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REALTORS®**



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THIRD QUARTER 2021 | ARIZONA REALTORS® BROKER/MANAGER QUARTERLY

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June 2021:

New content was inserted on page 3, under Purchase Contract topic concerning Contingency Waivers.



ARIZONA ASSOCIATION OF REALTORS®

Buyer Advisory



ARIZONA
association of
REALTORS®

REAL SOLUTIONS. REALTOR® SUCCESS.



EQUAL HOUSING
OPPORTUNITY



REALTOR®

DOCUMENT UPDATED:
JUNE 2021

CONTINGENCY WAIVERS

The Purchase Contract contains numerous contingencies, including, but not limited to, the loan contingency, the inspection contingency, and the appraisal contingency. Should a buyer elect to waive any such contingencies in conjunction with their purchase offer, adverse consequences may result that place buyer at risk of losing their Earnest Money or incurring monetary damages if buyer decides not to purchase the property after their offer is accepted. Before offering to waive any contractual contingencies, buyers should weigh the risks and consult with independent legal counsel. 🏠

AIR CRE contracts



ARIZONA REALTORS® & AIR CRE CONTRACTS

MEMBER BENEFIT: COMMERCIAL FORMS


Designed by CRE experts and written to be completely party-neutral, AIR CRE Contracts provide you with customizable templates to close your deal legally, efficiently, and cost-effectively.

The application includes 50+ of the most commonly used commercial real estate contracts, including Purchase and Sale, and Lease agreements. Our contracts are regularly reviewed to account for changes in real estate laws, so they are always up to date with state-specific regulations. AIR CRE Contracts provide you with the most streamlined way to close a deal.

The AIR CRE Contracts for Arizona have recently been updated and are now available to all Members of Arizona REALTORS®. This constitutes a major update to both the content of the contracts, as well as the software platform, so anyone wanting to access the new contracts will need to register and download the new software.

Learn More / [Download Software Platform](#)

As a partner of AIR CRE, AAR Members receive a significant discount off the regular price of the software.

Click to learn more and get the software AAR.AIRCRecontracts.com 



SUBDIVIDED OR UNSUBDIVIDED? THE IMPORTANCE OF GETTING IT RIGHT

REALTORS® throughout Arizona are familiar with the Affidavit of Disclosure as set forth in [A.R.S. § 33-422](#). However, confusion exists as to if and when a seller is obligated to convey the Affidavit and, more specifically, whether the subject property is or is not subdivided land. Fortunately, there are tools in place to assist in this regard and the below Frequently Asked Questions provide information to help REALTORS® navigate this process.

Q1: When is an Affidavit of Disclosure required?

A1: A.R.S. § 33-422(A) provides that a seller of five or fewer parcels of land, **other than subdivided land**, in an unincorporated area of a county must furnish a written Affidavit of Disclosure to the buyer, at least seven days before the transfer of the property, and the buyer shall acknowledge receipt. Simply put, a seller is required to provide an Affidavit of Disclosure in accordance with Arizona law if: (i) the seller is selling five or fewer parcels, (ii) the parcels are not subdivided land, and (iii) the parcels are located in an unincorporated area of the county.

Q2: When does a subdivided parcel of land become legally established?

A2: The Arizona Supreme Court held in the case of *Robinson v. Lintz*, 101 Ariz. 448, 420 P.2d 923 (1966) that a subdivision lot becomes legally established when a plat containing it is recorded. The Court stated, “We find that, in the absence of any express statutory requirements, as soon as a plat is properly recorded, the lots therein become ‘legally established’ within the meaning of both the zoning ordinance and common understanding.” *Id.*

Q3: What is a “recorded plat”?

A3: A recorded plat refers to a final plat bearing all of the certificates of approval as required by statute and any local ordinance. And, as the title suggests, the document itself is recorded with the appropriate County Recorder’s Office. While some believe that a survey map is akin to a recorded plat, that is not the case, and a recorded survey map does not establish that the subject property has in fact been legally subdivided.

Q4: Do all properties purporting to be a subdivision actually contain legally subdivided parcels?

A4: No. Simply because a piece of property is located within “ABC Subdivision” does not guarantee that a recorded plat exists.

Names and titles can be misleading and should not be exclusively relied on. Rather, it is the existence of a recorded plat that is dispositive.

Q5: Should the “Find Development” tool on the Arizona Department of Real Estate’s website be used to conclusively determine the existence of a legal subdivision?

A5: It is not uncommon for REALTORS® and members of the public to utilize the Arizona Department of Real Estate (ADRE) website in an effort to determine the existence of a subdivision, and in turn, whether an Affidavit of Disclosure is required pursuant to A.R.S. § 33-422.

