the licensee and any additional nickname, corporate, or dba name that the Commissioner finds is not detrimental to the public interest. A professional corporation or professional limited liability company licensed under A.R.S. § 32-2125(B) shall not adopt a DBA name."

The current law has long presented issues for many of our REALTOR® members. From denial of nickname applications to citations from the Arizona Department of Real Estate, Arizona REALTORS® stepped up at our annual REALTOR® Caucus and determined something had to be done.

The Arizona REALTORS® asked at the beginning of this year's legislative session for fellow REALTOR® member and state legislator, Representative Ben Toma, to sponsor our legislation to allow for the use of a name other than an individual's legal name for the purposes of advertising.

On February 25, 2019, a Strike Everything amendment was offered to HB 2371. The bill did the following:

1. Requires the application for licensure as a real estate broker or salesperson to include any derivative of the following that the applicant regularly uses for advertising purposes:
   a. The applicant's first name;
   b. The applicants middle name; or
   c. The applicants nickname that the applicant regularly uses.

Testimony further clarified that this change would also be applicable when obtaining a license renewal.
Throughout the legislative process, the bill received unanimous support and was signed into law by the Governor on April 17, 2019. There is no specific effective date, which means it becomes effective 90 days after legislative session adjourns. There is no set date for adjournment, but session can't continue beyond June 30th, so the latest the bill will become effective is September 28, 2019.

With the passage of this legislation, REALTORS® in Arizona will finally be legally able to use their common nicknames for business and marketing purposes without fear of reprisal from the Arizona Department of Real Estate.

ONLINE FILE MANAGEMENT AND COMPLIANCE FOR BROKERS

Available in TransactionDesk and Docbox at an Additional Cost

Online Document Checklist
A checklist of required and optional documents will automatically be added to each new transaction. Agents will know which documents they need to submit.

File Status Tracking
Anyone looking at the file will see what is complete and what is missing from a file.

Automated Alerts
Automated emails notify brokerage staff when documents are ready to review.

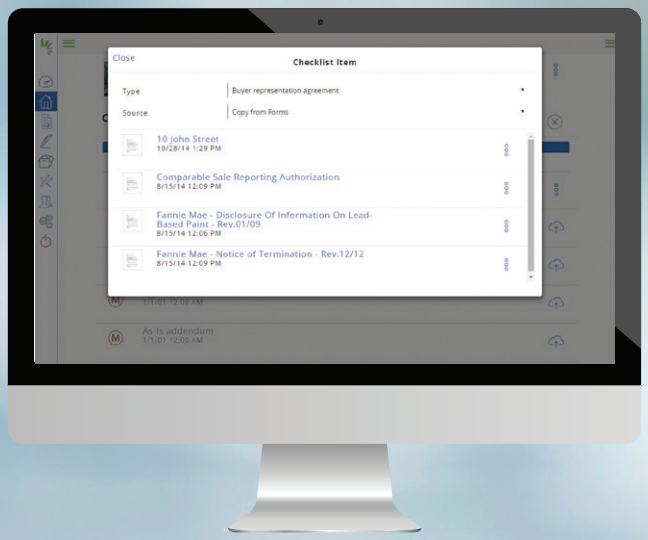
Reporting Dashboards
See exactly which documents you need to review in a simple report with links to each document that makes accessing and reviewing easy and fast. The automated Broker File Management tool helps brokerages manage their listing, sale and lease files much more efficiently while reducing legal exposure.

Broker Controlled
The system lets you know when documents are ready for review. Only broker staff can mark off documents as reviewed.

Reduce Risk
Agents know what documents are needed for each transaction. Broker file review work is automatically documented in transaction file history.

Save Time
Stop shuffling paper. Perform file reviews faster, from your computer, tablet or even your smartphone, anytime, anywhere. Spend less time chasing agents for documents - when agents update their files online, the broker files are updated and staff is notified.

