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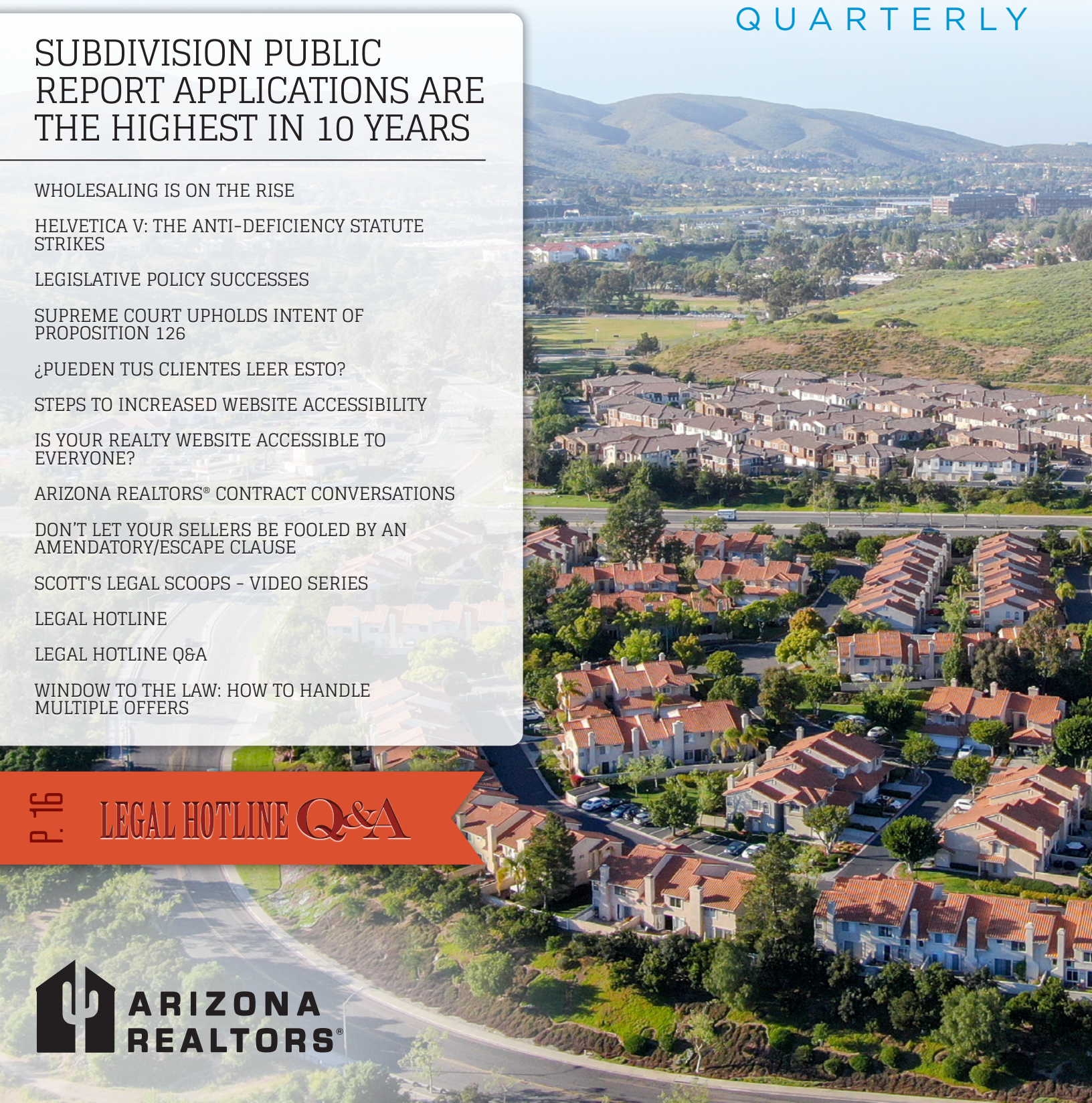
SUBDIVISION PUBLIC REPORT APPLICATIONS ARE THE HIGHEST IN 10 YEARS



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FOURTH QUARTER 2020 | ARIZONA REALTORS® BROKER/MANAGER QUARTERLY

IN THIS ISSUE

Subdivison Public Report Applications are the Highest in 10 Years

The Subdivision Public Report law regulates the sale or lease of subdivided land, which is defined as land divided or proposed to be divided for sale or lease into six or more lots or parcels. A.R.S. §32-2181 et seq. A "subdivider" is anyone who offers for sale or lease six or more lots, parcels or fractional interests in a subdivision or subdivides land into a subdivision, or who undertakes to develop a subdivision. A.R.S. §32-2101(55). A subdivider may not sell or lease or offer for sale or lease any lots, parcels or fractional interests in a subdivision without first obtaining a public report from the ADRE. A.R.S. §32-2183. A subdivider must give a prospective new home buyer a copy of the public report and an opportunity to read and review it before the prospective buyer signs a contract to purchase a home in the subdivision. A.R.S. §32-2183(A).

Purchasing a newly constructed home or a home to be constructed in a new home subdivision involves different considerations than buying a resale home in an established neighborhood.

Buyer Considerations When Entering into a Contract for a New Home to be Constructed

When a buyer decides to buy a new home that has yet to be constructed, there are many important decisions to make, such as design, flooring, countertops and colors. With all these decisions and all the excitement of buying a new home,

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the legal issues are often forgotten or ignored. However, there are a few issues that demand a buyer's attention.

For example, before signing a new home contract, buyers should do the following:

Read the Subdivision Public Report. As discussed above, the purpose of the public report is to disclose important information about the subdivision. Therefore, a new home buyer should always read the public report before signing a purchase contract.

Read the CC&Rs and Other Homeowners Association Rules. Most new homes are in a homeowners association. Covenants, Conditions and Restrictions (CC&Rs) generally empower a homeowners association to control certain aspects of home's use. The CC&Rs may be very strict, especially those addressing landscaping, RV parking, and play equipment. It is essential that the buyer review and agree to these restrictions prior to entering into a contract; afterwards is generally too late.

In addition to the CC&Rs, a homeowners association may be governed by articles of incorporation, bylaws, rules and regulations, and often architectural control standards, which should also be reviewed.