However, the Department’s website understandably states that “The Arizona Department of Real Estate attempts to maintain the highest accuracy of content; yet neither the ADRE, nor any agency, officer, or employee of the ADRE, warrants the accuracy, reliability or timeliness of any information published on this system.”

Furthermore, in addressing the accuracy and thoroughness of its public database, the Department has recently explained that “ADRE keeps records only for so long, it is entirely possible that something in the early ‘90s may no longer be available.” Consequently, the ADRE public database should not be used to definitively determine the existence of a legal subdivision.

Q6: How can someone verify whether a parcel has been legally subdivided?

A6: In light of the information contained in question 5 above, the ADRE recommends that “to verify if a parcel is in a subdivided or unsubdivided area you need to go to the county recorder’s [office].” REALTORS® and the public alike have access to publicly recorded documents and some county recorders allow recorded documents to be searched for and located on-line via their website. For example, documents publicly recorded in Maricopa County can be found using the Maricopa County Recorder’s Office website at <https://recorder.maricopa.gov/recdocdata/>.

Q7: Can title companies assist in this process?

A7: It is possible that some title companies can be of assistance, and it never hurts to ask. In fact, preliminary title reports generated in conjunction with the sale of unsubdivided land in unincorporated areas may

contain a legend stating that the property appears to be subject to A.R.S. § 33-422, meaning that an Affidavit of Disclosure must be furnished by the seller.

Q8: Regarding the Affidavit of Disclosure, what are the important timelines in the Arizona REALTORS® Residential Resale Real Estate Purchase Contract that must be adhered to?

A8: The Arizona REALTORS® Residential Resale Real Estate Purchase Contract requires seller to deliver a completed Affidavit of Disclosure in the form required by law to buyer within five days after contract acceptance. Buyer can then provide notice of any Affidavit of Disclosure items disapproved within the Inspection Period or five days after receipt of the Affidavit, whichever is later. Five days after contract acceptance is typically no later than seven days before close of escrow so the aforementioned contractual provision does not run afoul of the statute.

Q9: Is there a right of rescission associated with the conveyance of an Affidavit of Disclosure?

A9: Yes. A.R.S. § 33-422(D) states, “The buyer has the right to rescind the sales transaction for a period of five days after the affidavit of disclosure is furnished to the buyer.” NOTE – In the case *Verma v. Stuhr*, 223 Ariz. 144, 221 P.3d 23 (App. 2009), the Arizona Court of Appeals held that the buyer’s right to rescind does not survive close of escrow.

Q10: How is A.R.S. § 33-422 enforced?

A10: There is no express penalty or enforcement mechanism contained in the statute. However, a seller could have civil liability to the buyer for failure to furnish the Affidavit of Disclosure. REALTORS®, especially those representing sellers, should therefore never guess or make assumptions as to whether the subject property constitutes subdivided land. As previously mentioned, names and titles of developments can be misleading. Individuals that simply assume a parcel is subdivided and therefore choose not to convey an Affidavit of Disclosure put themselves at risk. 🙅

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

ABOUT THE AUTHOR



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IMPORTANT ANNOUNCEMENT REGARDING THE NATIONAL ASSOCIATION OF REALTORS® ZIPFORM® MEMBER BENEFIT:



At Arizona REALTORS®, we recognize the importance of our members' ability to utilize a reliable and efficient electronic forms program.

It is for this reason that **we provide Lone Wolf TransactionDesk forms platform and Authentisign electronic signing program as member benefits, free of charge.** TransactionDesk and Authentisign allow all Arizona REALTORS® to create forms and provide their clients the ability to legally sign an unlimited number of documents using a wide range of devices.

While TransactionDesk and Authentisign will remain free Arizona REALTORS® member benefits, **effective Saturday, January 1st, 2022, the National Association of REALTORS® (NAR) Lone Wolf Transactions zipForm Edition (zipForm) member benefit is scheduled to end.**

NAR's contract with zipForm is set to expire at the end of 2021 and, according to NAR, will not be renewed.

As a result, NAR will no longer provide zipForm as a free member benefit, meaning that it will convert to an optional, yearly subscription plan. For those who do not wish to subscribe to zipForm, it is recommended that they save any zipForm® transactions as a PDF or otherwise as users will lose access to the zipForm system on January 1, 2022. Arizona REALTORS® currently licenses its forms to zipForm, which enables zipForm users to access updated versions of the Association's forms. zipForm has expressed that it will continue with this licensing agreement in 2022, meaning that members purchasing zipForm will still have access to the Arizona REALTORS® most current forms.