Save Money
In addition to saving staff time, brokerages save money on paper, toner and storage costs by going paperless. Try our paperless savings calculator at www.InstanetSolutions.com and see how much you could save.



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RESPA Revisited

BY K. MICHELLE LIND, ESQ., CEO ARIZONA REALTORS®

The following is an excerpt from the book, *Arizona Real Estate: A Professional's Guide to Law and Practice (Third Edition)* written by Arizona REALTORS® CEO Michelle Lind. To order a copy visit: www.aaronline.com/manage-risk/azre-book/

The Real Estate Settlement Procedures Act of 1974 (RESPA)[1] is a Federal law enacted to insure that buyers are provided with sufficient information about the nature and costs of financing and closing escrow on a home (defined in the law as the settlement process). RESPA is also intended to protect buyers from unnecessarily high close of escrow charges. RESPA requires that buyers receive disclosures at various times that spell out the costs associated with the close of escrow, lender and escrow practices and fees, such as the Good Faith Estimate. Section 8 and Section 9 of RESPA have the greatest impact on real estate brokers.

KICKBACKS AND REFERRAL FEES
Section 8 (12 U.S.C. §2607; 24 C.F.R. §3500)
Section 8(a) Prohibits Kickbacks and Referral Fees

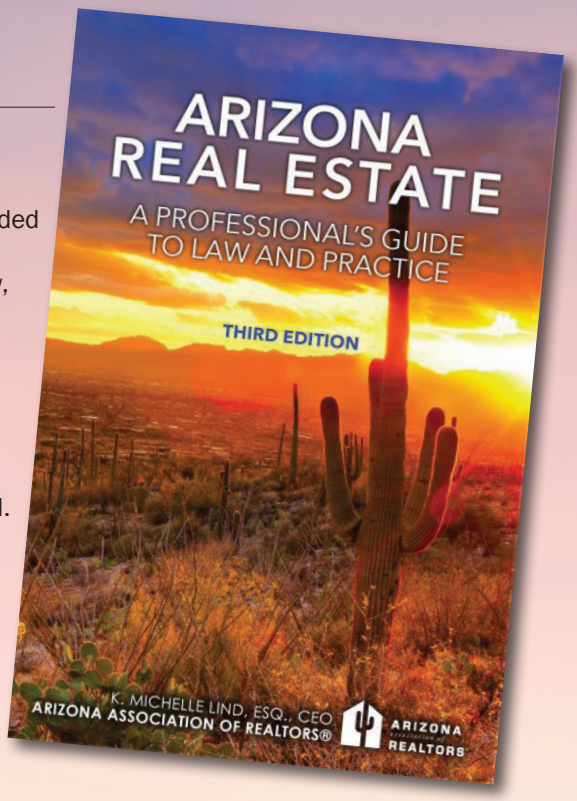
Section 8(a) states: No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person. Thus, Section 8 prohibits a person from giving or accepting any "thing of value" for referrals of prohibits a person from giving or accepting any "thing of value" for referrals of settlement service business.

[1]RESPA was amended in 1976 and 1983 (minor revisions); in 1992 (addressing affiliated business relationships and computer loan origination); in 1996 (further revisions, including addressing certain employer payments to bona fide employees) and 2009 (revisions including addressing servicing disclosure states and a new GFE effective January 2010); in 2019 (the Dodd-Frank Act granted rule-making authority under RESPA to the Consumer Financial Protection Bureau); in 2013 (many revisions occurred, most notably, the TILA-RESPA integrated rule which changed integrated forms; timing, and related disclosure requirements for most consumer mortgage loans).

Section 8(b) Prohibits Unearned Fees
Section 8 (b) prohibits a person from giving or accepting any part of a charge for services that are not performed.

Section 8(b) states: No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

Section 8 Definitions (12 U.S.C. §2602)
A "settlement service" includes any service provided in connection with a real estate transaction, including title insurance, attorney services, surveys, credit reports, appraisals, pest and fungus inspections, and loan origination (the taking of loan applications, processing, underwriting and funding). If the service is provided at or before close of escrow, it is probably a settlement service.