Read the Purchase Contract. Buyers must understand the importance of reading the purchase contract carefully and should be advised to keep the following questions in mind:

- Who will hold the earnest money and other advance deposits? If possible, all earnest money and other advance deposits should be held by the escrow company. If the deposits are held by the seller, the buyer may have a difficult time recovering those funds in the event the seller fails to perform.

- Does the contract contain a financing contingency for the benefit of the buyer? Unless the buyer plans to pay cash, the contract should contain a financing contingency stating that the contract is contingent upon the buyer qualifying for a loan. If the buyer is unable to qualify for a loan to buy the home, the buyer should be entitled to a return of the earnest money. Some new home contracts provide only that the seller has the right to cancel the contract if the buyer fails to qualify for a loan, which does not protect the buyer.

- When will the home be completed? The seller should be asked to give a realistic estimate as to when construction will be completed. A realistic completion date is important so that the quality of the construction will not be compromised by a contractor who is rushing to complete the home. A realistic completion date will help the buyer plan the move and avoid unanticipated housing costs. If the completion date is critical, the buyer may be able to negotiate a contract provision in which the seller agrees to pay a certain dollar amount to the buyer per day for late completion.

- What are the buyer's remedies if there is a problem? The remedies for problems may be specifically set forth in the contract. The contract should direct the buyer to the Arizona Registrar of Contractors (ROC), a governmental agency that regulates home builders. This agency can assist buyers with some construction defects. The contract may require that any disputes be resolved by binding arbitration, which may eliminate the right to a trial by judge or jury and the right to appeal.

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

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Wholesaling is on the Rise.

Can you Answer These Top 10 Questions?

Real estate wholesaling is the process through which an individual, the "wholesaler," enters into a purchase contract with the seller of real property and assigns, for profit, that same contract to an end buyer. Notably, the process of wholesaling differs from "fixing and flipping" real property in that the wholesaler does not close escrow, performs no renovations, and incurs no carrying costs. Rather, the wholesaler assigns their contract rights to a third-party buyer who ultimately purchases the property directly from the seller.

Upon entering into a purchase contract, a wholesaler obtains equitable title, which is the interest retained by a person who has contracted to purchase a property but has not yet closed the transaction. This is different than legal title, which is actual ownership of the real property. Wholesalers must therefore remember that they cannot sell the property itself and must market and sell only their equitable interest. Stated differently, the wholesaler is selling their contractual rights, which is their sole interest in the property.

The process of wholesaling exposes real estate licensees to a great deal of potential liability. Disclosure and transparency are absolutely critical, yet even with full disclosure, sellers are often dismayed to learn that the wholesaler was able to assign the purchase contract to an end buyer who is ultimately paying more money than the contract price between the seller and wholesaler. To mitigate the risk, fully understanding the process is critical and real estate licensees are therefore encouraged to consider the below frequently asked questions and corresponding answers.

Q1 ***If an agent is contacted by a wholesaler seeking to retain the agent to represent their interests in the acquisition of equitable title to real property, what is the first step the real estate licensee should take?***

It is critical that agents talk to their broker before agreeing to represent a wholesaler! This cannot be stressed enough. First, some brokerages do not permit their agents to represent wholesalers so the agent must determine whether their proposed representation is even permitted. Second, by seeing so many transactions, brokers understand the perils associated with wholesaling and can guide agents through the transaction, steering clear of pitfalls that often result in litigation.

Q2 ***Is the purchase contract assignable, or must the wholesaler write into the contract terms like "and assignee" when identifying the buyer?***

Generally speaking, in Arizona rights and duties under a contract are freely assignable. More specifically, a party can assign its contractual rights to a third party unless:

(a) the substitution of a right of the assignee for the right of the assignor would materially change the duty of the obligor, or materially increase the burden or risk imposed on him by his contract, or materially impair his chance of obtaining return performance, or materially reduce its value to him, or (b) the assignment is forbidden by statute or is otherwise inoperative on grounds of public policy, or (c) the assignment is validly precluded by contract.

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See Restatement (Second) of Contracts § 317(2). Consequently, terms like "and assignee" are not legally required for a contract to be assignable.

Q3 ***Must wholesalers and their agent disclose in their marketing materials the wholesaler's lack of legal title?***

Yes. Because wholesalers lack legal title, they must disclose in all marketing material that they solely hold an equitable interest in the property and are therefore not the owner on title. This disclosure should not leave any questions as to the wholesaler's role in the transaction. Furthermore, if the wholesaler holds a real estate license, that too must be disclosed under Arizona law.

Q4 ***Following the wholesaler's assignment of the Purchase Contract to an end buyer, does the wholesaler remain liable if the end buyer fails to perform?***

Yes. The wholesaler's assignment of the Purchase Contract does not change the terms of the underlying purchase contract, nor does it negate the wholesaler's contractual obligations owed to the seller.

Q5 ***Must the wholesaler notify the seller of their intent to assign their equitable title to an end buyer?***

Arizona case law holds that a buyer must disclose to the seller all facts materially affecting the buyer's ability to perform and pay the agreed upon purchase price. See Lombardo v. Albu, 199 Ariz. 97, 14 P.3d 288 (2000). In other words, a buyer cannot present themselves as "ready, willing, and able" if they know that there is a significant risk that they will be unable to perform their contractual obligations. Many wholesalers have no intention of ever purchasing the property, which means they are not "ready, willing, and able" purchasers. If the wholesaler does not intend to perform if they are unable to assign their equitable rights, their intentions must be disclosed upfront to the seller.

Q6 ***If accepting a purchase offer from a wholesaler, can the seller request a substantial earnest money deposit in an effort to better protect their own financial interests?***

Yes. As mentioned above, many wholesalers do not intend to purchase the property if they are unable to assign their contractual rights, even if that means forfeiting their earnest money deposit. Requesting a substantial earnest money deposit is one way sellers can better protect themselves in the event the wholesaler breaches the contract by failing to close escrow.

