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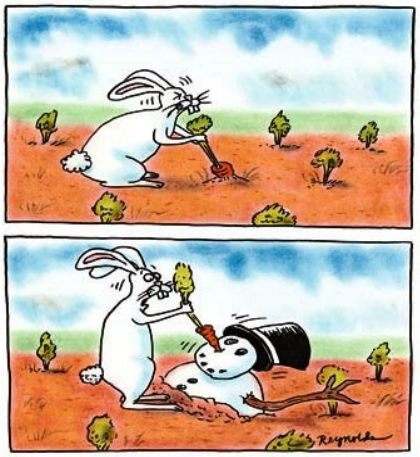
Monroe McDonough Goldschmidt & Molla
Attorneys at Law

MONROE McDONOUGH GOLDSCHMIDT & MOLLA

SOUTHERN ARIZONA'S REAL ESTATE LAW FIRM

Welcome to the MMGM Newsletter

Happy Spring!



MEET THE STAFF

By SALLY MYERS, OFFICE ADMINISTRATOR

Joyce Balsino

Manager, HOA Collections

Joyce Balsino graduated from the University of Arizona with a B.S. in Business Administration, where her focus was in Management Information Systems. She went from legal assistant to Operations Manager at the collection law firm of Aron & Associates, P.C., before eventually gaining an ownership interest in the firm. She has experience dealing with national banks and credit card companies as well as many local Tucson businesses and their collection issues. She brings over twenty years of legal collection experience to Monroe, McDonough, Goldschmidt & Molla, PLLC.

Monroe McDonough Goldschmidt & Molla

Tucson Association of REALTORS®

National Association of REALTORS®

Tucson Women's Council of REALTORS®

Green Valley Association of REALTORS®

Southeast Arizona Association of REALTORS®

Santa Cruz County Board of REALTORS®

TELL ME HOW I CAN GET OUT OF MY CONTRACT

By Michael J. Monroe, Esq.

Those exact words are spoken many times at a real estate law office by clients. The client comes in and says "I signed a contract to buy this property but I changed my mind. How can I get out of the contract"? That statement is an oxymoron. If you have a contract you are bound to its terms, which means you can't just "get out of it". But what if you have a situation where one of the parties fails to comply with the strict terms and conditions of the contract? The other party may be anxious to get out of the contract. This sometimes results from seller's or buyer's remorse. So the party wishing to walk away from the contract starts looking for any possible non-performance (breach) by the other party as an excuse to void the contract. In such situations can the non-breaching party refuse to close escrow?

The answer to that question usually depends on whether the breach is a material breach of the contract or a non-material or trivial breach of the contract. A material breach of contract is defined as a violation that substantially affects the consideration a party bargained for in the contract. If the court determines the breach was material then the injured party (non-breaching party) can cancel the transaction. If the court determines a breach is not a substantial or material breach the court will advise the non-defaulting party to seek a remedy for the minor damages sustained but won't allow the non-defaulting party to walk away from the contract.

For instance, what if a buyer is flying back to Tucson to sign the escrow papers and is delayed due to weather conditions and arrives past the deadline to be timely with the close of escrow? Assume further that the buyer is as diligent as possible and arrives at the escrow company early the next morning to sign. Will a one day (or a few hours) delay cause the contract to fail? Is it really a material breach that so impacts the contract that the seller should be excused from performance?

You savvy real estate agents and brokers are probably saying "Well if that happens the seller must give the buyer a three day cure notice (grace period) to perform pursuant to lines 272 through 275 of the Arizona Association of Realtors (AAR) Residential Resale Real Estate Purchase Contract" and the problem is solved. First of all, that is precisely why that language is in the purchase contract – to avoid just such inequities. Yes, that would avoid the problem in the example above. But, what if the buyer gets held up overseas and is already in the three day period and sends the signed escrow papers by Federal Express in a timely manner but due to unforeseen, adverse weather conditions the plane is delayed and the papers don't arrive at the escrow company until the fourth morning through no fault of the buyer? Stranger things have happened. Is that a material default?

