

#### ARIZONA REALTORS

BROKER I MANAGER QUARTERLY

#### BROKER BEWARE AUGUST 2025

TRENDING TOPICS -

New Scam Targets REALTORS®

Warning To REALTORS® Purchasing Advertising Space

Rising Rates Result In Rising Interest In Risky Wraps And Selling Subject To

Reminder - Wholesaler Status Must Be Disclosed

Fingerprint Clearance Cards Are Not Needed For Routine License Renewals

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#### NEW SCAM TARGETS REALTORS®

The U.S. Secret Service is warning REALTORS® about a new cryptocurrency scam targeting real estate professionals. It is a sophisticated scheme that begins with a potential buyer requesting the services of a REALTOR®. The potential buyer is out of state, looking to purchase a multi-million dollar home and will pay in cash. When asked for proof of funds, the potential buyer casually mentions they are a cryptocurrency investor, but they invite questions about their occupation and how much money can be made. Over time, the potential buyer establishes a relationship with the REALTOR® and soft sells them on making a small investment or talking to their investment manager (who is a more skilled con artist).

Once the REALTOR® is convinced to make a small investment, their account is set up to buy and sell cryptocurrency, usually through Black Rock trading tools. All websites and crypto "wallets" mirror real investment companies. The initial investment always increases in value and profits are quickly seen on paper. The REALTOR® is even encouraged to withdraw some of their gains to dispel any concerns and reinforce the legitimacy of the investment. The apparent validity of the investment and its success motivates the REALTOR® to invest more.

Predictably, if the REALTOR® ever wants to make a large withdrawal, they encounter problems. There may be a fee to convert the cryptocurrency to cash or taxes may need to be paid upfront on the gains.¹ But even if these fees or taxes are paid, no money is ever received. It is just the last opportunity for the fraudsters to extract more money from the victim.

Unfortunately, this scam is prevalent, and one REALTOR® victim lost their entire retirement savings. In 2024 alone, cryptocurrency investment scams accounted for \$5.8 Billion in losses and generated over 40,000 complaints.



The U.S. Secret Service warns all REALTORS® and the public to be alert to these "hog butchering" schemes that are designed to build trust over time, start with a small cryptocurrency investment, show profits, and entice greater investments to swindle as much money from the victim as possible.

If you or anyone you know suspects they are being victimized by a cryptocurrency scheme, please report the matter at <u>ic3.gov</u> or email the U.S. Secret Service at <u>CryptoFraud@usss.dhs.gov</u>.



 $<sup>^{\</sup>rm 1}\,\text{Please}$  note the IRS does not require pre-payment of taxes on investment account with drawals.



#### WARNING TO REALTORS® PURCHASING ADVERTISING SPACE

Detective Roberts with the Maricopa County Sheriff's Office is warning REALTORS® of a purported advertising scam targeting high end real estate agents. Although these are only allegations and everyone is afforded the presumption of innocence, the Arizona Association of REALTORS® is sharing the below information so that its members can be on alert and make informed decisions when purchasing advertising space.

According to Detective Roberts, the suspect is cold calling agents, offering to place their properties in a variety of magazines (Luxury Communities of Scottsdale, Luxury Properties of Scottsdale, etc.). The price is extremely low and that is the hook used to convince agents to start paying for the service. The suspect will make one or two magazines and will give them to the victim, yet fails to distribute the magazines as he is contracted to do.

This suspect goes by the name of Peter Veitch. He has an LLC out of Florida which is named The Veitch Group USA. Veitch also uses Veitch Media to sponsor the fake magazines. His phone number begins with a 250 area code and his email is **peter@azbrits.com**. According to police, the suspect speaks with a British accent and claims to be from London or Vancouver. He often disappears during the summer and then reappears around October/November at which point he resumes contacting agents in an attempt to sell advertising space that authorities warn is fake.



Detective Roberts reports that there are currently six agents that are victims of the purported scam. The biggest loss so far is approximately \$20,000. If you feel you are being defrauded, Detective Roberts can be contacted at **R Roberts@MCSO.gov**.

Whenever purchasing advertisements, REALTORS® are encouraged to research the company with which they are contracting on platforms like Trustpilot, Google Reviews, and BBB (Better Business Bureau). References from past and current clients should be requested and REALTORS® should take the time to contact those individuals to ask about their experience. Whenever purchasing advertising space, a contract should be utilized spelling out pricing, deliverables, timelines, cancellation terms, and refund policies. Finally, watch for red flags such as high-pressure sales tactics, unrealistic promises, requests for full payment upfront absent a contract, and vague or evasive answers when asking for references or ad metrics.