Q7 ***Does the Arizona REALTORS® Residential Resale Real Estate Purchase Contract contain a contingency by which a wholesaler can cancel the contract without penalty if they are unable to assign their equitable interest prior to close of escrow?***

No. If the wholesaler desires to insert an assignment contingency into the contract, that must be negotiated via an Addendum or in Section 8a of the contract under Additional Terms and Conditions. Otherwise, no such contingency exists.

Q8 ***Upon assigning their equitable interest to a third-party end buyer, what steps should the wholesaler take?***

If and when the wholesaler has assigned their contractual interest, they should immediately notify both the seller and title company.

Q9 ***If representing a seller who receives a purchase offer from a wholesaler, what information should the agent convey to their seller?***

The majority of sellers have little knowledge of the process of wholesaling real estate and rely on their agent to help them understand what can be a complicated transaction. However, real estate licensees are prohibited from offering legal advice and should therefore advise their seller, in writing, to seek independent legal counsel to fully understand their rights and obligations should they accept the offer. With that said, there is information that the agent can and should convey. First and foremost, the agent should explain to their seller that if the wholesaler is able to assign their contractual rights, they will do so at a profit. In other words, the wholesaler intends to find a buyer who will ultimately pay more money than the contract price between the seller and wholesaler. If the seller is uncomfortable with this, they should decline the offer and seek a buyer willing to purchase the property for a greater sum. Second, if there is a risk that the wholesaler will fail to close escrow if they are unable to assign their equitable interest, that too should be explained to the seller so that they understand the risks associated with accepting the wholesaler's purchase offer.

Q10 ***If the listing agent learns that the buyer is a wholesaler who intends to assign their contractual rights prior to close of escrow, must the listing agent disclose this information to the seller?***

Yes. An agent's disclosure obligation to the client arises from their fiduciary duty. Part of that fiduciary duty is the obligation to make a complete and full disclosure of all known material facts that might affect the client's decision to sell the property.

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

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Helvetica V: The Anti-Deficiency Statute Strikes

"Good things come to those who wait." At least that is what litigant Michael Pasquan hopes in the thirteen-year-old litigation following the Supreme Court's recent decision in Helvetica Servicing, Inc. v. Michael S. Paquan. This is the fifth appellate decision stemming from a single foreclosure action dating back to the 2007 housing crash. Now the thirteen-year-old case is going back to the trial court for factual findings. Pasquan, the borrower, received a $3.4 million loan to finance vast improvements to his Paradise Valley home. He eventually defaulted on the loan, and ever since the lender Helvetica has been trying to secure a deficiency judgment against him personally for the significant balance still owed after the foreclosure sale.

The legal issues, and there have been many, revolve around what type of loan qualifies for anti-deficiency protection. Arizona's anti-deficiency statutes in A.R.S. §§ 33-729(A); 33-814(G) protect residential borrowers from being subject to a deficiency judgment in the event that they default on the loan, as long as the loan is secured by a residential property of "(1) a property of two-and-a-half acres or less and (2) "limited to and utilized for either a single one-family or a single two-family dwelling." The Helvetica line of cases has gone a long way in fleshing out what loans can qualify. In the first Court of Appeals decision, which the Arizona Supreme Court confirmed in Helvetica V, loans used to construct a residence by an individual ("construction loans") were brought under the umbrella of anti-deficiency protection. But what pushed this case to the Arizona Supreme Court was a need to explain the difference between a construction loan and a home improvement loan. That is where the Court of Appeals in Helvetica IV erred.

The Court of Appeals declared that a construction loan only qualified for anti-deficiency protection if the house was "built from scratch." That relied on an old Arizona Supreme Court case, Sw. Sav. & Loan Ass'n v. Ludi, which mentioned only that home improvement loans did not qualify for the protection, but never described what a home improvement loan was. Sw. Sav. & Loan Ass'n v. Ludi, 122 Ariz. 226, 228, 594 P.2d 92, 94 (1979). What the Court of Appeals overlooked was that the determination of an individual loan's character is a factual determination for a trial court. The legal principle was already sufficiently established: construction loans gain protection, home improvement loans do not. There was no need to create a new standard that changed the essential character of a construction loan. Additionally, the "built from scratch" standard used by the Court of Appeals in Helvetica IV would have cut off a significant number of homeowners who would have otherwise qualified for anti-deficiency protection, based on the statute's intent, which "reflects a legislative policy decision to place the risk of inadequate security on lenders rather than borrowers."

But without a bright-line rule, the Arizona Supreme Court needed to provide guidance on what parties and judges should look to when characterizing a loan. As the Court noted, "there is a substantial grey area between a loan used to finance a newly constructed, built from scratch home and a loan used to remodel the kitchen." Enter the totality of circumstances test. The Arizona Supreme Court laid out five non-exclusive factors to differentiate a construction loan from a home improvement loan: "(1) whether there was a complete or substantially complete demolition of an existing structure and a new building constructed in its place; (2) the intent of the parties when executing the loan documents; (3) whether the structure was inhabitable or inhabited during construction; (4) whether the structure was largely preserved and improved or substantially expanded; and (5) whether the project is characterized as "home improvement" or "construction" in the loan documents and in the permits or other official documents."

Ultimately, the Court remanded the case to the trial court to rule on these factors. The takeaway for lenders and borrowers, is that the character of the loan matters. Both parties should be as clear as possible throughout the lending and construction process to define whether the loan is being used for a complete remodel, which would be protected under the anti-deficiency statute, and a simple home improvement loan, which is not protected in the event of default.

If you are a lender or a borrower facing issues involving judicial or non-judicial foreclosure, deficiency judgments, home improvement or construction loans, the Attorneys at Provident Law® are here to help. We are experienced in all aspects of financing and real estate transactions, from purchase contracts, mortgages, deeds of trust, to non-judicial and judicial foreclosures. Contact Ms. Courchaine today at a.courchaine@providentlawyers.com.

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ARIZONA REALTORS®

Legislative Policy Successes for 2020

SHIELDED against efforts to deteriorate the real estate licensing model.

EASED tenant record retainment requirements for property management firms.

ENSURED that Real Estate professions were designated an Essential Service.

PASSED preemption legislation to protect private property owners right to utility options.

ACCELERATED access to remote online notary.