In addition to TransactionDesk and zipForm, members can also access Arizona REALTORS® forms by purchasing subscriptions to other platforms such as Brokermint, DocuSign, dotloop, and SkySlope, with Jointly soon to be added to the list.

For pricing or additional information, zipForm support can be reached at (800) 383-9805. For information on NAR member benefits and their future plans for zipForm, REALTORS® can contact NAR at (800) 874-6500. [👉](#)

**MLS CONNECT, ZIPFORM MOBILE, AND ZIPFORM STANDARD ARE
AVAILABLE FOR PURCHASE FROM ZIPLOGIX ([click here to visit page](#))**

SCOTT'S LEGAL SCOOPS – VIDEO SERIES

Supported Living Service or Support Animal



Chimpanzees as support animals?
Scott serves up the scoop!

CLICK ARROW ABOVE TO WATCH THE VIDEO

While many confuse chimps with their primate cousins, what rules might apply to a chimpanzee or other exotic animal if a landlord discovers their tenant utilizes one as a support animal?

In times like these, we always turn to Arizona REALTORS® Assistant CEO and General Counsel Scott Drucker (who knew that chimps aren't monkeys) to remind us of the do's and don'ts related to service or support animals.



ANNOUNCING AN UPDATED AUTHENTISIGN



We're excited to announce an updated Authentisign. Starting on **July 6th**, Arizona REALTORS® members will have exclusive access to the new experience. Lone Wolf re-designed the entire app and introduced a new, modern look and feel—so you can complete your transactions faster than ever. Chose Authentisign 2.0 within the Authentisign platform to start using today.

Highlights you will love:

- Complete signings 60% faster with an all-new workflow
- Deliver a simple and intuitive signing experience to your clients
- Correct rejected signatures with new insights and signer feedback


[Click here](#) to learn more about what to expect in the New Authentisign.

What's new?

A simple, intuitive interface: all the tools you need in one place, easily drag, drop, delete and rotate pages, and more.

Faster than ever: the new framework, combined with a more efficient workflow, also allows you to complete signings in less than half the time. New signing templates allow you to save default annotation properties and create automatic signature blocks. Plus, with an active sync with Transactions (TransactionDesk Edition) you only have to enter contact information once.

New insights: Now you can quickly correct rejected signatures and have access into insights, so you know why a signature was not accepted.

For questions or additional information, please contact Arizona REALTORS® support at 480-304-8930 or support@aaronline.com. 



LONE WOLF
TECHNOLOGIES



Oppler Op-ed: Compensation Model, MLS' Are Pro-Consumer

National Association of REALTORS® President Charlie Oppler is promoting the real estate industry's compensation model and multiple listing service in a new [national op-ed](#), explaining their pro-consumer benefits after the U.S. Department of Justice reneged on its [settlement with the association](#).

As part of the agreement with the DOJ, which was struck last November, NAR committed to making certain changes in its Code of Ethics and MLS policies to further support market competition. However, the DOJ withdrew its consent to the agreement in an unprecedented move earlier this month, and NAR's mandatory policy changes are now on hold.

"Commissions for real estate agents and brokers are negotiable. Always have been. Always will be. Let's put that on the table right now," Oppler writes in the op-ed, which was published by leading industry publisher RISMedia on Monday. "It's the free market at work, and the reality is that the commission structure gives everyday Americans critical advantages they otherwise wouldn't get. That structure is what ultimately makes it possible for many people to realize the dream and benefits of homeownership."

Oppler also called the MLS the "envy of the free world," saying it offers a model of cooperation that bring transparency and equity, maximizing options for both buyers and sellers. 🏡

Navigating the Housing Market, Industry Disruptors, and the DOJ Reversal



Listen to Second Edition of the [Presidential Chat Series](#)



Audit



Compliance



Regulation



JULY 2021

Arizona Department of Real Estate Bulletin

Volume 2021 - Issue 2


What Are the Most Common Violations Found by the Auditing and Investigations Staff?

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IN GENERAL:

- Failure to perform documented broker review of transaction documents within ten (10) business days.
- Failure to maintain required transaction documents in the broker's file or failing to back-up electronic records.
- Advertising Violations – failure to clearly and prominently display the name of the employing broker and/or the name of the listing broker when advertising another broker's listing.
- Failure to account for and/or timely deposit earnest money in a broker trust account, or with escrow. This includes misrepresenting to the seller in a purchase contract that earnest money has been collected and will be timely deposited when such is not the case.
- Failure to make appropriate disclosures regarding owner/agent status, including being a member / manager of an entity buying or selling a property.
- Breach of fiduciary duty or being unfair to all parties to a transaction.
- Acting as a dual agent, as well as part of the buying entity, and placing the interests of the buyer over that of the seller.
- Licensees conducting real estate activities outside of their employment with their broker, and/or on behalf of an unlicensed entity.