A "thing of value" is very broadly defined. A thing of value includes any payment, advance, funds, loan, service or other consideration.

A "federally related mortgage" includes any loan (other than temporary financing such as a construction loan) that is secured by a first or subordinate lien on residential real property designed principally for the occupancy of one to four families. In other words, a federally related mortgage covers virtually all financing secured by a lien on residential property.

Section 8(c) Exceptions
Not all fees, salaries, compensation or payments for settlement services violates Section 8. RESPA does not prohibit:

- payments to attorneys for services actually rendered,
- compensation by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance or by a lender to its duly appointed agent for services actually performed in the making of a loan
- payment of a bona fide salary, compensation or payment for goods or facilities actually furnished or for services actually performed
- payments pursuant to cooperative brokerage and referral arrangements or agreements between real estate agents and brokers
- affiliated business arrangements so long as certain requirements are met.

An affiliated business arrangement is an arrangement in which a person (or associate) who is in a position to refer business, incident to or a part of a real estate settlement service involving a federally related mortgage loan, has either an affiliate relationship with or an ownership interest of more than one percent in a settlement service provider and

either directly or indirectly refers business to that provider or affirmatively influences the selection of that provider. See, 12 U.S.C. §2602. To qualify for the affiliated business arrangement exemption, a disclosure must be made of the existence of the arrangement, and a written estimate of the charge or range of charges for the service is made at or before the time of the referral. Further, the buyer cannot be required to use the service. Additionally, the only thing of value that is received from the arrangement is a return on the ownership interest.

HUD[2] has investigated sham affiliated business arrangements. For example, a title company in Florida reportedly paid $3.2 million to settle allegations that it was entering into sham affiliated business arrangements in an attempt to funnel improper payments to builders, real estate agents and mortgage brokers.

Question: Can a real estate broker be compensated by a home warranty company?
Answer: According to HUD Interpretive Rule effective June 25, 2010, HUD interprets Section 8 of RESPA and HUD's regulations to prohibit payment by a home warranty company to a broker for marketing services.[3] See also, HUD Home Warranty Interpretive Rule (11/23/2010.) Depending upon the facts, a home warranty company may compensate a broker for services that "are actual, necessary and distinct from the primary services provided" by the broker if the additional services are not nominal and are not services for which there is a duplicate charge.

[2]Effective July 21, 2011, RESPA is administered and enforced by the Consumer Financial Protection Bureau

[3]The RESPA Home Warranty Clarification Act of 2011 (H.R. 2446), which is supported by NAR, may clarify that home warranties fall outside the scope of RESPA.

Additionally, the amount of compensation for the additional services must be reasonably related to the value of those services and not include compensation for referrals of business.

Question: Can a real estate brokerage lease office space to a lender or other settlement service provider without violating RESPA?
Answer: Yes. HUD interprets Section 8 to allow the rental of office space in this situation if the rental payments are reasonably related to the market value of the office space. If the rental payments exceed the market value of the office space, a RESPA violation may have occurred.

Question: Can a real estate broker and title company advertise their services on the same brochure?
Answer: Joint advertising is not prohibited by RESPA. However, if one party is paying less than a pro-rata share for the brochure, there could be a RESPA violation.

Question: Does offering a package of settlement services or offering of discounts to consumers for the purchase of multiple settlement services violate RESPA?
Answer: A package of services or a discount will not be considered a prohibited required use if it is optional to the purchaser. The discount must be a true discount below the prices that are otherwise generally available and must not be made up by higher costs.

