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SOUTHERN ARIZONA'S REAL ESTATE LAW FIRM



Around the World at TAR Expo 2016

The Tucson Association of REALTORS® held their annual Expo at the Tucson Convention Center on Wednesday, September 14 with the theme this year being “Around the World.” As always, attendees had fun visiting vendors, taking classes and networking with industry professionals. Special emphasis was given to featured presentations of new technology and green resources. As an affiliate, our firm sponsored a booth that let participants experience ancient laws from around the world. It was a great time and each of us thoroughly enjoyed meeting friends, old and new.





Home Inspections: What Good are They?

By: Heidi Rib Brent
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In the first scenario, young first-time home buyers used all their financial resources to buy a house and, just months after purchasing their home, there was a major problem with the plumbing. Their plumber advised them that the faulty plumbing was not up to code, it had substandard materials, merely clamped to the exterior walls and buried only an inch or two deep across the yard, exposing the pipes to the desert temperatures. The Seller Property Disclosure Statement (“SPDS”) failed to disclose any plumbing problems, as the sellers repaired the plumbing themselves, and the buyers used the services of the home inspector that their real estate agent told them to use. The repairs exceed their finances. Is anyone liable?

In the second situation, other home buyers wanted to enclose their porch shortly after their purchase, but the inspector for their building permit advised them that the porch was so seriously out of code that they need to tear it down so they did not risk it falling on their children’s swing set. Their SPDS did not give any indication of problems and they, too, used the home inspector recommended by their real estate agent. This will cost thousands of dollars, as well as a portion of their home. Is anyone liable?

Both of these home buyers paid for home inspections before purchasing their homes. If a home inspection does not identify these problems, what good are they? And can you sue them for missing these serious problems?

Arizona statutes regulate home inspections, defined as follows:

"Home inspection" means a visual analysis for the purposes of providing a professional opinion of the building, any reasonably accessible installed components and the operation of the building's systems, including the controls normally operated by the owner, for the following components of a residential building of four units or less:

- (a) Heating system.
- (b) Cooling system.
- (c) Plumbing system.
- (d) Electrical system.
- (e) Structural components.
- (f) Foundation.
- (g) Roof covering.
- (h) Exterior and interior components.
- (i) Site aspects as they affect the building.
- (j) Pursuant to rules adopted by the board, swimming pool and spa.

A.R.S. §32-101.B.17.



"Home inspection report" means a written report that is prepared for compensation, that is issued after a home inspection and that clearly describes and identifies the inspected systems, structures and components of a completed dwelling and any visible major defects found to be in need of immediate major repair and any recommendations for additional evaluation by appropriate persons. A.R.S. §32-101.B.18.

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"Home inspector" means an individual who is certified pursuant to this chapter as a home inspector and who engages in the business of performing home inspections and writing home inspection reports. *A.R.S. §32-101.B.19.*

Arizona statutes and regulations require home inspectors to be of "good moral character and repute," successfully complete 84 hours of training, meet competency standards, pass a written exam, comply with continuing education requirements, and provide financial assurance in the form of errors and omissions coverage or post a bond before any fees are charged for home inspections. *A.R.S. §32-122.02 and Board of Technical Registration Rules of the Arizona Administrative Code Sections R4-30-101 et seq.*

In addition to licensing, home inspectors may join a trade organization, the American Society of Home Inspectors, ("ASHI"), which, much like the Association of REALTORS®, holds the home inspectors to a higher standard than the regulators, as well as a code of ethics. <http://www.homeinspector.org/>

So with all these requirements, how did those home inspectors miss major plumbing and structural issues? Well, there are good and bad members of every industry. Since a home inspection is an important element in making such a significant purchase, home buyers should verify home inspectors' licensing and other credentials. And maybe REALTORS® should give home buyers a list of a few reputable home inspectors rather than secure the services of one particular home inspector to prevent the backslash of blame for the inspector's oversight.

And why weren't the home inspectors responsible to those poor home buyers? Home buyers need to read their home inspectors' contracts. Even though the statute requires financial assurances of errors and omissions insurance or posting a bond, the contracts I have seen often exclude areas from their responsibility and/or limit the home inspector's liability to the fee paid for the inspection. For example, the inspector for the first couple excluded exterior items from his contract, which made no sense as he did inspect and report about the gas line and the roof, but the contract provision protected his liability. The home inspector in the second situation limited his liability to the \$400 fee for the inspection. It was not even worth a demand letter. Yet, the word of both of these inspectors was relied upon to make the largest purchase of these couples' lives. What can a home buyer do? If the home inspector's contract limits their areas of liability or limits their liability to the fee, negotiate the contract or find another home inspector!