FOR RESIDENTIAL PROPERTY MANAGEMENT:

- Trust account deficiencies.
- Trust accounts not in balance, i.e., unexplained overages.
- Failure to perform and/or maintain monthly trust account reconciliations in which the adjusted trust account bank balance is reconciled with the owner/tenant liabilities.
- Negative owner balances being used to offset broker liabilities.
- Trust accounts that are not clearly designated as such.
- Online banking websites inappropriately being used as "offsite storage" for banking information (monthly statements, canceled checks, etc.).
- Property Management Agreements that fail to contain all required clauses, most often disposition of interest and non-assignment clause.
- Automatic PMA renewal without written 30-day notice to property owners.
- General lack of understanding of accounting basics, the property management software being used and the requirements for a property management broker.
- Changing property management accounting software programs and failing to maintain a copy of the data. 



As an accomplished author and attorney in the real estate industry, not to mention more than twenty years leading the association, CEO of Arizona REALTORS® Michelle Lind always invites members to send her the burning questions they have but were afraid to ask!

Michelle share's a few of the questions she has received and responded to.

Q1 How can I find the date I must take my continuing education classes as I do not have a record of when I need to take them.

A1 Your license renewal application must be submitted to the Arizona Department of Real Estate (ADRE) every two years and in order to renew your license, you must have taken 24 hours of ADRE-approved Continuing Education (CE) courses and entered the course information in the ADRE licensing website at <https://ptl.az.gov/dre/#/login> prior to your license expiration/renewal date. Once you log in to the licensing site, select the option to record Continuing Education (CE) credits and enter the ADRE course numbers and dates of the CE classes you have taken.

Your CE may be entered online at any time after you take the CE class, there is no need to wait until it is time for your license renewal.

The classes you have taken during the last two years will also show on the ADRE Public Database website at <https://services.azre.gov/publicdatabase/> if you have entered the information.

Note: Of the 24 hours required for license renewal, you must obtain credit hours in each of the following subjects: 3 hours of Agency, Contract, Commissioner's Standard, Disclosure, Fair Housing Real Estate Legal Issues and 6 hours of general real estate or other courses in the mandatory category that are not identical.

For more information, go to: <https://azre.gov/faq#faq-each-qna-487>

Q2 The Residential Real Estate Contract has an area for a Seller to Reject offers. It has always been my practice to provide the Buyer's Agent with a copy of the Seller Rejected Contract. A year ago, I moved to a part of the state where the practice of returning Rejected Offers is not common practice. I was in a meeting with Commissioner Judy Lowe who said as that the Auditors are reviewing rejected offers, if a Buyer's Agent does not receive the Rejected Offer from the Listing Agent to keep a copy of an email requesting a copy. I was also in a class where the instructor said that the Seller was not required to initial the Rejected Area of the Contract. Can you provide some clarification on this issue?

A2 To help real estate licensees avoid allegations that an offer was not submitted to the seller or not provided in a timely manner, the Arizona REALTORS® added a box to the contract to prompt the seller to acknowledge that an offer was submitted and rejected on the date specified. The seller's initials evidence that both the listing broker and the buyer's broker complied with the Arizona Department of Real Estate (ADRE) Rules.

Additionally, to help clarify the ethical requirements within the Code of Ethics, Standard of Practice, the National Association of REALTORS® revised section 1-7 to require:

Upon the written request of a cooperating broker who submits an offer to the listing broker, the listing broker shall provide, as soon as practical, a written affirmation to the cooperating broker stating that the offer has been submitted to the seller/landlord, or a written notification that the seller/ landlord has waived the obligation to have the offer presented.

The rationale for this addition to the Code of Ethics is that it benefits the listing brokers by confirming their ethical duty to present offers consistent with the other provisions of Standard of Practice 1-7, and it benefits cooperating brokers by affording them written confirmation of offer presentation to provide to their buyers.

However, the instructor was correct that, generally speaking, a seller has no legal obligation to respond to an offer and the offer expires if not accepted by the deadline set forth in the Residential Purchase Contract.

By statute, real estate brokers must maintain copies of all rejected offers for a one-year period. See A.R.S. §32.2151.02(I). To comply with this statute, the buyer's broker must maintain a copy of the unaccepted offer they submitted on the buyer's behalf for a one-year period.