In the example above, has the seller been damaged by the overnight delay? Or should the court strictly adhere to the language of the contract and say the three day notice was provided and the signed papers came in late so the seller can opt out of the contract? While I am not aware of a case on this point it presents two competing issues. The buyer was already in the grace period and the AAR contract provides a remedy for not performing a contract duty in a timely manner. So should the court rewrite the contract and give the buyer extra time? There are good arguments to say "No". The contract is clear – three days and you're out. Or should the court say due to the circumstances it would be inequitable and creates forfeiture on the buyer who acted in good faith but due to circumstances beyond the control of the buyer the papers were late. I don't have the answer to that question. But you don't want to be the test case to find out what the court would say.

This issue often comes into play with language that is almost universally utilized in real estate contracts called the "Time is of the Essence" provision. The language in the AAR contract at Line 341 says "Time is of the Essence: The parties acknowledge that time is of the essence in the performance of the obligations described herein." That language appears to create a cancellation option for the seller if the buyer is late for the closing, even for an unavoidable delay. However, courts do not favor such absolute language.

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(Continued from previous page) TELL ME HOW I CAN GET OUT OF MY CONTRACT *By, Michael J. Monroe, Esq.*

The clause, on its face, attempts to create a condition in the contract that time is of the essence and any violation or infraction of the time commitments in the contract can result in a cancellation of the contract. Yes, most sellers want their houses sold timely and any slight inconvenience is considered intolerable. However, that is not necessarily the case. But, even a slight delay could be a catastrophe for the seller. Assume the seller contracted to move their furniture out to a new house the seller is purchasing. Now that the buyer is late in closing the seller does not have the funds to close on the new house seller is purchasing and has nowhere to drop the furniture. As a result seller loses the house the seller intended to purchase and incurs substantial expense to the moving company. That sounds like a substantial negative impact that should allow the seller to declare a material default on the buyer.

Consequently courts usually will look beyond the language of the contract to the real live circumstances to determine how much of a hardship was caused to the non-defaulting party by the breach. If the breach merely created an inconvenience for the seller without any substantial dollar impact the courts are prone to indicate that such time is of the essence language is mere boilerplate language and time really was not of the essence. Courts traditionally don't like forfeitures where a party loses out on an opportunity they had bargained for as a result of a minor breach that caused little harm. Therefore courts generally will try to prevent such forfeitures. If the court finds the breach was insignificant it will tell the seller that the seller has to perform but may have a claim for the minor damages incurred such as a day or two of extra interest on the mortgage or a day or two of extra homeowner's insurance premium, but not the right to walk from the contract. Courts look to what really happened and decide whether certain actions should be penalized or not. The mere recital that time is of the essence in a contract (like in line 341 of the AAR contract) is not likely to transform trivial actions into a material breach.

The lesson here is that if timing (performance) in the contract is genuinely important (material) to one of the parties then that fact should be stated in section 8 of the purchase agreement entitled Additional Terms and Conditions. Consider utilizing language to this effect: "Time is of the essence to the seller (or buyer) and is a material consideration for the seller (or buyer) entering into this contract and but for such language the seller (or buyer) would not have entered into this contract." When the court can see that the parties specifically considered the facts in advance and determined that time is really to be a material consideration of the agreement the courts will generally honor such a provision and not look to see if the delay was a material or insignificant breach of the contract.

There was a funny decision by an Arizona court a number of years ago concerning material versus non-material breaches. A buyer noticed a small scratch in the bathtub in the house he was having built. Although the contractor "fixed" the scratch the buyer said he could still detect the small scratch and refused to close when the house was completed. The buyer demanded a new tub. The contractor pointed out that to install a new tub it would be necessary to take out the bathroom wall to the outside and bring in a new tub and redo the entire outside wall to match the remaining outside wall –all at very considerable expense. The court found that indeed there was a breach. The buyer had the right to expect a tub without a scratch. But, the court found it was an insignificant breach. Therefore the court ordered the buyer to close on the purchase of the house. The court then instructed that the buyer could sue the contractor for damages incurred as a result of the trivial breach – the value of the scratched tub versus an unscratched. So, the court directed that the measure of damages for the suit for damages would be that the buyer had to obtain an appraisal of the house assuming that the tub had not been scratched and fixed and a second appraisal of the same house assuming that the tub had been scratched and fixed. The difference in the two appraisals would be what the buyer could recover from the contractor.