CHAMPIONED legislation that allows an electronic signature to be used to sign a document that is submitted to the Department of Revenue.

FOUGHT to establish and fund the $5M Rental Property Owner Preservation Fund (RPOPF).

SUPREME COURT UPHOLDS INTENT OF PROPOSITION 126

In 2018, the Arizona REALTORS® drafted and ran Proposition 126, "The Protect Arizona Taxpayers Act," which was overwhelmingly approved by the voters. Pursuant to the Proposition, Article 9, Section 25 of the Arizona Constitution was amended to prohibit the state, cities and towns from imposing or increasing transaction-based taxes and fees on the privilege to engage in services performed in this state.

The constitutional amendment itself has a broad application, protecting consumers and small businesses across numerous industries from having to pay new and increased taxes on everyday services like childcare, doctor visits, and home repairs. Included in this list are real estate services performed by REALTORS® and other professionals within the real estate industry.

Without the protections afforded by Proposition 126, a sales tax on real estate related services would likely reduce the demand for housing by effectively increasing the cost of purchasing a home and could have discouraged buyers and sellers from using a REALTOR® based on the added expense that would result from a tax on their services.

While passing Proposition 126 was therefore of great importance, so too is ensuring that the law is upheld and judicially enforced when appropriate. It is for this reason that the Arizona REALTORS® filed an amicus curiae brief [1] with the Arizona Supreme Court in the case of State of Arizona v. City of Phoenix, No. CV-20-0019-SA.

In this litigation, the Court was asked to decide whether new and increased "trip fees" imposed by the City of Phoenix on commercial ground transportation vehicles (i.e. Uber and Lyft) that transport passengers to and from Sky Harbor Airport are prohibited by the language inserted in the Arizona Constitution

via Proposition 126. Although the Court held that such new and increased trip fees are constitutional, the Court's August 3, 2020 decision proves very beneficial to REALTORS®.

The key issue for the Court was whether the "trip fees" the City of Phoenix sought to charge are "transaction-based" as that term is used in Section 25 of the Arizona Constitution. As a part of its analysis, the Court defined a "transaction-based" fee as one "based on consumer spending for delivered goods or services." The Court went on to specify that these types of taxes are calculated based on consumer spending in commercial dealings with persons engaged in a business or occupation.

Using the above definition, the Court concluded that the proposed "trip fees" are not based on the transaction between providers and passengers but are instead based on the commercial vehicle's use of Airport property. In other words, the City's fee is not based on a passenger's payment to the company providing their ride, which means it is not a "transaction-based" charge and is therefore constitutional.

So, what does this decision mean for REALTORS® practicing in Arizona?

Very clearly, a commission charged by a REALTOR® is based on a transaction between a provider of services and the party receiving the benefit of those services. A tax charged on a real estate commission would therefore be based on a consumer purchasing services within the scope of a commercial dealing and thus prohibited as intended by Proposition 126.

In other words, the Court's decision convincingly supports the proposition that REALTOR® services are "transaction-based," meaning that Proposition 126 should protect REALTORS® and consumers precisely as envisioned.

State of Arizona v. City of Phoenix represents the first time that the new law created by Proposition 126 has been analyzed, or even considered, by the Arizona Supreme Court. While future cases may provide further guidance, the precedent set by the Court in this case is overwhelmingly positive for REALTORS® and a reflection of all the time and hard work that went into passing Proposition 126.

[1] An amicus curiae brief, which translates to "friend of the court," is a brief filed by a person or entity interested in influencing the outcome of a lawsuit but is not a party to the suit.

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¿Pueden Tus Clientes Leer Esto?

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/**.

STEPS TO INCREASED WEBSITE ACCESSIBILITY

REALTORS® throughout Arizona are working to make their websites more accessible to those with disabilities.

In some instances, this step is taken in response to threats of litigation alleging that the real estate professional's website violates the civil rights of individuals with disabilities. But more commonly, REALTORS® are taking this step because they deem it morally proper.

Additionally, web accessibility increases the available audience and, in turn, a REALTOR's® potential customer base. The lack of federal regulations governing website accessibility has made it difficult for REALTORS® to ascertain precisely what an accessible website should look like. But that should not stop REALTORS® from helping those with disabilities perceive, understand, navigate, and interact with the web. With that in mind, there are a number of steps REALTORS® can take to increase website accessibility.

Many people with disabilities use assistive technology to help them navigate the web. This includes the use of screen readers, text enlargement software, and refreshable Braille displays that translate the text on the web page into Braille symbols (small plastic or metal pins that move up and down to display the Braille character). To optimize your site for these adaptive tools, below are some key principals of accessible design that can be implemented relatively easily and without impacting the overall "look and feel" of your website.

Text Equivalents

Because assistive technologies cannot interpret photographs, charts or other graphic information, adding a line of H.T.M.L. code to provide text for each image will enable a sight disabled user to understand the content being displayed. Such descriptions, called "ALT" text, should provide a text equivalent of the visual, thereby enabling screen readers to interpret the images for those with disabilities.

Subtitles and Audio Descriptions

If your web content includes videos, consider the use of video transcription to get subtitles or captions to assist those users with hearing disabilities. Popular video hosting sites such as YouTube offer tools that allow users to add subtitles to their clips. Similarly, audio descriptions of images can help make videos accessible to individuals who are blind or have low vision.

Text-Based Documents

P.D.F. documents and related image-based formats are often inaccessible to disabled users as they typically integrate poorly with screen readers and text enlargement programs. In addition to PDFs, documents should, therefore, be provided in alternative H.T.M.L. web pages. If this is not possible, provide a series of tags to accompany the P.D.F., which provide a hidden structured, textual representation of the P.D.F. content that is presented to screen readers.

Color and Font Control

Often times, disabled users need to manipulate color and font settings in order to make pages readable. As far as possible, do not "hard code" colors and ensure that the site can be viewed with the color and font sizes set in a user's web browsers and operating systems. If the site is designed to prohibit changing the color and font settings, users with low vision may struggle to absorb the content. It is also advisable to use highly contrasting colors for text and background. Certain color combinations are extremely difficult to distinguish for people with poor eyesight. Generally speaking, black or dark-colored text on a white background is the best practice because it is readable for most audiences.