The Key Contact program pairs a REALTOR® with every member of the state legislature so our elected officials can hear directly from our industry practitioners on what is happening in the real estate industry.

You are your own best advocate, so whether you have an existing relationship with a state lawmaker or are willing to build a relationship with an elected official, the Arizona REALTORS® are here to help you succeed as a Key Contact or a Contact Team member.

Become part of the Arizona REALTORS® Key Contact Program





#### A REALTOR® CAN:

Phase Two of the Consumer Advertising Campaign

The Arizona REALTORS® is pleased to announce phase two of its consumer advertising campaign highlighting the benefits of working with a REALTOR®. The theme, "A REALTOR® CAN," is designed to show consumers how using a REALTOR® can make the transaction significantly smoother than going it alone.





A REALTOR® is a member of the National Association of REALTORS®.



How should property managers navigate an existing tenant's request to allow an emotional support animal?

Watch Legal Hotline Attorney Rick Mack's video.









#### Q3 LEGISLATIVE UPDATE

Each year our legislative policies are approved by the Board of Directors and guide our advocacy team on which issues to prioritize to support our members. This process begins each summer at the Arizona REALTORS® Caucus where we just heard from all our members, the industry practitioners, on which issues are impacting them most.

The Arizona REALTORS® will be hard at work during the 2026 Legislative Session tracking bills that impact our industry. We advocate to protect our members' ability to do business, private property rights, and homeownership. Arizona REALTORS® Senior Director of Government Affairs, Tim Beaubien provides our Legislative Update on the specific issues impacting the real estate industry.









**RESOURCES** 





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# RISING RATES RESULT IN RISING INTEREST IN RISKY WRAPS AND SELLING SUBJECT TO

Interest rates that remain high compared to the recent past continue to spark interest in risky wrap financing or selling subject to (Subject To) an existing mortgage. Either type of sale may be beneficial to the seller if the current interest rate is high, and the seller's loan is at a lower rate, as is becoming more common in today's market. A buyer may consider wrap financing or buying Subject To if the buyer cannot qualify for new conventional financing or is seeking to negotiate a lower than market interest rate. However, there are significant risks with wrap financing and buying Subject To an existing mortgage for both buyer and seller, especially if the seller's loan documents contain a due-on-sale clause (also known as an acceleration clause), which requires the loan to be paid off if the property is transferred. Both types of sales also create substantial risks for the real estate licensees involved in such a transaction.

## WHAT IS A WRAP OR A SUBJECT TO TRANSACTION?

Wraps and Subject To transactions are alternatives to the seller paying off or the buyer qualifying to assume the existing loan on the property in a real estate transaction. In a wrap, the seller sells their property to the buyer and agrees to a carryback loan from the buyer for a purchase price that matches or exceeds the seller's existing loan. In other words, the seller "wraps" their loan around the existing loan. In Subject To transactions, the buyer pays the seller their equity in the home and continues to pay the existing mortgage on the home. In other words, the seller buys the home "subject to" the existing home loan. In either transaction, the seller does not pay off and the buyer does not assume the seller's existing loan; the seller remains responsible to the lender for its payment.

**Wrap Example:** The seller has a home valued at \$500,000 that is encumbered by an existing loan with



a \$300,000 balance and a 3% interest rate. The seller sells the home to the buyer for \$500,000, with a \$50,000 down payment and finances the buyer with a carryback loan of \$450,000 at a 5% interest rate. The buyer makes the monthly loan payments to the seller on the \$450,000 loan and the seller makes the payment on their existing \$300,000 loan to their lender. The seller also makes a profit on the 2% difference in the interest rates.

Wraps are also referred to as wraparound financing, an all-inclusive deed of trust, or a blanket mortgage.

**Subject To Example:** The seller has a home valued at \$500,000 that is encumbered by an existing loan with a \$450,000 balance and 3% interest rate. The seller sells the home to the buyer for \$500,000 with a \$50,000 down payment. The buyer makes the monthly loan payments to the existing lender at the 3% interest rate. In other words, the buyer purchased the home "Subject To" the existing loan.

## WHAT ARE THE RISKS FOR THE SELLER?

• A Due-on-Sale Clause: Loan documents often contain a due-on-sale clause, and this is almost always the case if the loan is not assumable. If the seller's loan documents contain a due-on-sale clause, wrap financing is a breach of the seller's loan documents with serious consequences.