That case illustrated that courts do not like so see inequitable situations created in the name of a mere trivial breach of contract where at best there are relatively insignificant damages resulting from the breach. So, if your client wants to walk from a contract claiming a breach to the contract by the other party, you can see that the answer may not be clear black versus white. The answer could be clear "maybe!" Welcome to the world of law.

HIGH-COST MORTGAGES FOR PRINCIPAL DWELLINGS (MORE OF MORTGAGE REFORM IN 2014) *By Heidi Rib Brent, Esq.*

The Consumer Financial Protection Bureau (CFPB) issued new rules amending Regulation Z, which implements the Truth in Lending Act (TILA), to effect changes to the Home Ownership and Equity Protection Act (HOEPA). The rules became effective for loan applications received beginning mid-January and impact high cost mortgages for principal dwellings. These rules regulate loans secured by a consumer's primary residence, both for closed equity loans and home-equity lines of credit, as well as refinances. The rules to do not apply to initial construction loans or FHA or USDA originated loans.

To determine if a loan is a high-cost mortgage subject to HOEPA coverage, there are three tests, each of which can bring a loan within the requirements:

1. The annual percentage rate (APR) exceeds the average prime offer rate (APOR) by 6.5% for 1st liens, 8.5% for junior liens or for loans for less than $50,000 or loans secured by personal property (including non-affixed manufactured homes).

2. Points and fees in connection with the loan exceed 5% of a loan of $20,000 or more or 8% of a loan of $1,000 to $20,000, which amounts will be updated annually with Regulation Z. Determining the points and fees is a complex calculation, including finance charges, Loan Originator compensation, pre-payment penalties, and even some charges paid by third parties. The calculation of points and fees excludes real estate related fees only if they are (1) reasonable, (2) the lender receives no compensation, directly or indirectly, in connection with the real estate fees and (3); the charge is not paid to an affiliate of the lender. (Affiliate transactions have been a major focus of recent CFPB enforcement.) Otherwise, the points and fees calculation may include title fees, title insurance, survey, document preparation fees, notary and credit report fees, appraisal fees and inspection fees.

3. Pre-payment penalties are either (1) still in effect more than 36 months after closing (or account opening) or (2) for an amount greater than 2% of the amount prepaid.

For high-cost mortgages, the HOEPA rules prohibit most balloon payments, reverse mortgages, higher rates of interest upon default and due on demand features in the absence of a default.

In February's article regarding the Mortgage Reform of 2014, we addressed "higher-priced loans," defined as loans that have an APR that exceeds the APOR by 1.5% for first liens and 3.5% for subordinate liens. To add to the complexity, the HOEPA "high-cost mortgages," due to the APR criteria, actually involve higher cost mortgages than "higher-priced loans." Thus, lenders of high-cost mortgages need to follow Ability to Repay Rules; however even if they meet the criteria of a Qualified Mortgage, the best a lender can get is rebuttable presumption of compliance.

Lenders of high-cost mortgages must provide consumers a list of at least 10 local HUD-approved counseling agencies for the consumer to obtain counseling, both upon receipt of the good-faith estimate disclosure and upon receipt of additional disclosures, and lenders must receive written certification that the consumer received the required counseling. In addition, lenders must provide consumers with specific additional disclosures at least three days prior to the loan closing (or account opening), which disclosures will be subject to additional new rules and forms effective in August 2015.

Other regulations are still becoming effective to implement the many aspects of the Dodd-Frank Act relating to real estate transactions. Before participating in any transaction involving private loans secured by real estate, be careful to consult an expert for your own protection.