Question: Do lender fee programs comply with RESPA?
Answer: Some may and some may not. RESPA does not prohibit a lender from paying the lender's agent or contractor for services actually performed in the origination or processing of a loan. Thus, the program may comply with RESPA if a real estate agent is actually providing loan services, the appropriate RESPA-required disclosures are made, and the buyer is notified that the buyer is not obligated to use the real estate agent as their loan originator. Do not enter into a compensation agreement with a lender without checking with the designated broker or legal counsel. Also, make sure that you are being paid for actually performing substantial services (see, HUD Statement of Policy 1999-1), the appropriate required disclosures are made, and the buyer is notified that the buyer is not obligated to use the offered services.

TITLE INSURANCE — SECTION 9 (12 U.S.C. §2608; 24 C.F.R. SEC. 3500.16)
Section 9 of RESPA prohibits a seller from requiring the buyer to buy title insurance from a specific title insurance company. Section 9 of RESPA states:

(a) No seller of property that will be purchased with the assistance of a federally related mortgage loan shall require directly or indirectly, as a condition to selling the property, that title insurance covering the property be purchased by the buyer from any particular title company.

(b) Any seller who violates the provisions of subsection (a) of this section shall be liable to the buyer in an amount equal to three times all charges made for such title insurance.

"Required use" means: A situation in which a person must use a particular provider of a settlement service in order to have access to some distinct service or property, and the person will pay for the settlement service of the particular provider or will pay a charge attributable, in whole or in part, to the settlement service.

Question: Is it a RESPA violation if the seller requires the buyer to use a specific title company when the seller is paying for the buyer's title insurance?
Answer: HUD has indicated that it "will not enforce Section 9 of RESPA against a seller who selects the title insurance company if the seller is paying for the owner's title insurance policy, and does not require the buyer to use the title insurance company for the simultaneously issued lender's policy."[4]

[4]See correspondence from Rebecca J. Holtz, acting Director, Office of Consumer and Regulating Affairs, HUD RESPA/ILS Division dated August 2000 and related enclosures and correspondence available on the Arizona REALTORS® website.

Question: Is it a RESPA violation if the seller requires the buyer to use a specific title company?
Answer: Yes. HUD has indicated that it would take action "in situations where a seller required a buyer to pay the seller an amount toward closing costs, and the seller used a portion of the buyer's paid closing costs for the owner's title insurance without providing the buyer with a choice of that title company."

Question: What is the safest course for a seller who wants to require the use of a certain title insurance policy?
Answer: Based on HUD's position, the safest course for a seller who insists on using a particular title company is to pay for both the buyer's title insurance policy and the lender's title insurance policy. Additionally, the seller should not require the buyer to pay any closing cost that could be attributable to the cost of the title policies.

Question: What are the penalties for a violation of Section 9 of RESPA?
Answer: Pursuant to 12 USC §2608(b), any seller who violates Section 9 is liable to the buyer in an amount equal to three times all charges made for such title insurance. Additionally, the seller may face sanctions from HUD (Section 3500.19(c)) and the Arizona Department of Real Estate (A.R.S. §32-2153(B) (10)).

Question: What is the effect of a seller's counter offer changing the title company to be used in a transaction?
Answer: If the buyer submits an offer, and the seller responds with a counter offer requiring the use of a different title insurance company, that counter offer has the same legal effect as rejecting the buyer's offer. Therefore, by submitting a counter offer requesting a different title insurance company, the seller is risking the transaction in its entirety.

KEY POINTS TO REMEMBER: A broker cannot accept any fee, kickback or "thing of value" for referrals to a settlement service provider. A prohibited "thing of value" under RESPA is interpreted very broadly and may include joint advertising if one settlement service provider is paying more than a pro-rata share, or any other item that would defray the broker's expenses. Generally, a broker cannot accept any portion of a settlement service charge other than for services rendered. Generally, a seller may not require as a condition of sale that the buyer purchase title insurance from any particular title company. Affiliated business arrangements are allowed under RESPA as long as certain requirements are met.

Accommodating Assistance Animals in Rental Housing

Landlords are obligated under fair housing laws to grant reasonable accommodations for their tenant's disabilities if the accommodation would afford the disabled tenant an equal opportunity to use and enjoy the dwelling as a non-disabled tenant.