If the seller breaches the terms of the loan documents, the lender is entitled to all available legal remedies, including acceleration of the loan or foreclosure. Simply put, the seller may be responsible for paying their loan in full without the ability to collect the entire amount from the buyer because the seller is either obligated to accept monthly payments under the conditions of the wrap financing agreement or has no contractual right to require the buyer to make full payment (or any payment) in a Subject To transaction. Subject To transactions are even more precarious for the seller because the seller is responsible for paying their loan in full without the contractual right to collect any funds from the buyer or retake the home.

 The Buyer Fails to Make their Payments: The seller is still the primary borrower on the existing loan and is obligated to make the required payments regardless of whether the buyer makes the wrap payments to the seller or makes payment on the existing loan. In a wrap, if the seller cannot make their existing loan payments without the wrap payments from the buyer, it can result in past due payments to the seller's lender, lowering the seller's credit score or even default and foreclosure. In Subject To transactions, the seller has no contractual remedies if the buyer fails to make the existing loan payments, has no means to require their lender to foreclose and the buyer could potentially be delinquent on loan payments for years before foreclosure (hurting the seller's credit the entire time).

 The Dodd Frank Act: In wrap transactions, the seller is providing the financing in a wrap and the seller should ensure that they are complying with all applicable laws, including the Dodd Frank Act. The Arizona REALTORS® provides Dodd Frank Seller Financing Addendums which may need to be utilized in the transaction.

## WHAT ARE THE RISKS FOR THE BUYER?

- A Due-on-Sale Clause: If the seller sells the home using a wrap or Subject To, either constitutes a violation of a due-on-sale clause and the seller's lender may foreclose on the property. In either circumstance, the seller's lender can accelerate the loan and the buyer could lose the property, and their down payment, if the seller's loan is not immediately paid in full.
- The Seller Fails to Make their Payments: In a wrap transaction, even though the seller is responsible for making the payments on the existing loan, the buyer generally has no guarantee that the seller will make these payments. Thus, the property could be foreclosed upon if the seller fails to make payments on the existing loan, even if the buyer has made all their required wrap payments to the seller, because the wrap loan is in second position behind the seller's existing loan.

## WHAT IF PARTIES INSIST ON WRAP FINANCING OR SELLING SUBJECT TO

Subject To transactions are inherently hazardous to the seller and should generally be avoided. However, the seller could consider providing a wrap to better protect their interests (this would be an "exact wrap" where the seller's carryback loan would "exactly" wrap the terms of the existing mortgage).

If the parties in a transaction insist on wrap financing or selling Subject To, your first step is to talk to your broker or manager. A legal interpretation of the alternative financing being considered is generally outside the area of a real estate licensee's area of expertise. However, your broker or manager can provide guidance on how to handle the transaction, including identifying appropriate disclosures that should be made.

Second, because wrap financing and selling Subject To raise complex issues, each licensee should advise both buyer and seller in writing, to consult with their own independent legal counsel and tax professionals before entering any such transaction. It would also be important for the licensees to document that the buyer and seller actually received their written advice to consult with their own independent advisors. If your client declines to consult with legal counsel, you should consider withdrawing from the representation.

Because of the complexities involved in a wrap, the purchase contract must address numerous issues, such as:

- The buyer should request and obtain a copy of the seller's existing note and deed of trust to review the rights and obligations of the loan agreement. The buyer should confirm that a wrap will not trigger a due-on-sale clause.
- The seller must ensure that the buyer is financially capable of making the required payments.
   Therefore, the seller should require the buyer to provide financial information to the seller, such as a credit report and income verification and seek professional assistance in interpreting the information, if necessary.
- All payments should be made concurrently through a single servicing account maintained by a licensed escrow agent with adequate instructions regarding forwarding payments. Record-keeping for a wrap loan can be complex. The seller must keep track of the payments made by the buyer and how much of each payment is attributable to principal and how much is attributable to interest. The amount of interest paid must be provided to the buyer for tax purposes. Therefore, the use of a servicing agent in wrap financing, such as an escrow company, is advisable for record-keeping purposes.

## HOW COULD A LENDER FIND OUT THAT THE LOAN HAS BEEN WRAPPED OR SOLD SUBJECT TO?

Lenders often discover that a loan has been wrapped by the recording of the transfer of the property, the change of the tax liability, or the change of the insured's name on insurance policies. Lenders can also become aware by receiving payments from the account servicing agent or the buyer.

