Spring
2015

MONROE MCDONOUGH
BRENT & MORALES, PLLC
ATTORNEYS AT LAW

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SOUTHERN ARIZONA'S REAL ESTATE LAW FIRM

MAY WE PRESENT . . .

We want to introduce you to our wonderful support staff, with whom you will interact when contacting our office.

We start our day with a song – Melody Race – who is a joy to have around. Her experience includes working for iconic Tucson real estate attorney Jerry Hirsh, whom we fondly remember. Melody brightens the office with her sunny smile and people skills. According to Melody, "The law can be very intimidating to people not familiar with it. I like to help them feel more comfortable and prepared."

In the afternoons, Lois Hall keeps us in line. A former chief with the U.S. Navy, she also has years of experience as a legal assistant. We benefit from her recent retirement from full-time employment, as she does a full days' work for us in a half day. Lois says, "Having returned to the work force, I have been blessed finding such great people with whom to work ."

Our assistants overlap at noon for updates at shift change. So, whether you call us A.M. or P.M., you can be sure we are ready to help!

2015 Legislative Update

By: Heidi Rib Brent

From January 12, 2015 to April 3, 2015, the Arizona 52nd Legislature met for 81 days—a record for the shortest session since 1968. There were 1,163 bills introduced, 324 bills were signed and 20 bills were vetoed. While there were no changes to the Arizona Department of Real Estate, there are several new laws that impact real estate.

House Bill 2084: **Condominiums; planned communities; associations; disclosures**: requires condominiums and planned community associations to submit, with their annual report to the Arizona Corporation Commission, a statement with the name of the association's management company or designated agent and contact information, including address, telephone numbers, fax number, website and email address. This bill eliminates the filing of such information with the County Recorder and requires updates within 30 days of changes to the information. This will make the Arizona Corporation Commission the one place to go to determine how to contact an HOA or other community association. This does not alter the provisions of A.R.S. Section 41-2198, et seq., which governs administrative complaints against condominiums and planned communities.

House Bill 2311: **Judgment Liens; recordation; real property**: provides that, beginning January 1, 2016, when a certified copy of a judgment is recorded with the County Recorder where the judgment debtor has property, the judgment becomes a lien on real property of the judgment debtor in that County. This allows a municipal court or justice court judgment to be executed in the same manner as a superior court judgment.

House Bill 2578: **Real property; purchaser dwelling actions** mandates that at least 90 days prior to filing a lawsuit against a developer or seller, purchasers must provide written notice of the alleged defects or deficiencies. The seller is permitted to inspect the dwelling and may offer monetary compensation and/or repair or replacements within 60 days after receiving notice. An HOA also may file a dwelling action for construction defects affecting the community. (See Page 3 for more details.)

Senate Bill 1185: **Guest removal; landlord tenant act** clarifies that under the Arizona Residential Landlord Tenant Act, a guest of a tenant who remains on the premises without the permission of the landlord or tenant does not become a tenant in their own right and can be removed by a law enforcement officer at the request of the landlord or tenant.

Senate Bill 1368: **Municipalities; additional business licenses; prohibition** prohibits a municipality from requiring additional business licenses for a real estate broker or agent who is licensed in another municipality in Arizona where the primary place of business is located. Thus, brokers or agents with multiple offices cannot be required to have multiple business licenses.

Recent Amendments to Arizona's Construction Defect Laws: What Homebuyers, Contractors and "Sellers" Need to Know

By: Anne Terry Morales

On July 3, 2015 substantial amendments to Arizona's construction defect statutes will become effective. The following is a summary and analysis of the most notable amendments contained in House Bill 2578.

House Bill 2578 defines "**Construction Defect**" as a "**Material Deficiency**" in the design, construction, etc. of the home resulting from one or more of the following:

(a) the violation of applicable building codes;
(b) use of defective materials, products, etc.; or
(c) failure to meet the "generally accepted workmanship standards" within the community.

"**Material Deficiency**" is then defined as a "deficiency that *actually impairs* [emphasis added] the structural integrity, the functionality or the appearance of the dwelling at the time of the claim or is reasonably likely to actually impair the structural integrity, the functionality or the appearance of the dwelling in the foreseeable future if not repaired or replaced."

> **Questions**: What standard will be used to determine if a deficiency "*actually impairs*" the structural integrity, functionality, or appearance of a dwelling? Who will make that determination? Will it be necessary to go to court to have that decided?