If the buyer's broker is unable to obtain the rejected offer initial by the seller, a buyer's broker may want to consider maintaining a copy of the request to the listing agent for the rejected offer with the seller's initials or a written affirmation from the listing agent that the offer was submitted and rejected to address any questions that may arise from the buyer, in an ADRE audit, or in a Professional Standards complaint.

Q3 Can a Buyer waive a contract contingency?

A3 Yes, if the contingency is solely intended for the Buyer's benefit. A contingency is a clause that requires the completion of a certain act before the parties are obligated to perform. However, the party benefited by the contingency may waive the contingency and close escrow. For example, a buyer who is unable to obtain a loan may waive the financing contingency and pay cash.

Q4 I have a Buyer that does not speak or read English. Is a contract enforceable against the buyer if he signs a purchase contract without being able to read it?

A4 Yes. The parties to a contract need not be literate or able to read the contract. The general rule is, absent misrepresentation, an illiterate or non-English speaking person who signs a contract without having the contract read to him cannot thereafter claim that he did not assent to its provisions. A buyer or seller who cannot read the contract due to an inability to read or an inability to read English should select his or her own translator.


Note: Spanish translations of the Arizona REALTORS® most often used forms in residential transactions are available at <https://www.aaronline.com/manage-risk/sample-forms/forms-spanish-translations/>. These translations are not to be used as transaction documents to be signed, only as companion translations to the AR forms.

Q5 The following two questions were combined: (1) Can the Arizona REALTORS® develop a transfer of brokerage form? (2) Is there an addendum to the purchase contract that is a trust advisory addendum?

A5 The Arizona REALTORS® maintains transaction forms produced by the Association that have been adopted for use by members statewide. We currently have 70+ forms with several additional forms in development. However, we do not currently offer either of the forms referenced in these questions.

So how does the Association decide what forms to develop? Several years ago, the Arizona REALTORS® Risk Management Committee streamlined the numerous requests we receive to draft new forms and revise existing forms. A Forms Request document was created to be completed and returned to General Counsel Scott Drucker or any other staff member. To obtain the Forms Request document, please send me an email at michellelind@aaronline.com.

Once we receive the completed form it will be evaluated by the Chair of the Risk Management Committee who decides whether to place the issue on the agenda for the next meeting or hold the suggestion until the next time the form is revised. If the issue is placed on the agenda, the completed paperwork is then provided to the Committee members who ultimately vote on the proposal.

If the form development/revision is approved by the Risk Management Committee, a work group will be formed to create a draft for approval by the Risk Management Committee and the Executive Committee. The importance of the Association's forms, including their content, is reflected in Arizona REALTORS® Policy: "The Executive Committee or Board of Directors shall approve all form content and format, new or revised, prior to printing. Prior to substantive revision of any existing form being printed, the revised form shall be circulated for comment from experts in the field, all local Boards, and any appropriate Institutes, Societies or Councils. New or revised forms shall be released on or about February 1, June 1, and October 1 unless law or regulation mandates earlier release." (AAR Policy Statements D.3) 

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

It's **YOUR**
Brokerage...

It's **YOUR**
Reputation...



They're
YOUR
Agents:

We've got you covered. We have resources you can use in your new agent onboarding and/or office meeting. **Check them out.**

The **Contract Conversation** video series provides a detailed look at the transaction contract and forms.

www.aaronline.com/Contract-Conversation

The **C2EX** program empowers REALTORS® to identify what they know and don't know through 11 online self-assessments to measure proficiency in 10 aspects of professionalism ranging from customer service to use of technology.

BONUS: brokers can customize the content!

www.c2ex.realtor

The **GRI** program covers the topics that prelicensing doesn't.

www.AZGRI.com

(course registration applies)

Our **Legal Snippet** videos (Scotts Scoops and Mack in a Minute) clarifies issues we are seeing in our market.

www.aaronline.com/LegalSnippets

The **CRPM** program covers the necessary topics for agents working in the property management field.

www.aaronline.com/crpm

(course registration applies)

NAR's **FairHaven** simulation online program goes through a series of real-life situations your agents are likely to experience and help avoid inadvertent fair housing violations.

www.aaronline.com/fairhaven

The **rCRMS** program takes many of the topics in GRI and focuses on how to manage risk through the transaction.

www.aaronline.com/rcrms

(course registration applies)

The monthly **GRI** scholarship program.

www.AZGRI.com

The **Professionals...That's Who We R** video series covers professional etiquette when working with other agents.

www.aaronline.com/WhoWeR

Help your agents succeed, manage their risk and grow your brokerage by utilizing these tools in your agent training, office meetings and newsletters to your agents to make them aware of these tools.