## POSSIBLE ALTERNATIVES TO WRAPS AND SUBJECT TO SALES

There may be alternatives to wrap financing and Subject To sales depending upon the circumstances, such as:

• Loan Assumption: A loan assumption is when the buyer takes over the seller's loan and continues to make payments on it. Most conventional loans cannot be assumed because lenders do not allow it with a due on sale clause. However, FHA, VA, and USDA loans may be assumable.

Generally, to assume a loan, the buyer will need to qualify for the loan and will probably incur loan transfer and assumption fees. Additionally, the buyer will most likely have to pay cash (or a seller carryback) to the seller for seller's equity in the property. A loan assumption is beneficial in that the buyer will inherit the lower interest rate that the seller received when they obtained the loan. Moreover, the term of the loan will likely be shorter than if the buyer were to obtain new financing. In agreeing to a loan assumption, the seller should ensure they are released from any future liability on the loan. The Arizona REALTORS® provides a Loan-Assumption-Addendum that addresses these and other issues.

- Buying Down the Interest Rate: A buyer or a seller through seller concessions, can buy down the buyer's interest rate on a loan by paying discount points. The cost of the discount point depends upon a variety of factors. Additionally, the buydown can be structured in a variety of ways. The interest rate can be lowered for the life of the loan, a set period of time, or structured in a way that the interest rate gradually increases over time.
- Seller Carryback Financing: Seller carryback financing occurs when all or a portion of the purchase price is financed by the seller. Generally,



the buyer will execute a promissory note and deed of trust in favor of the seller, which will be recorded, at close of escrow. This creates an income-producing note for the seller. As mentioned above, The Arizona REALTORS® provides **Dodd Frank Seller Financing Addenda** which should be used in the transaction. You can find the Addenda here: **Only 1 Residential Property**, **3 or Fewer Residential Properties**, and Non-Consumer Credit Transaction.

- Loan Programs Other than Conventional Financing: Non-conforming loans, in other words, loans that do not conform to Fannie Mae or Freddie Mac guidelines, but are government backed, may also be an option. For example:
- **FHA Loans:** FHA loans may be an option for buyers with lower credit scores or not much money for a down payment. And closing costs may be rolled into the loan.

- VA Loans: VA loan may be an option for active military, veterans, or surviving spouses. These loans have lower credit score requirements, do not require a down payment, have lower interest rates, and do not require private mortgage insurance (PMI).
- USDA Loans: USDA loans may be an option for lower income buyers purchasing a home in a qualified rural area. These loans may have a lower interest rate, do not require a down payment, and may have a lower PMI, which may be rolled into the loan amount.

In conclusion, all the parties in a real estate transaction, including the real estate agents, are subject to an increased risk of liability and disputes in a transaction involving wrap financing or Subject To sales. Always explore other financing options and consult with your broker or manager before writing a contract that includes a wrap or sale Subject To an existing loan.



This article is of a general nature and may not be updated or revised for accuracy as statutory or case law changes following the date of first publication. Further, this article reflects only the opinion of the author, is not intended as definitive legal advice and you should not act upon it without seeking independent legal counsel. 5/27/2025



# Why train your agents when the Arizona REALTORS® can do it for you?

Members pursuing their GRI designation don't just earn one credential - they're opening the door to multiple certifications along the way.

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#### REMINDER: WHOLESALER STATUS MUST BE DISCLOSED

For the past few years, the real estate investing strategy referred to as "wholesaling" has been on the rise and, as a result, complaints regarding wholesaling increased. The public voiced concerns over a lack of disclosure identifying the wholesaler's status, predatory wholesalers, an increased number of defaults/cancellations by wholesalers, and a lack of knowledge or understanding of the wholesaling business.

This led to confusion and frustration by Sellers who believed they were being taken advantage of when they learned that a wholesale buyer was assigning their equitable interest in the property to an end-buyer and profiting monetarily from that assignment at close of escrow. Additionally, many wholesalers never intended to purchase the property if they are unable to assign their contractual rights, even if that means forfeiting their earnest money deposit. As such, wholesalers may be more likely to default when compared to a traditional buyer that has no intention of trying to assign their equitable interest.

As a means to alleviate misunderstanding between the public and wholesalers, A.R.S.§ 44-5101 was enacted to require wholesalers to disclose their wholesaler status in writing PRIOR to entering into a binding agreement. To assist in the compliance for written disclosure, the Arizona REALTORS® Addition Clause Addendum (ACA) incorporates a section for wholesaler status disclosure.