"**Seller**" has been expanded to include any person or entity engaged in the business of designing, constructing or selling dwellings, including any "**Construction Professional,**" which is defined as any "architect, contractor, subcontractor, developer, builder, builder vendor, supplier, engineer or inspector."

> **Questions**: Must the homeowner give each of these entities notice of the claimed Construction Defect since they fall under the definition of "Seller"? Who has the right to make and the liability for the repairs and replacements? Who must be included as a party in any lawsuit?

Prior to filing a construction defect lawsuit; the homeowner must first give the "Seller" written notice of the alleged Construction Defect. Upon receipt of the notice, Seller then has a "reasonable opportunity" to repair or replace the claimed Construction Defect. The Homeowner then has the right to request repairs or replacements be made by another licensed construction professional. The Seller, with consent of the homeowner, has the right to choose the alternate licensed construction professional.

> **Questions**: Who is the Seller for these purposes? Do all of the "Seller" entities have a say in choosing the alternate construction professional? Since "inspectors" are included in the definition of Seller, will the homeowner be required to file a statutory notice of claim with any governmental agency that inspected the dwelling?

The "Conduct of the Parties" during the repair process, as well as any "any repair or replacement efforts undertaken by the Seller," will now be admissible as evidence in any lawsuit.

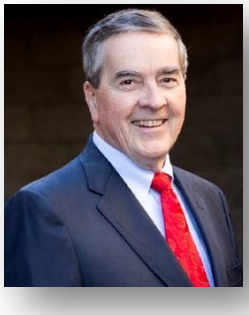
> **Questions:** Will this amendment have a chilling effect on the willingness of the Seller entities to repair or replace the claimed defects prior to any litigation? Will the admissibility of the Conduct of the Parties promote or discourage pre-litigation cooperation between the parties?

Finally, the House Bill 2578 eliminates the requirement that the court award attorney's fees and expert fees to the successful party; however, original purchasers may still be able to recover such fees under normal contract theories.

According to the sponsors of House Bill 2578, the newly adopted amendments were intended to discourage construction defects litigation. The volume of questions raised by the amendments suggests that they may actually have the opposite effect. In any event, homeowners and each "Seller" involved in the construction or renovation of a dwelling should establish procedures and documentation to assure compliance with the new requirements. Each party must also be mindful of their conduct and communications throughout any repair process, since they are now admissible in any construction defects lawsuit.

I SIGNED MY REVOCABLE TRUST – WHAT ELSE DO I HAVE TO DO?

By: Lawrence McDonough



Whether you retain a lawyer to prepare an estate plan, hire a document preparer, or do-it-yourself on the internet, you are not finished with your trust until you transfer almost everything that you own into the name of your trust. Otherwise, you have wasted your time preparing the trust and your will still has to be probated to transfer those assets to the trust.

In order to avoid probate (which is not the end of the world in Arizona), make sure that all of your real estate, bank accounts, business ownership, brokerage accounts, and especially stocks and bonds in your given name, are transferred out of your personal name and into the name of the trustee of your trust.

The lawyer can help you transfer your real estate into the name of your trust which requires a couple of technical steps. However, the lawyer need not be involved in transferring your bank accounts, brokerage accounts and stocks and bonds. The bankers and brokers prefer to deal directly with you in transferring those assets using the Certificate of Trust prepared by your lawyer. For security reasons, you really shouldn't have your account numbers in anyone else's files.

Generally, life insurance policies and retirement plans need not be transferred to your trust because their ownership will be determined by your beneficiary designations. Having stated that, there are circumstances in which life insurance or retirement plans should be transferred to your trust if necessary to provide funds to administer the trust. In either case, it's important to determine and retain a balance between the assets to be distributed through the trust on one hand and the assets left to beneficiaries of life insurance policies and retirement plans on the other hand.

LEGISLATURE APPROVES SUBSTANTIAL PROPERTY TAX EXEMPTION FOR PROPERTY LEASED BY RELIGIOUS ENTITIES

By: Anne T. Morales

During the recent legislative session, the property tax statutes were amended to allow a "non-profit church, religious assembly or religious institution" that leases its property from a for-profit owner to have the same property tax exemption currently available for property leased by charter schools. Under the new provision, property that is leased by a religious entity and used primarily for religious worship can be classified as "Class Nine Property." Class Nine Property has an assessed valuation of 1% of full cash value rather than the 18% rate applicable to most commercial property. To qualify as a Class Nine Property, both the property owner and the religious entity must first file affidavits with the County Assessor. The property owner's affidavit must state that: (1) the religious entity is the sole beneficiary of the change in property tax classification, and (2) the lease rate being charged to the religious entity is consistent with the lease rates that are charged to other tenants of the property or fair market rate. The religious entity's affidavit must state that: (1) it uses or holds the property primarily for religious worship and (2) it is the sole economic beneficiary of the Class Nine Property classification. Each year thereafter, the religious entity must file a comparable affidavit in order to maintain its classification.