Let **YOUR** Association's Tools
Assist You and Your Agents!

LEGAL HOTLINE

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The following is for informational purposes only and is not intended as definitive legal or tax advice. You should not act upon this information without seeking independent legal counsel. If you desire legal, tax or other professional advice, please contact your attorney, tax advisor or other professional consultant.

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

Listing agent is not required to explain recorded documents to buyer

FACTS: The buyer, who was represented by his brother, an inexperienced licensee, closed escrow using the Arizona REALTORS® Residential Resale Real Estate Purchase Contract (Contract) without looking closely at the title commitment, nor the schedule B documents attached. After closing, the buyer discovered that a notice of code violations was recorded against the property by the city. The escrow company confirmed that the title commitment and schedule B documents were provided to the buyer as required by Section 3c of the Contract. The buyer also signed an acknowledgement that he received the Title commitment and Schedule B documents at closing. The buyer is now threatening to sue the listing agent because the listing agent did not explain to him the meaning or potential consequences of the document recorded by the city.

ISSUE: Was the listing agent required to explain the meaning and potential consequences of the document recorded by the city?

ANSWER: No.

DISCUSSION: Generally, a listing agent is not allowed to communicate with a buyer who is represented by another licensee. Additionally, a listing agent owes a duty of fairness (disclosure) to the buyer. See A.A.C.R4-28-1101. Here, because the title commitment and documents were provided to the buyer, the fairness (disclosure) requirement has been satisfied. Although the listing agent owes a duty of fairness (disclosure) to the buyer, that duty does not include the obligation to explain real estate documents to the buyer. See *Buffington vs. Haas*, 124 Ariz. 36, 601 P. 2d 1320 (1979). (Real estate licensee has no obligation to explain real estate documents to a party with whom he has no agency relationship.).

Subdivider may not disclaim misrepresentation claims by contract

FACTS: The buyer purchased a new home in a residential subdivision. Prior to closing on the home, it was advertised as having “unobstructed views.” Before the contract documents were signed, the buyer’s agent inquired with the developer as to the meaning of that language because the buyer did not want a home built in a way that would obstruct the views. The developer stated in an email that there would be no construction or development of the adjoining property that would obstruct any views. Relying on that information, the buyer purchased the home. A year later, the developer began construction of several two-story homes in the same area he previously said would remain undeveloped. The buyer complained that this construction was contrary to what was previously represented. The developer contends that the contract language in the standard builder form insulates it from liability because the buyer specifically agreed to “release and hold harmless” the developer for any statements before the contract was signed.

ISSUE: Did the buyer waive his legal claims by signing the contract?

ANSWER: See discussion.

DISCUSSION: Generally, the law disfavors contract language that attempts to release a party from the consequences of a misrepresentation. See *Salt River Project vs. Westinghouse Electric Co.*, 143 Ariz. 368, 694 P. 2d 198 (1984). Additionally, in the context of a residential subdivider, A.R.S. § 32-2185.06 addresses the issue and provides: If the transaction involves a lot or parcel offered for present or future residential use, the contract, agreement or lease shall not waive or disclaim liability for prior material representations relied upon by the purchaser made by the seller and such seller’s agents concerning the subdivision and lot or parcel involved, and any provision attempting to waive or disclaim liability is void.

The buyer should seek independent legal counsel

Landlord must handle abandoned personal property pursuant to Arizona law

FACTS: The tenant of the single-family residence is over 30 days past due on paying rent and has been non-responsive for over 30 days. The property manager has been to the property several times during the 30-day time frame to investigate. It appears as though the tenant has simply disappeared. Most of the furniture and personal property has been removed from inside the residence, but there are yard tools in the garage, including a riding lawn mower. The landlord is insisting that the property manager remove the remaining items and re-rent the house.

ISSUE: If the property manager removes the items in the home, including the riding lawn mower, is there an obligation to store the personal property for the benefit of the tenant?

ANSWER: See discussion

DISCUSSION: Based on the facts presented, the tenant has abandoned the residence as defined in A.R.S. §33-1370 (J). The disposition of the personal property is addressed by the same statute. After re-taking possession, the property manager must inventory the personal property left behind. A.R.S. §33-1370 (D). The property manager must also store the personal property, either in the residence, or at a storage facility, for a period of 14 days and notify the tenant. A.R.S. § 33-1370 (E) and (F). If the tenant makes no reasonable effort to recover the personal property, the landlord may donate or sell it, § 33-1370(F). If sold, the amount received, must be credited to the amount owed by the tenant for rent. *Id.*

Note: Before removing the abandoned personal property, the landlord is required to send the tenant a notice of abandonment and post the same on the property. See A.R.S. §33-1370 (A).