#### A.R.S.§ 44-5101 states:

- **A.** Before the parties enter into any binding agreement:

  1. A wholesale buyer of residential real property shall disclose in writing to the seller that the buyer is a wholesale buyer.
  - 2. A wholesale seller of residential real property shall disclose in writing to the buyer that the seller is a



wholesale seller that holds an equitable interest in the real property and that the wholesale seller may not be able to convey title to the property.

- **B.** Notwithstanding any other provisions contained in the contract for sale, if a wholesale buyer violates this section, the seller may cancel the contract for sale at any time prior to the close of escrow without penalty and may retain any earnest money paid by the wholesale buyer.
- **C.** Notwithstanding any other provisions contained in the contract for sale, if a wholesale seller violates this section, the buyer may cancel the contract for sale at any time prior to the close of escrow without penalty and shall be refunded all earnest money paid by the buyer.



- **D.** For the purposes of this section:
  - 1. "Residential real property" means real property with fewer than five dwelling units.
  - 2. "Wholesale buyer" means a person or entity that enters into a purchase contract for residential real property as the buyer and assigns that same contract to another person or entity.
  - 3. "Wholesale seller" means a person or entity that enters into a purchase contract for residential real property as the seller, that does not hold legal title to that real property and that assigns that same contract to another person or entity.

#### FREQUENTLY ASKED QUESTIONS

- **Q1.** Can an individual/entity be a wholesale buyer and wholesale seller in the same transaction?
- **A1.** Yes. When the wholesaler contracts to purchase the home from the seller, they are acting as a wholesale buyer. When that same individual seeks to convey their equitable interest to an end-buyer, they are acting as a wholesale seller.
- **Q2.** What does the law require of the wholesale buyer?
- **A2.** The law requires the wholesale buyer to disclose to the seller in writing before entering into a binding agreement for residential real property that they are a wholesale buyer.
- Q3. What does the law require of the wholesale seller?
- **A3.** The law requires the wholesale seller to disclose to the potential end-buyer that they are a wholesaler that holds an equitable interest in the real property, not legal title, and may therefore be unable to convey legal title.
- **Q4.** How can the wholesale buyer and/or wholesale seller go about disclosing their status in writing PRIOR to entering into a binding agreement as required by law?
- **A4.** The wholesale buyer and/or wholesale seller can appropriately disclose their status by: (i) submitting written notice to the appropriate party, either the seller or buyer, before entering into a binding agreement; (ii) inserting the required disclosure into the Additional Terms and Conditions section of the purchase contract

- or use of the Arizona REALTORS® Additional Clause Addendum before conveying their offer; or (iii) inserting the required disclosure into a counteroffer before it is conveyed.
- **Q5.** If I am a wholesale buyer and a real estate licensee, how do I comply with the law?
- **A5.** You should confirm with your broker whether the transaction must go through the brokerage. In addition to disclosing you are a wholesale buyer, you must also disclose that you are a licensed agent.
- **Q6.** If I am a principal and a real estate licensee, what are my obligations as a wholesale seller?
- **A6.** In addition to disclosing you are a wholesale seller, you must also disclose that you are a licensed agent. Furthermore, as a principal in the transaction, you should never represent the buyer because your ownership presents an unwaivable conflict.
- **Q7.** What if the wholesale buyer does not disclose their status as a wholesale buyer before the parties sign the purchase contract?
- **A7.** If a wholesale buyer does not disclose to the seller that they are a wholesale buyer before the parties execute the purchase contract and the transaction has not closed escrow, the seller can legally cancel the purchase contract and retain the wholesale buyer's earnest money deposit, if any.
- **Q8.** If a wholesale buyer does not disclose to the seller that they are a wholesale buyer, does the seller have to wait to see if the wholesale buyer can close escrow?
- **A8.** No. The law does not require the seller to wait to see if the wholesale buyer can close escrow. Rather, the law allows the seller to immediately cancel the purchase contract and retain the wholesale buyer's earnest money deposit.
- **Q9.** Assume a wholesale buyer timely makes the required disclosure and assigns their equitable interest to an endbuyer. Does the wholesale buyer remain liable if the end-buyer fails to perform?
- A9. Yes. The wholesale buyer's assignment of their equitable interest does not change the terms of the

underlying purchase contract, nor does it negate the wholesale buyer's contractual obligations owed to the seller.