In addition, a home inspector is not necessarily the only professional on whom to rely. The Residential Resale Real Estate Purchase Contract form of the Arizona Association of REALTORS®, includes a "Buyer Attachment" that urges buyers to hire inspectors specifically qualified in mold, roof, pest control, pools and heating/cooling. REALTORS® also may want to distribute to their home buyers the Buyer Advisory published by the Arizona Association of REALTORS® https://www.aaronline.com/wp-content/uploads/2016/03/Buyer-Advisory_09Mar2016.pdf

Furthermore, buyers should actually verify termite inspections, as I had one home buyer whose seller provided a fraudulent termite certification and the house was horribly infested, yet the home inspector did not discover the recent plaster and paint.

While the recommendation to investigate more and have inspections by additional professionals may cost a bit more time and money than hiring the one home inspector that someone else used, it may save the home buyer thousands of dollars in home repair, the buyer's frustration and unexpected expense when they discover major problems with their newly purchased home and the potential for legal fees to all involved in the transaction.





What's Happening in Tucson



Frida Kahlo: Art, Garden, Life - Tucson Botanical Gardens - October 10 - March 2017

ZOOcson - Reid Park Zoo - October 14

Tucson Rotary Club's Classic Car Show - Gregory School - October 15

Film Fest Tucson - Scottish Rite Cathedral - October 20 - 23

U of A Homecoming - University of Arizona - October 27 - 29

Tucson Celtic Festival & Highland Games - Rillito Raceway Park - November 4 - 6

El Tour de Tucson - through Pima County - November 19



But You Must Pay the Rent! An Eviction Primer for the Residential Landlord

By Anne Terry Morales
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What must an Arizona landlord do in order to evict a tenant? The answer is: "it depends." What is the cause for the eviction? Late payment? Falsification of information on rental application? Illegal discharge of a weapon? Once the cause for the termination is determined, the landlord's actions must follow the applicable provisions of the Arizona Residential Landlord and Tenant Act (Arizona Revised Statutes, "A.R.S." §§33-1301 through 33-1381, inclusive.) In addition, the Landlord should review the termination provisions in the written lease between the landlord and the tenant to see if there are any additional requirements for termination. (Always have a written lease agreement and make sure it complies and is compatible with the Act!)

Notice. In each case the landlord must first give the tenant notice of the breach and/or eviction action. Notice must be in writing and can be either hand-delivered to the tenant (considered delivered immediately) or mailed by registered or certified mail to the tenant to his last known address (considered delivered on the earlier of the date actually received by the tenant or five days from the date of mailing). It is strongly recommended to have the notice hand-delivered in order to shorten the process and have fewer days that the property is not producing income. The content of the Notice that must be given will depend on the cause for the eviction.

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Material and Irreparable Health, Safety and Welfare Violations. If the termination is due to gang activity, the illegal discharge of a weapon or any other breach that occurs on the premises, which breach is irreparable and jeopardizes the “health, safety and welfare of the landlord, the landlord’s agent or another tenant or involving imminent or actual serious property damage” (A.R.S. §33-1368.A.2) the landlord may immediately terminate the lease by hand- delivering written notice to the tenant. The landlord can then directly file the eviction summons and complaint (also known as a forcible entry and detainer or special detainer action) as described below.

Nonpayment of Rent. On the day after the rent is due and unpaid, the Landlord should deliver to the tenant (in either manner set forth above) a “Five-Day Notice to Pay or Quit.” The Five-Day Notice should include the amount due, late charges, and any applicable fees. The Notice must also inform the tenant that, if the amount due is not paid within five calendar days, the lease will terminate and the landlord will file an eviction action to recover the premises and the amounts due, including attorney’s fees.

Health, Safety and Welfare Violations. If there is a curable breach of the lease materially affecting health and safety, the landlord should deliver a Five-Day Notice to the tenant specifying the acts and omissions constituting the breach. The notice also must state that the lease will terminate if the breach is not remedied within five calendars days after receipt of the notice.

Material Noncompliance with the Lease. If the landlord discovers that the tenant has materially breached the lease, such as falsifying information on the rental application or failure to maintain the premises, the landlord must deliver to the tenant a “Ten-Day Notice” stating the specific acts constituting the violation and that the lease will terminate ten calendars days after receipt of the notice if the breach is not cured within the ten day period. If the nature of the breach is such that it cannot be cured, the Ten Day Notice should state that the lease will terminate ten days after receipt of the notice.

Eviction Action. If the rent has not been paid or the breach cured within the time period set forth in the Notice, the next step is to file the eviction summons and complaint and attend the eviction hearing. For more information regarding eviction hearings and related actions please see the upcoming Winter Edition of our Newsletter.