So what happens when your tenant asks for permission to use and live with an assistance animal? First, do not fixate on whether the tenant's assistance animal is a *service animal* versus an *emotional support animal*. Instead, the relevant questions are: Does the tenant have a disability? Is there a disability-related need for the assistance animal?

If the answers to these questions are obviously "yes," you cannot ask for proof through medical documentation. If the answers are not obvious, you may ask for reliable documentation of the tenant's disability and his/her disability-related need for an assistance animal.

If the tenant has a disability-related need for his/her assistance animal, you must provide exceptions to your "no-pet" policies and you must waive pet fees and deposits. Breed, size, and weight restrictions do not apply to assistance animals.

There are exceptions to these obligations if the assistance animal would create a direct threat to the health and safety of others; cause substantial property damage; require a fundamental alteration in the nature of a housing program; or result in an undue financial or administrative burden.

The Civil Rights Division of the Arizona Attorney General's Office is happy to provide outreach and informational presentations on housing laws, but cannot provide legal advice. If you have questions about your obligations as a landlord, please consult legal counsel. If you'd like to schedule an outreach event, please contact us at (602)542-5263.


Arizona Attorney General Mark Brnovich

¿Pueden Tus Clientes Leer Esto?

BY SCOTT DRUCKER, ESQ., ARIZONA REALTORS® GENERAL COUNSEL

Can your clients read the title of this article? If so, they may be interested to know that Arizona REALTORS® has translated its most often used forms and advisories into Spanish. Arizona is a diverse state, home to individuals of many different nationalities. Among those is a large Hispanic population. While many Spanish speakers are multilingual, some are more comfortable reading and reviewing complex transaction documents in Spanish.

For this reason, Arizona REALTORS® publishes on its website in Spanish 28 commonly used forms, along with a list of key real estate terms. Additionally, the association's website publishes in Spanish the following Advisories: (i) Buyer Advisory; (ii) Short Sale Seller Advisory; (iii) Tenant Advisory; (iv) Lease Owner's Advisory; and (v) Wire Fraud Advisory.

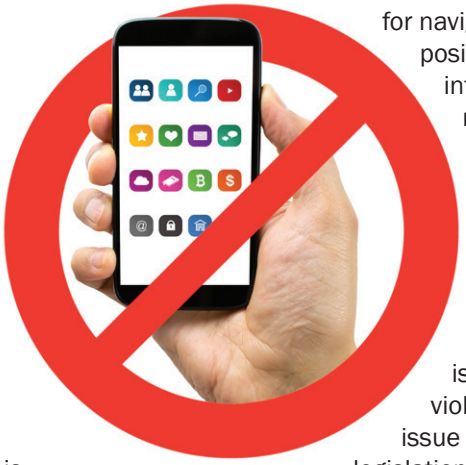
These translated forms are not to be used as transaction documents to be signed, only as companion translations to Arizona REALTORS® forms. For more information on Arizona REALTORS®' Spanish translations and to view the translated forms, go to https://www.aaronline.com/spanish/.

Arizona's New Cell Phone Law

BY NICOLE LASLAVIC, NICOLE LASLAVIC, ARIZONA REALTORS® VICE PRESIDENT OF GOVERNMENT AFFAIRS

In today's day and age, technology has allowed for most of us to have the simple convenience of our workplace in our hands at all times with a mobile device. For REALTORS®, this technology allows us to easily conduct business on the go. In Arizona, however, the laws surrounding the use of handheld devices have been silent, often defaulting to distracted driving laws or a piecemeal of city ordinances that ban the practice of texting while driving.

Over the years, many attempts have been made by our elected officials to pass legislation prohibiting the use of handheld devices. Unfortunately, it took the death of Salt River Police Officer, Clayton Townsend, to finally motivate the legislature to act and pass a bill to prohibit the use of such devices while operating a motor vehicle.