**Q10.** What if the wholesale seller does not disclose in writing their status as a wholesale seller before assigning their equitable interest to an end-buyer?

**A10.** If before entering into a binding agreement, a wholesale seller does not disclose in writing to the end-buyer that the wholesale seller holds only an equitable interest in the real property and therefore may not be

able to convey legal title to the property, the end-buyer can legally cancel the purchase contract and be refunded their earnest money deposit, if any.

**Q11.** If a wholesale seller does not disclose to the end-buyer that they are a wholesale seller, can the end-buyer still purchase the property?

**A11.** Yes. As long as the wholesale seller can convey legal title to the end-buyer, the end-buyer can still choose to close escrow.





#### CHANGES TO ARS 32-2108.01: ARIZONA'S SHIFTING STANCE ON FINGERPRINT CLEARANCE CARDS

#### By Arizona Department Of Real Estate

The 2024 Arizona legislative session introduced changes to ARS 32-2108.01, leading to two distinct legal interpretations of the law. In response, the Arizona Department of Real Estate (ADRE) has decided to suspend enforcement of one of these interpretations, opting to revert to the pre-amendment enforcement practices.

#### REVERSION TO PREVIOUS ENFORCEMENT

For the moment, this decision means that the ADRE will no longer mandate a valid fingerprint clearance card for license renewals, unless there is evidence of a criminal record that has not been previously reviewed by the Department. This

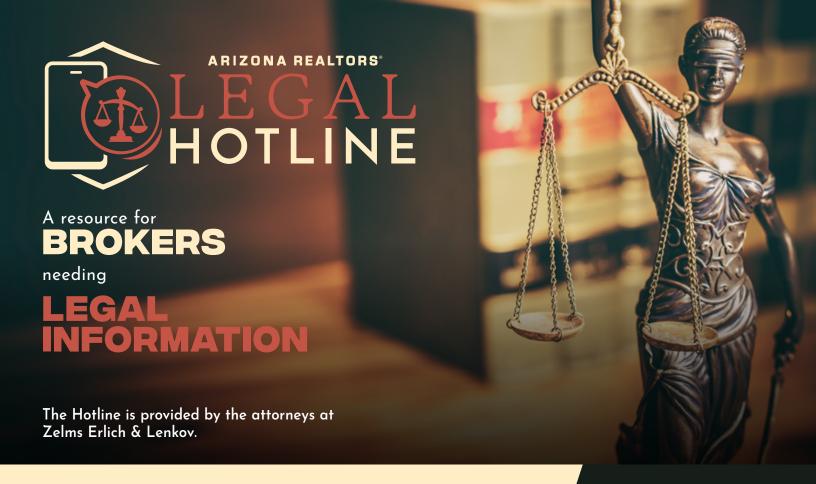
move aims to maintain consistency and avoid confusion while the legal interpretations are further clarified.

## LOOKING AHEAD: COLLABORATION AND CLARITY

The Department of Real Estate is committed to collaborating with industry stakeholders and the legislature to achieve clear legislative intent regarding ARS 32-2108.01. This proactive engagement will be crucial in ensuring that the statute is applied effectively and transparently, benefiting both licensees and the public. The ADRE looks forward to continued industry engagement to bring much-needed clarity to this statute.







# THE ARIZONA REALTORS® LEGAL HOTLINE IS DESIGNED:

- As a free member benefit for Designated REALTORS®
   (Designated Brokers) to have direct access to a qualified attorney who can provide information on real estate law and related matters.
- To answer legally related questions about the many diversified areas of today's real estate industry.

Primary access to the Hotline is for Designated Brokers, who may also give access to one REALTOR® or REALTOR-ASSOCIATE® member per office and/or branch.

For More Information
Please Contact

Jamilla Brandt, Arizona REALTORS® Risk Management Coordinator at:

jamillabrandt@aaronline.com

#### **GET ANSWERS TODAY**

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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.

## A LISTING AGENT IS NOT REQUIRED TO PROVIDE ASSISTANCE TO AN UNREPRESENTED BUYER

**FACTS:** An unrepresented buyer submitted an offer to purchase the residence, which was ultimately accepted. The buyer is now seeking assistance and advice from the listing agent, and he has made several claims that the listing agent is obligated to "help" him.

**ISSUE:** Is the listing agent obligated to provide assistance to the unrepresented buyer?

ANSWER: No.