Skip to Main Content Link

A typical website includes a variety of navigational links on each page. In fact, the main content is not usually the first thing on a web page. Unfortunately, this means that keyboard and screen reader users must navigate a long list of navigation links, sub-lists of links, icons, site searches and other elements before they are able to access the main content. Without a mechanism for bypassing these links, disabled users are unable to navigate the site in an efficient manner. By placing a "skip to main content link" at the top of each page, this problem can be avoided.

Periods in Abbreviations

Screen readers attempt to phonetically pronounce acronyms if the letters are not separated by periods. For example, the acronym "URL" will be read by a screen reader as "earl" if not written as "U.R.L." Sites should, therefore, distinguish acronyms by the use of periods.

Descriptive Links

Some screen readers allow users to read only the links on a webpage. Therefore, every link should make sense in the abstract, meaning even if the link text is read by itself, the user will understand the content. Link phrases like "click here," when read independent of context, will prove meaningless to a user relying on a screen reader. When embedding a link in a post, it is therefore far more useful to describe the link.

For example, "check out Arizona REALTORS® Bylaws" is better than writing "to check out Arizona REALTORS® Bylaws click here."

This list is certainly not exhaustive and REALTORS® should consult with web developers to better understand Web Content Accessibility Guidelines 2.0, which is a series of guidelines created by the World Wide Web Consortium for improving web accessibility. However, by addressing these basic principles, REALTORS® can increase accessibility to their website and avoid excluding a segment of the population that may want to retain their services.

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Excerpt from Pearl Insurance newsletter the E&O Risk Manager. Permission to republish courtesy of Pearl Insurance.

JUNE 2020

E&O RISK MANAGER

HELPING REAL ESTATE PROFESSIONALS REDUCE THEIR CLAIM EXPOSURES

IS YOUR REALTY WEBSITE ACCESSIBLE TO EVERYONE?

It is common to think about accessibility in terms of physical spaces, and most likely your realty office can accommodate clients with a disability. The Americans with Disabilities Act of 1990 (ADA), a civil rights law that prevents discrimination against individuals with disabilities, mandates such accommodations. A disability under the law is defined as a physical or mental impairment that substantially limits one or more major life activities such as seeing, hearing, speaking, breathing, and working, among other activities. With over 8.1 million people who are visually impaired and 2 million people who are legally blind according to the U.S. Census Bureau, the law covers more than brick and mortar.

The following is a real-world scenario for real estate professionals to consider regarding the risk of claims due to website ADA non-compliance. With a 131% increase in non-compliant website filings in the first quarter of 2019 alone according to the National Association of REALTORS®, the risk of a claim is very real.

SITUATION

A real estate professional receives an email from an attorney stating their realty website violates ADA compliance guidelines. A demand letter threatening litigation is attached as well as a copy of a formal complaint which is not yet filed. In the email, the attorney requests a phone interview with the real estate professional to discuss existing violations.

PROBLEM

The ADA guidelines are clear that websites should be fully usable by people with disabilities, especially by those using assistive technology like screen readers. Violations are subject to federal and state Fair Housing Act (FHA) claims. Inaccessible websites are preventing the disabled from accessing the information they need to apply for jobs, shop, as well as secure housing. All National Association of REALTORS® (NAR) members' and state association websites need to provide accessibility options for the disabled. Learn more from NAR.

MISTAKE

A real estate professional should never agree to a phone interview or meet with anyone alleging a violation of the law without legal counsel present. If a real estate professional receives such a letter or email, the first step is to contact their attorney and insurance broker. Secondly, they should contact the National Association of Realtors® and their state association's attorney. Deciding whether to fight a demand or settle a claim is a legal decision.

RESULT

If a real estate professional gives a phone interview with an ADA representative without legal representation it could drastically affect the defense of the ADA complaint. This scenario could also increase the risk exposure to the real estate professional.

PREVENTION

Real estate professionals nationwide continue to receive notices of website non-compliance. Though it does not appear these complaints are being filed in federal court at this point, the demand letters threaten litigation. It is recommended real estate professionals push for a face-to-face interview with the opposing attorney with their own defense counsel present. In addition, they should notify their website administrator of the alleged violation(s). Confirmation from their website administrator that the stated violations are being corrected should be obtained, especially since some websites are leased. The bottom line is websites, particularly in the service industry, should be usable by persons with disabilities.

To be proactive in updating your website and protect your business from possible claims, contact your website administrator or hire an IT expert to audit your website and suggest accessibility improvements which may include voice overs and closed captioning, adaptive software, and specialized browsers. There are also numerous third-party solutions that can address specific issues such as text and cursor size, font type, contrast ratio, and keyboard integration through widgets. Read more about accessibility and available website resources.

People with disabilities should be treated as equal under the law. Whether that's access to physical spaces or information and opportunities, it is a responsibility all of us should take seriously.

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CONTRACT CONVERSATIONS

Have a quick question about the AAR Residential Resale Purchase Contract, the Buyer's Inspection Notice & Seller's Response (BINSR) and other AAR forms? Need information when you want it? Answers are just a click away!

Contract Conversations is a video series designed to provide a quick walk-through of the common AAR contracts and related forms. Each contract or form will feature a different broker/manager breaking down the form (or sections) for quick absorption.

Sally Ireland and Arizona REALTORS® Assistant CEO and General Counsel Scott Drucker, discuss the HOA Addendum and highlight specific areas of the contract to be especially careful with in this special two-part edition.

Don't Let Your Sellers be Fooled by an Amendatory/Escape Clause

The Federal Housing Administration (FHA) and Department of Veterans Affairs (VA) require that buyers and sellers sign specific disclosure forms to protect buyers who utilize FHA or VA financing. More specifically, the FHA requires use of the Amendatory Clause and the VA requires use of the Escape Clause.