On April 22, 2019, Governor Doug Ducey signed into law HB 2318: Texting While Driving; Prohibition; Enforcement. Upon his signature, the bill became effective immediately.

Here is what you need to know about the legislation.The bill prohibits a person, unless parked or stopped, from operating a motor vehicle on a street or highway if the person does either:

- Physically holds or supports with any part of the person's body either:
  - A portable wireless communication device, except when used with an earpiece or headphone device or wrist-worn device to conduct voice-based communication; or
  - A stand-alone electronic device.
- Writes, sends or reads any text-based communication, including a text message, instant message, e-mail or internet data, on a portable wireless communication device or stand-alone electronic device, excluding the following:
  - A voice-based communication to direct the writing, sending reading or other communicating of any text-based communication; and
  - The use of a portable wireless communication device or stand-alone device when used in a hand-free manner for navigation of the motor vehicle, use of a global positioning system, or obtaining motor vehicle information or information related to driving a motor vehicle.

Penalties for Violation

Though the legislation became effective upon signature of the governor, the penalties for a violation have a delayed effective date. A peace officer who stops a motor vehicle for an alleged violation is prohibited from issuing a citation for a violation before January 1, 2021 and may only issue a warning from the effective date of the legislation through December 31, 2020.

Once the penalties become effective on January 1, 2021, violations are imposed as follows:

- At least $75, but not more than $149, for an initial violation;
- At least $150, but not more than $250, for a second or subsequent violation.

At the bill signing ceremony, Governor Doug Ducey recognized the many families that have been impacted by the use of handheld devices while driving. He thanked the various legislators that stepped up to the plate to champion the legislation. The ceremony concluded with a statement by Governor Ducey, "It's common sense and will save lives. The text message can wait, it is not worth your life."

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* To answer legally related questions about the many diversified areas of today's real estate industry.

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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.

Agents May Not Accept Cash from Home Warranty Representatives for Referrals

FACTS: After the close of escrow, the home warranty representative offered the buyer's agent $50 in cash for referring the buyer to the home warranty company. The home warranty representative also indicated that he would pay $50 for each subsequent referral provided by the agent.

ISSUE: May the agent accept the $50 from the home warranty company representative?

ANSWER: No.

DISCUSSION: The agent accepting the $50 referral fee amounts to a kickback for the referral of business to the home warranty company. This activity is a violation of the Real Estate Settlement Procedures Act (RESPA). The agent therefore cannot accept the money from the home warranty representative without violating RESPA.

Agents Should Not Advocate for a Client After Closing

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

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

ANSWER: No.

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

Licensee May Not Practice Real Estate While in Prison

FACTS: The agent is serving a 120-day sentence in a minimum-security prison based on a DUI conviction. The agent has access to a computer and a lot of free time while in prison and wants to continue with his real estate activity.

ISSUE: May the agent practice real estate while in prison?

ANSWER: No.

DISCUSSION: A.R.S. §32-2166 provides: "While incarcerated, a person who is licensed pursuant to this Chapter shall not perform acts that require a license under this Chapter."

Therefore, the agent may not practice real estate while in prison.

Fair Housing Protection of "Familial Status" Not Limited to Tenant's Children

ISSUE: The prospective tenant has completed a rental application for the apartment. The prospective tenant states in the rental application that his twelve-year-old nephew will be living with him until his nephew completes middle school. There are no other children currently living in the apartment complex, and the landlord does not want to make an exception. Can the landlord refuse to rent the apartment to a tenant with a twelve-year-old nephew?

ANSWER: Probably not. Under the Fair Housing laws, "familial status" extends to persons with legal custody of any child under the age of eighteen, or with written permission from the parent or legal custodian of a child under the age of eighteen. Therefore, the landlord can request from the prospective tenant written permission from the twelve-year-old's parent or legal custodian. If the prospective tenant is unable to furnish such written permission, only then can the landlord refuse to rent the apartment to this prospective tenant.