The buyer's right to receive and review the subdivision public report should be in the contract itself rather than an addendum

FACTS: The licensee is the exclusive agent involved in the marketing and sales of new homes in a subdivision for the builder/developer. The builder/developer has a standard addendum that is signed by the parties in every transaction advising the buyer of the right to receive a copy of the subdivision public report as required by A.R. S. Section 32-2185.06. The licensee is concerned that the disclosure is made by way of an addendum rather than in the contract itself.

ISSUE: Is the statutory disclosure in an addendum sufficient to comply with Arizona law?

ANSWER: See discussion

DISCUSSION: A.R.S. §32-2185.06 provides in pertinent part: All agreements and contracts for the purchase or lease of subdivided land from a subdivider, owner or agent shall clearly and conspicuously disclose, in accordance with regulations adopted by the commissioner, the nature of the document, the purchaser's right to receive a copy of the public report and, in the case of unimproved lots or parcels not exempted by regulation pursuant to Section 32-2185.01, the purchaser's right to rescind the agreement as provided in Section 32-2185.01. Any contract, agreement or lease which fails to make disclosures pursuant to this section shall not be enforceable against the purchaser.

The critical inquiry is whether the builder/developer's addendum qualifies as an "agreement" or "contract" as those terms are used in the statute. While arguably, the addendum is an agreement as contemplated by the statute, the best practice is to include the statutory disclosure in the contract itself.

Personal representative should complete the seller's property disclosure statement (SPDS) even if they have never resided in the property

FACTS: Acting on behalf of an estate, the court appointed personal representative listed the property for sale shortly after the death of the owner. The personal representative has never resided in the Property and has virtually no knowledge of the property's conditions. The personal representative ultimately entered into an Arizona REALTORS® Residential Resale Real Estate Purchase Contract with the buyer. The buyer has now requested a SPDS and the personal representative does not want to provide it claiming she has no knowledge of the property condition.

ISSUE: Is the personal representative required to provide a SPDS even though she has virtually no knowledge of Property condition?

ANSWER: See discussion

DISCUSSION: Although some sellers are reluctant to provide a SPDS because they lack knowledge, a seller of real property that knows of facts materially affecting the value of the property that are not readily observable and are not known to the buyer, must disclose those facts to the buyer. *Hill v. Jones*, 151 Ariz. 81, 725 P.2d 1115 (App. 1986). Additionally, by entering into the purchase contract, the seller agreed to provide a SPDS within three (3) days of its acceptance. See Section 4a. The personal representative is therefore contractually obligated to provide the SPDS to the buyer even though she has virtually no knowledge of the property condition.

No obligation of broker to disclose fraud lawsuit

ISSUE: After the closing of the transaction, the buyer files a lawsuit against the buyer's broker for fraud and misrepresentation. Does the buyer's broker have to disclose to the Arizona Department of Real Estate the filing of this lawsuit for fraud and misrepresentation?

ANSWER: No. A.A.C. R4-28-301(A)(1) and 303(D)(1) require a real estate licensee to disclose to the Arizona Department of Real Estate within ten days, any judgment for “fraud, etc”. Therefore, the filing of a lawsuit for fraud and misrepresentation does not have to be disclosed to the Arizona Department of Real Estate.

Tax return required if wrongful FIRPTA withholding

ISSUE: A resident of Canada sold a home in Arizona for \$245,000. The buyer will reside in the home. At the time of closing the title company said that under the Foreign Investment in Real Property Tax Act (“FIRPTA”), fifteen percent of the sales proceeds were required to be forwarded to the Internal Revenue Service. The fifteen percent of the sales proceeds were then forwarded by the title company to the Internal Revenue Service. Did the title company act correctly? If not, what should the Canadian resident do?

ANSWER: The fifteen percent of the sales proceeds should not have been forwarded to the Internal Revenue Service. A non-resident alien, such as a resident of Canada, can sell a home without the FIRPTA fifteen percent withholding requirement, if the sales price does not exceed \$300,000 and the buyer will use the home as a residence. 26 U.S.C. §1445(b)(5). Inasmuch as fifteen percent of the sales proceeds have been wrongfully withheld and forwarded to the Internal Revenue Service, the Canadian resident will need to file a tax return with the Internal Revenue Service for a refund of the fifteen percent sales proceeds wrongfully withheld, even if the Canadian resident had no U.S. income. 26 U.S.C §1445(c)(1)(C)

Note: For more information, see Internal Revenue Service Publication 515 (Withholding Tax on Non-Resident Alien and Foreign Corporation).