Although the entities title the disclosure forms differently, the verbiage is virtually the same and therefore one may see the form titled "Amendatory/Escape Clause" or something similar. The disclosure verbiage resembles the following:
It is expressly agreed that notwithstanding any other provisions of this contract, the purchaser shall not be obligated to complete the purchase of the property described herein or to incur any penalty by forfeiture of earnest money deposits or otherwise unless the purchaser has been given in accordance with HUD/FHA or VA requirements a written statement by the Federal Housing Commissioner, Department of Veterans Affairs, or a Direct Endorsement lender setting forth the appraised value of the property of not less than $_____. The purchaser shall have the privilege and option of proceeding with consummation of the contract without regard to the amount of the appraised valuation. The appraised valuation is arrived at to determine the maximum mortgage the Department of Housing and Urban Development will insure. HUD does not warrant the value or the condition of the property. The purchaser should satisfy himself/herself that the price and condition of the property are acceptable.

The reason the FHA and VA require the Amendatory/Escape Clause is to protect the buyer against a low appraisal. In other words, if the appraised value is lower than the agreed upon purchase price, the seller cannot require the buyer to purchase the home. Furthermore, if the appraised value is low and the buyer thereafter cancels the purchase contract, the buyer will be awarded their earnest money deposit, if any. Of course, this does not preclude the parties from renegotiating the purchase price or having the buyer pay out-of-pocket the difference between the appraised value and purchase price.

REALTORS® Role

Although REALTORS® are not lenders, these types of loans require REALTORS® to understand certain requirements within the loan program so that the REALTOR® may effectively protect their client.

In a competitive market, there may be instances in which the FHA or VA buyer decides to make their purchase offer stronger by choosing to:

Waive the appraisal contingency;

Agree to deposit non-fundable earnest money with the offer; or

Allow the earnest money deposit to become non-refundable before the appraisal is returned.

Typically, the above provisions provide the seller with additional reassurances because the seller will not have to worry about whether the home will appraise and the seller will be able to keep the earnest money deposit if the appraised value is less than the purchase price and the transaction is thereafter cancelled. However, because the Amendatory/Escape Clause provides extra protection to the FHA and VA buyer, if the property does not appraise, the FHA or VA buyer is allowed to cancel the transaction and receive a refund of their earnest money deposit regardless if the buyer agreed to any of the above terms. In other words, even if an FHA or VA buyer included any of the above terms in their contract, if the property does not appraise for the agreed upon purchase price, the buyer may cancel the contract and receive a refund of their earnest money deposit.

Unfortunately, many sellers and listing agents misunderstand this process and believe that when a buyer waives the appraisal contingency in conjunction with an FHA or VA Loan, the seller will receive the earnest money deposit should the buyer choose to cancel if the home fails to appraise. This is not the case and, regardless of the appraisal contingency waiver in the purchase contract, the earnest money will be returned to the buyer.

Lender's Role

FHA and VA loans are government insured loans. This means that if the borrower defaults on the loan, the lender is guaranteed reimbursement. However, for the lender's loan to be guaranteed, the lenders' guidelines provide that the lender must ensure the Amendatory/Escape Clause is signed by the seller and buyer and included with the transactional documents. Accordingly, lenders will generate the form and supply it to the parties for their signature.

Because a seller may not understand the extra protections provided to an FHA or VA buyer, the listing agent should familiarize themselves with the Amendatory/Escape Clause so that they can educate and manage the expectations of their client.

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

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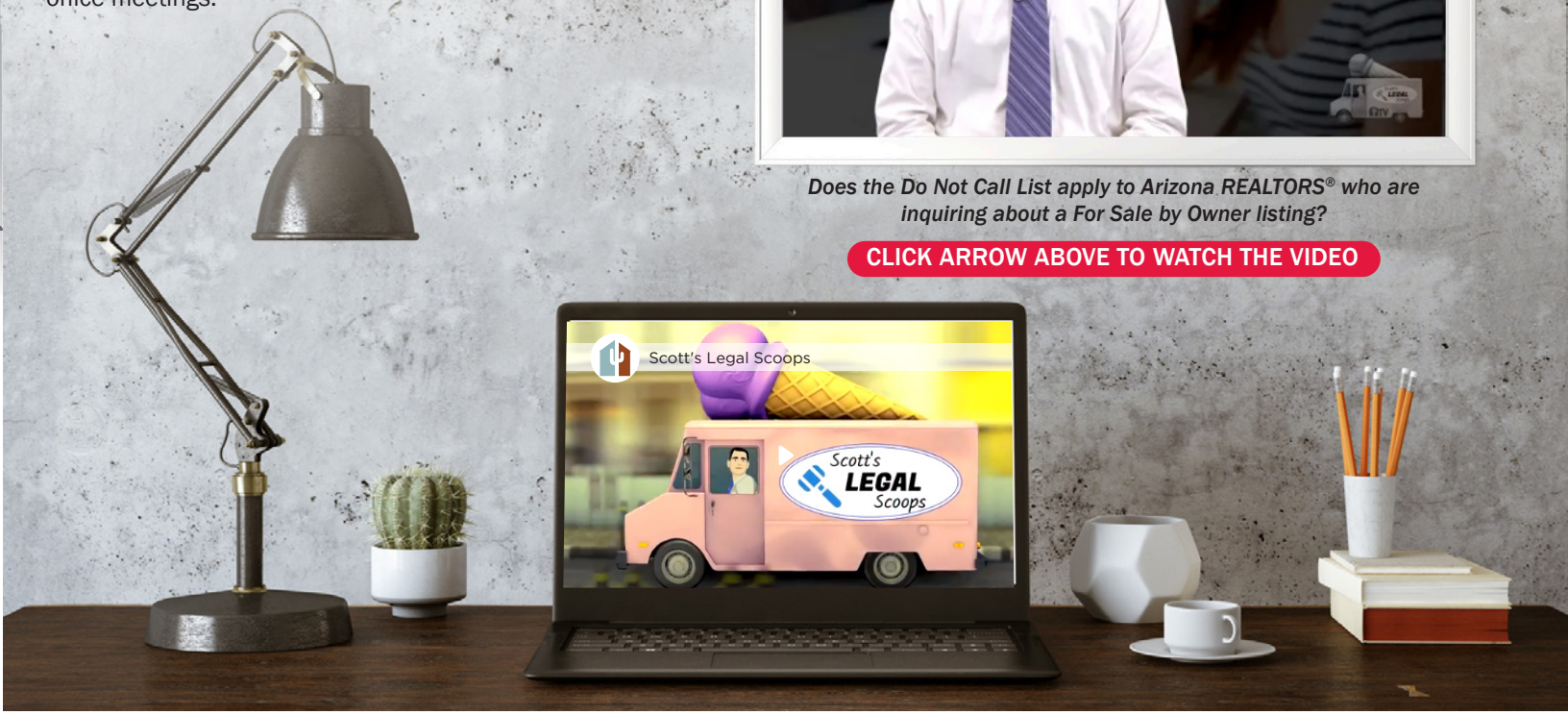

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Q&As are not "black and white," so experienced attorneys and brokers may disagree. Agents are advised to talk to their brokers/managers when they have questions.