Consent is Required for Dual Agency

FACTS: Two separate agents, both licensed with the same brokerage firm, represent a buyer and seller in connection with the real estate transaction. Both the buyer and seller executed the Real Estate Agency Disclosure and Election form. However, only the buyer executed the Consent to Limited Representation form.

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ISSUE: Should the listing agent have requested that the seller sign the Consent to Limited Representation?

ANSWER: Yes.

DISCUSSION: The Real Estate Agency Disclosure and Election form is primarily a disclosure of the respective agents' duties in the transaction. Although the form references the potential for dual agency, it is not an unequivocal consent to dual agency.

Both the statutes and the commissioner's rules prohibit an agent from representing both parties to a transaction without the knowledge and consent of all parties. *See* A.R.S. § 32-2153(a)(2) and A.A.C. R4-28-1101(F). Thus, the best practice is to obtain all parties' written consent prior to engaging in dual agency. The use of a fully executed Arizona REALTORS® Consent to Limited Representation form will satisfy those requirements.

Owner of Property May Not Serve as A Dual Agent

ISSUE: Can a co-listing agent, who is a part owner and managing member of the selling entity (which owns the subdivision), also represent a prospective buyer of a property in the subdivision as a dual agent?

ANSWER: No. Dual agency imposes restrictions on the conduct of the licensee. Among others, a dual agent may not advocate or negotiate on behalf of either the seller or the buyer. In addition, a dual agent may not disclose confidential information, such as the price the buyer is willing to pay to the other party without the informed consent of that party. Ordinarily, this is not a problem, and dual agency is in fact specifically authorized by Arizona law. *See* A.A.C. R4-28-1101(F). However, when a listing agent has an ownership interest in the property being conveyed, it would present a conflict for that agent to also represent the buyer. For this reason, an "owner/agent" cannot also represent the buyer as a dual agent in a transaction.

Pursuant to the Arizona REALTORS® Residential Lease Agreement, a Party Must Give Timely Notice to Terminate the Lease

FACTS: The landlord and tenant execute an Arizona REALTORS® Residential Lease Agreement for a one-year term expiring on February 28. The tenant advised the landlord that he was vacating the premises on February 26 and had all of his personal effects removed by February 28.

ISSUE: Did the lease terminate on February 28?

ANSWER: No.

DISCUSSION: The Arizona REALTORS® Residential Lease Agreement provides that either the landlord or the tenant must give notice of the intent to terminate 30 days "prior to the periodic rental due date." If no such notice is given, the lease continues on a month-to-month basis. Here, the tenant gave notice on February 26 which is not 30 days prior to the periodic rental due date. Accordingly, based on the notice provided on February 26, the lease continues through March 31.

In the Arizona REALTORS® Contract, the Parties Give the Escrow Company the Authority to Disburse the Earnest Money Pursuant to the Terms and Conditions of the Contract

FACTS: The buyer and seller entered into an Arizona REALTORS® Residential Resale Real Estate Purchase Contract contingent upon financing. Pursuant to the Contract, the buyer deposited $25,000 as earnest money with the Escrow Company. The day that escrow was scheduled to close, the buyer provided a letter from his lender providing that the buyer was unable to obtain financing and requested a return of the earnest money. The seller advised the Escrow Company that he was contesting the distribution of the earnest money to the buyer, claiming that the buyer had not acted in good faith with respect to his loan application. Over the seller's objection, the Escrow Company returned the earnest money to the buyer.

ISSUE: Does the seller have a claim against the Escrow Company for the wrongful disbursement of the earnest money deposit?

ANSWER: Probably not.

DISCUSSION: Pursuant to Section 3f of the Contract, the buyer and seller grant the Escrow Company the right to release the earnest money, "in its sole and absolute discretion," pursuant to the terms and conditions of the Contract. The parties also agree to hold harmless and indemnify the Escrow Company for any claim or expense relating to the release of the earnest money. Consequently, it is unlikely that the seller has a viable claim against the Escrow Company for the disbursement of the earnest money deposit.