Agent must disclose material financing facts in listing

FACTS: A condominium was listed for sale on the multiple listing service (“MLS”). The listing shows the seller will accept Conventional financing or cash offers.

Ultimately, the buyer’s lender discovers that a conventional loan cannot be approved for the condominium, because too many of the units are owned by one owner.

The buyer ultimately pays cash and the transaction closes. One month later, the buyer’s agent sees another condominium listed on the MLS by the same agent accepting conventional financing.

ISSUE: Does the listing agent have a duty to disclose that the condominium cannot qualify for conventional financing?

ANSWER: Yes.

DISCUSSION: Pursuant to the Arizona Administrative Code R4-28-1101, an agent must disclose all known material facts regarding a property. Additionally, R4-28-502(C) states that “A salesperson or broker shall ensure that all advertising contains accurate claims and representations, and fully states factual material relating to the information advertised. A salesperson or broker shall not misrepresent the facts or create misleading impressions.”

However, the buyer’s agent shouldn’t assume that all conventional loans are prohibited on this property.

Therefore, as a best business practice, the listing agent should disclose that the condominium may not qualify for all conventional loans, and that the buyer should investigate their financing options during the inspection period.

Seller not obligated to bring premises into compliance with swimming pool barrier laws

ISSUE: The buyer has presented an offer to purchase a home with a swimming pool. There is no fence around the swimming pool. The buyer has small children and has requested in the buyer’s offer that the seller construct a fence around the swimming pool. The seller has refused to accept the buyer’s offer. If a buyer has small children, is the seller required to accept the buyer’s offer?

ANSWER: Probably not. The Fair Housing Laws do not require a seller to construct facilities for the protection of small children.

Note: Under the AAR Residential Resale Real Estate Purchase Contract the buyer is required to pay for any costs in constructing a fence or otherwise complying with swimming pool barrier laws. If the buyer does not want to pay these costs, the buyer can cancel the AAR Contract during the inspection period.

A licensee marketing a property listed by another agent must display the listing brokerage firm in advertisements

FACTS: An agent active on social media posts properties listed by a different brokerage firm and invites potential buyers to call him for assistance. The social media posts do not identify the listing agent or brokerage firm.

ISSUES: Is this practice permissible?

ANSWER: See discussion.

DISCUSSION: The Commissioner’s Rules provide:

“A licensee who advertises property that is the subject of another person’s real estate employment agreement shall display the name of the listing broker in a clear and prominent manner.” A.A.C. R4-28-502 (F).

Thus, the agent must identify the listing brokerage in a clear and prominent matter to be compliant.

Atheists are entitled to the “religious” protection under fair housing laws

ISSUE: The seller is a deeply religious individual and does not want to sell his home to someone who is not religious. Specifically, the seller wants the listing broker to advertise that the home will not be sold to atheists. Do the Fair Housing Laws protect atheists in the sale of homes?

ANSWER: Yes. Although atheists are not formally religious, atheists as an “irreligion” are entitled to the protection of the Fair Housing Laws. *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 114 S.Ct. 2481 (U.S.N.Y., 1994). Therefore, the listing broker cannot advertise that the home will not be sold to atheists. 📞

ABOUT THE AUTHOR



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Richard V. Mack is a partner at Zelms, Erlich & Mack, 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

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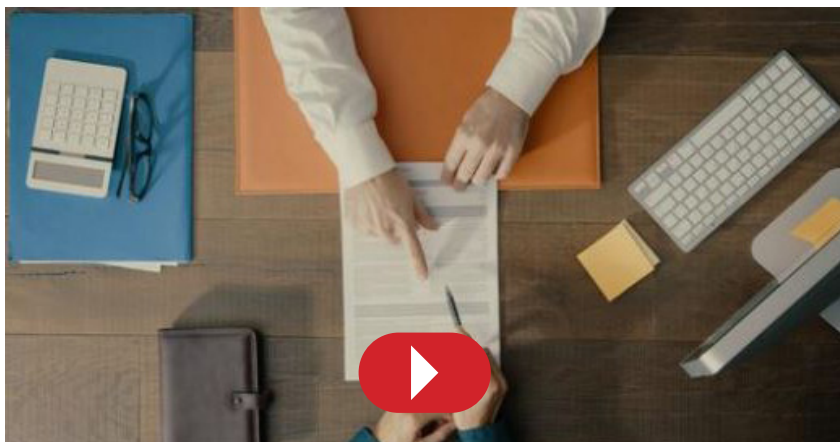
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