Out of State Broker May Not List Property For Sale

FACTS: An agent licensed in California apparently accepted a listing from a seller and placed a for sale sign in the yard of the property. The for sale sign identifies the out-of-state broker's name, brokerage firm, and a California telephone number. The California agent does not hold a license in the state of Arizona but claims that under Arizona reciprocity laws she can list the property for sale.

ISSUE: May a broker not licensed in the state of Arizona list an Arizona property for sale?

ANSWER: No.

DISCUSSION: A.R.S. § 32-2163(E) precludes an out-of-state broker from listing, marketing or advertising real property in the state of Arizona. The California broker's listing agreement and for sale sign therefore violate Arizona law since she is not in possession of an Arizona real estate license.

Final Acceptance of Multiple Counter Offers

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

The listing agent and seller failed to realize that a seller's signature box was auto-populated throughout the Multiple Counter Offer wherever the seller could sign. The seller signed the Multiple County Offer electronically, including the signature line on page two, under the "Seller Final Acceptance" section.

The listing agent then sent the Multiple Counter Offer to two (2) different buyers. Now, both buyers are claiming they have an accepted contract because the seller signed page two, indicating seller gave Final Acceptance.

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

ANSWER: Probably not.

DISCUSSION: If one party is operating under a mistake of fact when it signs an agreement, the agreement is voidable if the other party knew or should have known that the first party was mistaken (*Parrish v. United Bank*, 164 Ariz. 18, 20, 790 P.2d 304, 306 (App. 1990).

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

Lack of Affidavit of Disclosure Does Not Give Buyer Right to Rescind after Closing

ISSUE: One month ago, a buyer closed on the purchase of a lot in an unincorporated area of the county. The lot was not a subdivided lot. The seller failed to furnish to the buyer an affidavit of disclosure, and no affidavit of disclosure was recorded, as required by A.R.S. § 33-422. The buyer has now discovered significant problems with the lot that may prevent construction of a new home on the lot. Can the buyer rescind the transaction after closing because the buyer was not furnished an affidavit of disclosure?

ANSWER: No. Although an affidavit of disclosure was not received by the buyer and recorded prior to closing, the buyer has no right to rescind the contract after closing. *See Verma v. Stuhr,223 Ariz. 144, 221 P.3d 23 (App.2009)*. The buyer, however, still would have a claim against the seller for damages for the seller's failure to disclose any material and adverse fact relating to the lot. For example, if the seller

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knew of an expansive soils problem and failed to disclose the expansive soils problem, the buyer would have a claim against the seller for damages even though there was no affidavit of disclosure.

Buyer Cannot Use BINSR to Offer to Amend a Contract

FACTS: During the inspection period, the buyer submits a Buyer's Inspection Notice and Sellers' Response ("BINSR") to the seller requesting the repair of three items, and also requests that the seller provide a geological survey at the seller's cost to determine the cause of a crack in the foundation. In the seller's response, the seller agreed to repair the three items, but refused to provide a geological survey.

ISSUE: Can the buyer cancel the contract because the seller only agreed to repair the three items, but refused to provide a geological survey?

ANSWER: No. Under Section 6i of the Contract, the buyer is required during the inspection period to deliver to the seller notice of the "items disapproved," and the buyer can then either cancel the Contract or provide the seller an opportunity to correct the items disapproved. The demand for a geological survey is not the disapproval of any item, but an offer to amend the Contract. The seller is entitled to reject this offer to amend the Contract by not agreeing to furnish a geological survey. Therefore, inasmuch as the seller agreed to repair the three items disapproved by the buyer, the buyer has no right to cancel the Contract.

Note: The AAR Addendum form, and not the BINSR, should be used if either the seller or the buyer wants to amend the Contract.

Request for Credit Still Improper Through a BINSR

FACTS: The Buyer and Seller executed the AAR February 2017 Residential Purchase Contract. During the Inspection Period, the Buyer provided a BINSR to the Seller. In the BINSR, the Buyer asked for repairs *and* a $1,200.00 credit to install a gas stub to an outdoor fire pit that the Seller had agreed to leave behind as personal property.

The Seller said yes to all repairs, but said no to the credit.

The Buyer now wants to cancel the Contract.

ISSUE: Can a Buyer cancel the Contract if the Seller refuses to provide a credit requested on the BINSR?

ANSWER: No.

DISCUSSION: The February 2017 Contract states in Section 6i that "Prior to expiration of the Inspection Period, Buyer shall deliver to Seller a signed notice *of any items disapproved*. AAR's Buyer's Inspection Notice and Seller's Response form is available for this purpose."

Section 6j states the Buyer may disapprove of items and cancel the Contract immediately or provide the Seller an opportunity to correct the items disapproved.

In this instance, the $1,200.00 credit was an offer to amend the Contract, which the Seller did not accept.

Therefore, the Buyer cannot cancel and recover the earnest money based on the Seller declining Buyer's request for a credit.

"Double escrows" must be disclosed

ISSUE: The seller and buyer #1 signed a contract for the sale of ten acres of land. Escrow was opened. Buyer #1 then signed a contract to sell the same ten acres of land to buyer #2. Escrow was opened with the same closing date as the first transaction ("double escrow"). Buyer #2 was unaware of the first transaction. Did buyer #1 and any brokers involved in the transaction have the obligation to disclose to buyer #2 the first escrow?