Uploading SPDS and Insurance Claims History Report into MLS Does Not Constitute Delivery Per the Contract

FACTS: The listing agent uploaded the SPDS and Insurance Claims History report onto the MLS under the "Documents" tab. However, the listing agent did not state in the listing that the documents could be found under the Documents tab. Additionally, once the property went under contract, the listing agent did not notify the buyer's agent that the SPDS and Insurance Claims History were located on the MLS under the Documents tab until after the Inspection Period expired.

ISSUE: Is the buyer deemed to have received the SPDS and Insurance Claims History report when the listing agent placed the documents in the MLS?

ANSWER: Probably not.

DISCUSSION: Section 8m of the Residential Resale Real Estate Purchase Contract states: "Unless otherwise provided, delivery of all notices and documentation required or permitted hereunder shall be in writing and **deemed delivered** and **received** when: (i) hand-delivered; (ii) sent via facsimile transmission; (iii) sent via electronic mail, if email addresses are provided herein; or (iv) sent by recognized overnight courier service . . ." As such, the seller probably did not deliver the SPDS and Insurance Claims History report, and should be given five days to disapprove of items once the buyer is provided these documents.

If the buyer's agent has not received the SPDS within three days after Contract acceptance or Insurance Claims History report within five days after Contract acceptance, the buyer should send a CURE notice to seller to provide the required documents.

Buyer's Failure to Act during the Three Day Cure Period Allows the Seller to Cancel the Contract

FACTS: The parties executed an AAR Residential Resale Real Estate Purchase Contract ("Contract"). The Contract was contingent on the buyer selling their home. Pursuant to the terms of the Contract, the buyer agreed to deposit funds with the title company three days prior to close of escrow. The buyer failed to deposit funds with the title company three days before close of escrow and the seller sent a three day Cure Period Notice to the buyer for failing to do so. During the three day cure period, the buyer still failed to deposit the funds with the title company. After the three day cure period had ended, the buyer attempted to cancel the transaction. Thereafter, the title company cancelled escrow and gave the earnest money deposit to the seller.

ISSUE: Was the buyer entitled to the return of her earnest to money when she attempted to cancel the Contract after the three day cure period ended?

ANSWER: No.

DISCUSSION: Pursuant to the terms of the Contract, the buyer agreed to deposit funds with the title company three days prior to close of escrow. When the buyer failed to deposit the funds, she was in potential breach of the Contract. Once the seller gave the buyer a three day Cure Period Notice, the buyer could have cured the potential breach by depositing the funds within three days. The buyer also could have cancelled the contract within the three day cure period if the contingency to sell their home had not yet been met. Because the buyer failed to do anything until after the three day cure period was over, the buyer breached the Contract. As the non-breaching party, the seller had a right to cancel the contract and keep the earnest money as the seller's sole right to damages.

ABOUT THE AUTHOR

Richard V. Mack

Richard V. Mack is a partner at Manning and Kass, which provides the Arizona REALTORS® Legal Hotline service. He is a State Bar of Arizona Board Certified Real Estate Specialist and AV rated by Martindale Hubbell. He has also been designated as a Southwest Super Lawyer. Mr. Mack practices commercial litigation with an emphasis on real estate litigation. He is admitted to practice in the state and federal courts of Arizona and before the 9th Circuit Court of Appeals. Mr. Mack graduated Magna Cum Laude from Southwestern College in Winfield, Kansas with a Bachelor of Business Administration, with an emphasis in economics, and received his Juris Doctor from the University of Arizona.

Q&A Legal Hotline

Window to the Law: How to Handle Negative Reviews

Watch the video here: https://www.nar.realtor/window-to-the-law/how-to-handle-negative-reviews
NAR Associate Counsel Charlie Lee discusses options for how to handle a negative or fake consumer review. Charlie Lee is Associate Counsel at the National Association of REALTORS®.

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