The amendments allowing property leased by a religious entity to be eligible for Class Nine Property classification raise several legal questions. For example:

Will an amendment to the lease be required to reflect the potential for Class Nine Property classification?
Will the property owner be required to reduce existing lease payments if the property is reclassified?
Will the property owner be required to file the required affidavit on behalf of the religious entity?
If a reclassification is allowed, how will the parties address its impact on the allocation of property taxes among the tenants?

To clarify these issues, any amendment to an existing lease as well as any new lease should set forth the responsibility of the property owner and the religious institution regarding the required affidavits. In addition, a procedure to determine the square footage of the leased property actually being used for religious worship must also be established in order to enable the property owner and the religious entity to swear that the Class Nine Property is "primarily used for religious worship." The party responsible for that determination should also be designated. Finally, provisions must be added that address what happens in the event the Class Nine Property designation is terminated due to the action or inaction of one of the parties. Clearly, property owners and religious entities alike should care when incorporating this new exemption into their leases.

Huge Penalties Against Lender for Mistreating Borrowers

By Heidi Rib Brent

The Consumer Finance Protection Bureau ("CFPB") and the Federal Trade Commission ("FTC") announced a settlement with Green Tree Servicing for its mistreatment of borrowers trying to save their home from foreclosure. Green Tree "failed to honor modifications for loans transferred from other servicers, demanded payments before processing loss mitigation options, delayed decisions on short sales, and harassed and threatened overdue borrowers." Pending court approval, Green Tree agreed to pay $48 million in restitution to victims, plus a $15 million civil money penalty for its illegal actions. Green Tree also must engage in efforts to help affected borrowers preserve their homes, cease mortgage servicing violations, cease deceptive tactics to charge consumer fees and provide improved customer service. http://www.consumerfinance.gov/newsroom/cfpb-and-federal-trade-commission-take-action-against-green-tree-servicing-for-mistreating-borrowers-trying-to-save-their-homes/

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Go Team, Real Estate!

By: Heidi Rib Brent

Real estate teams have become commonplace and one often sees the team name as the focal point of real estate agent advertising. Teams may be a great way for some agents to operate, but the agents involved need to comply with Arizona statutes and rules of the Arizona Department of Real Estate ("ADRE").

Currently there are no Arizona statutes or ADRE rules specifically regulating teams and agents do not even register teams with the ADRE. Each broker can determine its own protocols on naming teams. However, there are ADRE rules regarding names for agent LLCs (limited liability companies), dba (doing business as) and advertising. Further, regardless of the team name, the employing broker's name must be displayed in a clear and prominent manner in any advertising so the public is aware of the person or entity legally responsible for supervising the agents. The ADRE prohibits advertising that creates a misleading impression, so the terms "Group" or "Associates" should not be used by teams, as the ADRE considers those words to create the impression of an independent entity. Brokers and agents must use their full legal names in advertising unless they licensed a nickname with the ADRE. (Even a "David" must get a nickname to advertise as "Dave"!)

Teams generally form to share the tasks, so brokers and team members must take care that no unlicensed assistants perform tasks for which a license is required. Anyone who negotiates, lists, offers or attempts to list, auctions, assists in procuring prospects, advertises, or holds himself/herself out as "engaged in the business of buying, selling, exchanging, renting or leasing real estate, businesses and business opportunities or timeshare interests or counseling or advising regarding real estate, businesses and business opportunities or timeshare interests," must be licensed as a real estate broker or agent under the supervision of a broker. A.R. S. § 33-2101(48) and (52); §32-2122. Thus, unlicensed assistants cannot access lock-boxes nor discuss the team's listings with clients. ADRE Substantive Policy No. 2005.04 identifies the tasks an unlicensed assistant may perform.

Brokers should personally review and approve all team operating agreements, specifically for task assignments, advertising and compensation to be sure they meet ADRE requirements.

The articles contained in this newsletter are of a general nature and reflect only the opinion of the author at the time it was drafted. They are not intended as definitive legal advice, and you should not act upon it without seeking independent legal counsel.