ANSWER: Yes. Any seller of real property, including buyer #1 on the sale to buyer #2, must disclose to a buyer any fact relating to the potential inability to close the transaction. *See Lombardo v. Albu*, 199 Ariz. 97, 14 P.3d 288 (2000). Buyer #1 may not be able to close on the sale to Buyer #2 if Buyer #1 is unable to close the purchase from the seller. If a principal such as buyer #1 has this obligation of disclosure, under the *Lombardo* decision the principal's broker has the same obligation of disclosure. In addition, under the Commissioner's Rules any broker involved in a transaction has the obligation of disclosure. A.A.C. R4-28-1101(A) and (B)(1).

Transfer of Ownership into an LLC May Affect Your Title Insurance

FACTS: John Smith, a single man, purchased a property as his sole and separate property. After close of escrow, John Smith formed an LLC for tax purposes. John Smith then transferred ownership of the property by executing a Quit Claim Deed from himself to his LLC.

ISSUE: Is the title insurance policy affected when an individual transfers his property into an LLC?

ANSWER: Probably.

DISCUSSION: An LLC is a legal person, therefore, the property is now owned by the LLC, not John Smith. Therefore, John Smith would no longer have title insurance on the property unless he paid for an additional insured endorsement.

Best business practice tip: If an individual is transferring ownership of a property into an LLC, or other entity, he/she should consult with a title company for information on obtaining an additional insured endorsement.

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Multiple Counter-Offer Does Not Cancel Negotiations

FACTS: A Seller receives an offer from Buyers A, B, and C. Seller sends a Multiple Counter-Offer (Counter-Offer #1) to Buyers A, B, and C.

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

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

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

The Seller now wishes to proceed with Buyer B, but does not want to sign line 43 of the Multiple Counter-Offer because the language on lines 40-42 reads in part:
"Seller revokes all other counter offers by separate notice and agrees to sell the Premises to the Buyer subject to the terms and conditions contained herein."

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

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

ANSWER: Yes.

DISCUSSION: The Seller must remember lines 7-11 of the Multiple Counter-Offer state:
Acceptance of this Multiple Counter Offer by Buyer shall not be binding unless and until it is subsequently finally accepted by Seller and the final acceptance is delivered per Section 8m of the Contract to the Buyer's Broker within the time specified ("Final Acceptance"). Until Final Acceptance, the parties understand that the Premises can be sold to someone else and/or either party may withdraw any offer/counter offer to buy or sell the Premises.

Lines 40-42 of the Multiple Counter-Offer refer to the negotiations between Seller and Buyers A and C. Therefore, Seller should sign line 43 and deliver the executed document to Buyer B.

Additionally, the Seller should send written notice to Buyers A and C that the Seller is withdrawing the Counter-offer and will not enter into a contract with them.

Known HOA Violations Must be Disclosed

FACTS: A seller enters into an Exclusive Right to Sell contract with her broker. While filling out the listing paperwork to sell her home, the seller tells the broker that the HOA does not allow homeowners to rent their properties for periods less than 30 days. However, the seller knows that multiple residents do lease their properties out as short-term rentals for less than 30 days.

ISSUE: Should the seller disclose that the HOA does not allow short-term rentals in the community, but that the seller is aware that the rule is frequently violated?

ANSWER:
Yes.

DISCUSSION: A seller must disclose known material facts. *See Hill v. Jones*, 151 Ariz. 81, 85, 725 P.2d 1115, 1119 (App. 1986). A fact is material if it is one to which a reasonable buyer would attach importance in making a decision as to the consideration to be paid for the property. *Id.* Because the CC&Rs' restriction on rentals is arguably a material fact, the seller should make the disclosure.

Buyer May Cancel Certain Transactions if Property is Purchased Sight Unseen

FACTS: Client currently resides out of the county but is interested in purchasing a vacant land parcel. The prospective purchaser is considering buying the parcel sight unseen.

ISSUE: Would the prospective buyer have a six-month rescission right as a result of purchasing the property sight unseen?

ANSWER: See Discussion.

DISCUSSION: If the parcel at issue is either: (1) an unimproved subdivided lot, or (2) "unsubdivided lands", as those terms are defined by statute, a buyer who purchases the property sight unseen may inspect the property and unilaterally rescind the sale within six months after the date of the purchase contract. See A.R.S. § 32-2195.04(E) (applicable to unsubdivided lands), A.R.S. § 32-2185.01(E) (applicable to unimproved subdivided lots or parcels).

Please note that not all vacant parcels qualify as unimproved subdivided lots or unsubdivided lands.

The AAR Vacant Land/Lot Purchase Contract Addendum Regarding Subdivided or Unsubdivided Land (08/07) outlines the buyer recession right at lines 20-26.

ABOUT THE AUTHOR

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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.

Window to the Law: How to Handle Multiple Offers

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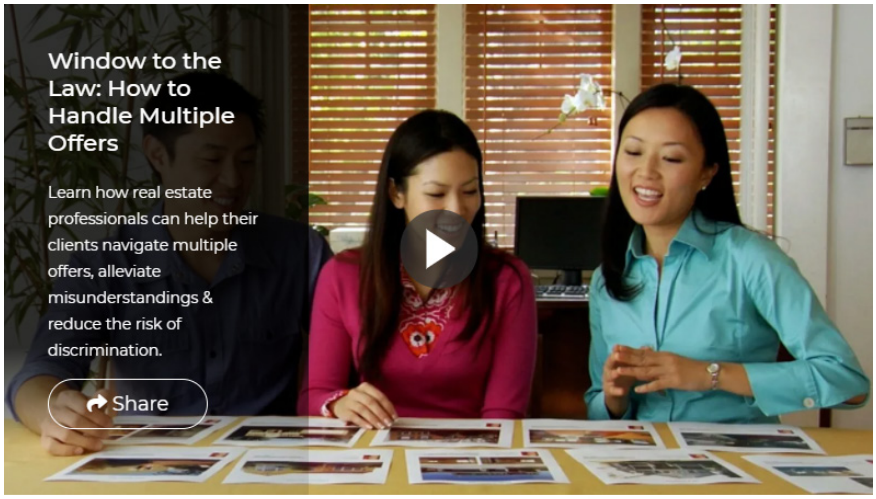

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