**DISCUSSION:** Here, the listing agent represents the seller only. By contrast, the buyer chose to forego representation. As a result, the listing agent should not provide any advice or assistance to the unrepresented buyer. To do so could create an implied dual agency. The listing agent should explain her position to the buyer and also have the buyer sign the Arizona REALTORS® Unrepresented Buyer Disclosure form to clarify and document the listing agent's role in the transaction.

# BUYER LIKELY ENTITLED TO A CREDIT INCLUDED IN SECTION 2J OF THE CONTRACT DOCUMENTING AN ALL-CASH SALE

**FACTS:** The buyer and seller executed the Arizona REALTOR® Residential Resale Real Estate Purchase Contract (the "Contract") in connection with an all-cash sale. Section 2j of the Contract provides that the seller will provide the buyer a 5% credit. The day before the close of escrow, the buyer and seller are disputing the 5% credit. The seller claims that because it is an all-cash sale, Section 2 does not apply. Therefore, the 5% credit written in Section 2j also does not apply. The buyer contends that the intent was clear, regardless of where in the Contract the 5% credit appears.

**ISSUE:** Is the buyer entitled to the 5% credit?

ANSWER: See Discussion.

**DISCUSSION:** In interpreting contracts, courts are required to give meaning to all the language used and give effect to each part. *Cardon v. Cotton Lane Holdings*, 173 Ariz. 203, 841 P. 2d 198 (1992). Granted, the 5% credit is in Section 2 which the Contract states "does not apply" if the offer is "AN ALL CASH SALE." However, ignoring the 5% credit, especially since the seller did not clarify the issue by a counteroffer or otherwise prior to signing the Contract, would remove a contract term entirely and could not reflect the intention of the parties. A court would probably find that the buyer is entitled to the 5% credit. Note: Best practice would be to avoid Section 2 altogether when making an all-cash offer or having the seller clarify any terms inserted in Section 2 in a Counter Offer form.

## SELLER MAY COUNTER THE LENDER IDENTIFIED IN THE PRE-QUALIFICATION FORM

**FACTS:** The seller received an offer on the residential property with a pre-qualification form attached. The listing agent is aware of the lender identified in the prequalification form and is of the opinion that it will not be able to fund the loan timely. Based on that opinion, the seller wants to submit a counter offer requiring the buyer to obtain financing from a different lender.

**ISSUE:** May the seller submit a counteroffer requesting a different lender on the prequalification form?

ANSWER: Yes.

**DISCUSSION:** A seller is under no compulsion to accept an offer with terms that are unacceptable. Here, because the seller believes in good faith that the lender identified in the prequalification form will not be able to perform, the seller



can either reject the offer altogether or counter, requiring a different lender.

## COLLEGE STUDENTS ARE NOT A PROTECTED CLASS

**FACTS:** The property manager REALTOR® received a rental application from four college students. The property owner does not want to rent to college students.

**ISSUE:** Would it be illegal discrimination to refuse to rent to the college students?

**ANSWER: See Discussion** 

**DISCUSSION:** College students are not a protected class under the Fair Housing Act. The landlord is therefore able to refuse the rental without violating the Fair Housing Act as long as the policy is/was uniformly implemented against ALL college students regardless of race, color, religion, sex, disability, familial status, national origin, sexual orientation or gender identity. If the landlord hadn't previously inquired whether potential tenants were college students, or made exceptions to the policy, the landlord may want to seek legal counsel prior to denying the application.

#### UNEQUIVOCAL STATEMENT NEEDED TO CANCEL

**FACTS:** The selling agent sent the listing agent an email on Friday stating, "I am sorry, but it looks like I may be sending you an unfulfilled loan contingency on Tuesday. I will let you know."

ISSUE: Is the selling agent's email a cancellation?

ANSWER: No.

**DISCUSSION:** A cancellation must be an unequivocal statement that the party is cancelling. Here, the selling agent stated the buyer "may" be cancelling. Until the seller receives an Unfulfilled Loan Contingency Notice or Notice of cancellation pursuant to sections 8l and 8m that the buyer is cancelling, the contract remains in effect.

#### REMOTE ACCESS INTO HOUSES

**FACTS:** A landlord has asked if the property manager can provide remote access allowing renters to enter vacant properties.

**ISSUE:** Can a property manager provide potential renters remote access to a vacant property?

ANSWER: See discussion.