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Uniform Fiduciary Access to Digital Assets Act

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There exists in this country a Uniform Law Commission the function of which is to study and propose uniform statutory codes to the various states' legislatures. This is supposed to lead to commonality of statutory codes among the various states. In recent years, the Uniform Law Commission has found that there was considerable difficulty for family members to gain access to digital assets of a deceased or incapacitated person. The Commission proposed a uniform act called Uniform Fiduciary Access to Digital Assets Act (which will be referred to as UFADAA hereinafter), that is intended to allow "fiduciaries" access to a deceased or incapacitated person's digital assets as a part of the administration of that person's estate. Arizona enacted its version of the UFADAA which became effective in August of 2016. Its purpose is to provide the fiduciaries – defined as executors (personal representatives in Arizona), successor trustees of trusts and those holding powers of attorney to gain lawful access to a decedent's digital assets.

What are digital assets? Nearly everyone now has some type of an on-line computer account used to communicate, pay bills, purchase merchandise, conduct business, even social accounts to create on-line personalities. Naturally, we protect the accounts by using our secret passwords. Digital assets also include either on-line or on-computer documents, media stored in one's computer, photos, videos, music, medical records, legal or financial documents, web-sites, banking information and other data maintained on or through the use of our computers.

Executors of wills, successor trustees of trusts and those holding powers of attorney typically have fiduciary responsibility to manage the assets owned by the decedent's estate or trust whether the assets are real property, personal property, money or other assets. These "other assets" are now recognized to include "digital assets." For example, when a family member dies or becomes incapacitated, the fiduciary is authorized and, in fact, has the responsibility to contact the person or company maintaining the digital asset and, upon proving the appropriate authority, to assume control of and manage the deceased or incapacitated person's digital assets. This is about as much help UFADAA provides – authority to assume lawful control over another person's digital assets.

How important to day-to-day life is this new statutory scheme? Most of us maintain bank accounts, investment accounts, commercial accounts through which we purchase merchandise and other contacts through the use of the computer. How many of us cause our bank to pay bills through computer authorization? The access to such accounts is through our computers, a web site familiar to us and our using a password that is confidential to us. We are often encouraged to use such accounts in such a way as to avoid any use of paper or mail. Such paperless accounts will leave the fiduciary with little information about how to contact the bank or investment company or

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other account without knowing who to contact, let alone how to provide such an account holder with evidence of the fiduciary's authority. Assuming that the fiduciary has access to information about the account and knows there is an account registered on the computer, how will the fiduciary be able to provide the confidential password necessary to gain access to the account? Many of us maintain our own records within our computers of our assets and liabilities and it can be necessary for a fiduciary to gain access to one's computer to obtain that recorded information. The first hurdle is to recognize that there are such materials within a computer or that there are records stored within the computer that contain information about monetary or other assets that are to be managed by the fiduciary. The fiduciary has to determine where the decedent's assets are located and, once having determined that, then access via the computer must be through the confidential password. If the deceased or incapacitated person possessed paper records of his or her accounts, the fiduciary can develop contact by either telephone or parcel post with the holder of assets and to gain access to those assets without the use of a computer or password.

There is little value in UFADAA to the fiduciary who has little information about the existence of paperless accounts, but cannot obtain passwords that enable access to such accounts. It will be of little comfort to the family of the deceased or incapacitated person that the fiduciary has discovered such paperless accounts, but cannot gain access for lack of the password.

Real Estate Brokers Are Not Necessarily Liable for the Negligence of Their Agents

By: Heidi Rib Brent

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In a recent wrongful death case arising from an automobile accident, the Arizona Court of Appeals held that, while Arizona statutes and regulations mandate real estate brokers closely supervise their agents in a real estate transaction, they do **not** establish the broker's requisite control over the other aspects of the agent's activities to make the broker liable for the agent's negligence arising out of an automobile accident.

In *Santorii v. MartinezRusso, LLC dba RE/Max Professionals*, No. 1 CA-CV 15-0211, filed 8-23-2016, a real estate agent, returning from a sales appointment, was involved in a car collision in which both drivers died. The widow of the other driver sued the real estate broker for vicarious liability for the agent's negligence. The broker defended that the agent was not an employee, but rather an independent contractor, so the broker should not be liable for the agent's driving. The agent furnished his own car, car insurance, was paid by commission only and made his own appointments.

The Court found that, although Arizona law imposes upon brokers the duty to supervise their agents, that duty regulates *only the real estate transaction itself* and does not extend to the agent's driving. Thus, if the agent truly is an independent contractor and not an employee, then the broker would not be liable for vehicular accidents even if related to real estate transactions. However, if the agent was an employee, then the broker would, in fact, be liable for the agent's negligent driving in the course of employment.

Therefore, for brokers to protect themselves from vicarious liability for acts of their agents, refer to our Spring Newsletter <http://tucsonazrealestateattorneys.com/agents-employees-contractors/> for an analysis of the law on independent contractors versus employees and to our Summer Newsletter <http://tucsonazrealestateattorneys.com/new-arizona-safe-harbor-statute-independent-contractors/> for specific provisions that should be in an independent contractor agreement under Arizona's new law. You also can contact us for a legal review and update of your independent contractor agreements.