**DISCUSSION:** Remote access, which allows users a one-time access code to enter into a vacant rental for potential

tenants to view the property, is legal. However, there is risk involved. There is always the chance that the caller is posing as a potential tenant, but in actuality is interested in stealing appliances or copper wiring. There have also been scams where people enter a property, change the locks, and then try to "rent" the property out to other unsuspecting tenants. Therefore, the best business practice would be to show the property with an agent physically present.

# LISTING AGENT IS NOT REQUIRED TO HAVE A BUYER BROKER AGREEMENT WITH AN UNREPRESENTED BUYER AS A CONDITION TO VIEWING THE HOUSE

**FACTS:** The listing agent received a call from a prospective buyer requesting access to view the listed property. The listing agent agreed to meet the prospective buyer at the property at an agreed-upon time.

**ISSUE:** Does the listing agent need to get a buyer broker agreement signed before allowing the unrepresented buyer access to the property?

ANSWER: No.

**DISCUSSION:** Consistent with the NAR antitrust settlement, a REALTOR® representing a buyer must have a written agreement with that buyer before showing a property. Here, the listing agent represents the seller only and has not agreed to be the agent of the prospective buyer. Therefore, the listing agent need not obtain a written agreement with the prospective buyer prior to allowing the prospective buyer to view the property.

#### UNLICENSED HANDYMAN MAY NOT FILE MECHANIC'S LIEN

**FACTS:** A seller hired an unlicensed handyman to repair several items in her home in preparation to sell her house. The material, plus labor totaled \$1,100.00. The seller did not pay the handyman because the work was performed poorly.

The handyman has now filed a mechanic's lien against the seller's property.

**ISSUE:** Can a handyman, who is not licensed, file a mechanic's lien on a property?

ANSWER: No.

**DISCUSSION:** Pursuant to Arizona Revised Statutes ("A.R.S.") §33-981(C): "A person who is required to be licensed as a contractor but who does not hold a valid license as such ... shall not have ... lien rights."

Further, pursuant to A.R.S. §32-1121(A)(14), the handyman was required to be licensed to perform the work for the

seller, because the aggregate contract price, including labor, materials and all other items, was more than \$1,000.

Thus, the unlicensed handyman may not file a mechanic's lien against the property.

#### UNSOLICITED TEXT MESSAGE MARKETING IS ILLEGAL

**FACTS:** An agent wants to send unsolicited text messages to consumers as part of a marketing campaign.

**ISSUE:** Can an agent send text messages as part of an unsolicited marketing campaign?

ANSWER: No.

**DISCUSSION:** The Federal Trade Commission ("FTC") provides information regarding unsolicited text message marketing:

"Text Message Spam is Illegal: It's illegal to send unsolicited commercial email messages to wireless devices, including cell phones and pagers, unless the sender gets your permission first. If you receive unwanted commercial text messages, file a complaint with the FTC."

Therefore, agents should not participate in text message marketing.

Note, the FTC lists an exception: "Transactional or relationship types of messages. If a company has a relationship with [a consumer], it can send [the consumer] things like statements or warranty information."

#### CURE NOTICE SENT VIA TEXT MESSAGE IS IMPROPER

**FACTS:** During a transaction, a listing agent sent an image of a Cure Period Notice via text message to the buyer's agent.

ISSUE: Can a Cure Notice be provided by text message?

ANSWER: No.

**DISCUSSION:** Section 8m of the Arizona REALTORS® Residential Resale Real Estate Purchase Contract states: "Unless otherwise provided, delivery of all notices and documentation required or permitted hereunder shall be in writing and deemed delivered and received when: (i) hand-delivered; (ii) sent via facsimile transmission; (iii) sent via electronic mail, if email addresses are provided herein; or (iv) sent by recognized overnight courier service . . .".

As such, the listing agent did not deliver the Cure Period Notice properly. The listing agent should proceed with sending the Cure Notice again via one of the above listed options.





#### ABOUT THE AUTHOR Richard V. Mack

Richard V. Mack, a partner in the Phoenix office of Zelms Erlich & Lenkov, has been a lawyer since 1990. He is a State Bar of Arizona certified real estate specialist and AV Preeminent® by Martindale Hubbell. He has also been designated as a 2008–2012 and 2014–2021 Super Lawyer and is a member of Arizona's Finest Lawyers. Mr. Mack also serves on the Arizona State Bar Real Estate Advisory Commission, which oversees the Real Estate Specialization Program, serving as vice chair in 2021. Mr. Mack 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 BBA with an emphasis in economics, and received his JD from the University of Arizona.



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