HOME SAFETY CONSIDERATIONS FOR THE ELDERLY

Courtesy of Wells Fargo Advisors

Slips and falls represent the primary source of injury for older people. Falls are the number one cause of injury-related death for males age 80 and older and for females age 75 and older. According to estimates from the Centers for Disease Control and Prevention (CDC), fall-related medical expenses cost Americans more than $30 billion each year. The CDC estimates that these expenses are projected to increase to more than $67 billion over the next 20 years. One-third of senior citizens aged 65 or older — or nearly 12 million people — experience falls each year, and almost 5,000 die from falls in the home. The Home Safety Council study finds that while falls are the leading cause of home injury-related death among older adults, measures that can prevent critical falls are missing from many homes. Many caregivers of older adults cite a lack of knowledge and understanding of what actions to take in making the home safer in order to help prevent older adults from falling.

The Home Safety Council suggests that all caregivers conduct a home safety walk-through to identify and fix potential hazards. Below is a list of home safety tips that should be considered when conducting a home-safety walk-through: (1) All stairs and steps should be protected with a secure banister or hand-rail on each side that extends the full length of the stairs. Porches, balconies and terraces should be properly protected. (2) Hallways, stairwells and porches should be well lit. Stairwells should have a bright light at the top and bottom. Light switches should also be located at the top and bottom of the stairs and at both ends of long hallways. (3) Nightlights should be used to help light hallways, bathrooms and stairwells. Keep a lamp or flashlight within reach of the bed. (4) Stairs, steps and all passageways should be free of clutter. Telephone and electrical cords should be kept out of walkways. Furniture should be arranged so there is plenty of room to walk freely. (5) The bathtub or shower should have a nonslip mat or strips on the standing area. Grab bars should be installed around the shower, bathtub and toilet. These grab bars should be sturdy enough to support a person's body weight. (6) Set the thermostat of the water heater at 120° F or lower to prevent accidental scalding. (7) All floors should be kept clean and dry. Promptly clean up grease, water or other spills. (8) Throw rugs and loose carpet should be removed or secured firmly to the floor. (9) A stepladder should be used to reach items on high shelves. A good stepladder has wide treads and easy-to-grab supports. (10) Telephones should be located in each room and emergency numbers posted by each one. (11) Door, drawer and cabinet knobs should be big, easy-to-grab C-shaped or D-shaped handles. These handles are especially helpful for someone with arthritis. (12) Use lamps that can handle 100-200 watt light bulbs. An 85-year-old needs about three times the amount of light a 15-year-old needs to see the same thing.

You should also suggest the older adult consider subscribing to a medical alert or buddy system. Having an easy-to-reach, easy-to-activate tool gives both the older adult and caregiver greater confidence and security.

If, after conducting a home-safety walk-through, you find that the home needs changes, you may have to hire a reputable home-repair contractor. The following guidelines should be considered to help protect against fraud when hiring contractors: (1) Ask friends and neighbors for recommendations. (2) Obtain at least three written estimates for a project. Most contractors provide free estimates. (3) Ask for references. Be sure to check them for positive feedback. (4) Check your local business-license requirements and ask to see the contractor's license. Also ask for proof of insurance and bonding. (5) Do not pay the contractor in full prior to the work being completed to your satisfaction. A small down payment is permissible. (5) Be sure to get a written agreement before work begins or money is paid. The contract should specify both a work and payment schedule. (6) To report complaints or if you have any questions about a contractor, contact the Better Business Bureau or the office of your state's attorney general.

Along with the lack of information, the Home Safety Council also found that caregivers faced difficulties in communicating with older adults about the importance of home safety. The most common reason given for why caregivers had not taken action to make their homes safer was concern over the older adult's reaction. In an effort to ease into the discussion of home safety, the council recommends that caregivers apply safety practices first to prevent falls so that safety improvements are not seen as a consequence of aging. Although talking with older adults about making their home safer can be a sensitive issue, having the conversation and addressing any needed modifications can be the difference in making it possible for older adults to live safely and independently in the homes they love.

HOW ARIZONA COURTS DECIDE HOA ENFORCEMENT ISSUES

By Carolyn B. Goldschmidt, Esq.

Enforcement of restrictions in CC&Rs and other community rules and regulations can be a troublesome issue with which Association Boards and their Managers must grapple. This article will look at three common questions that often arise concerning HOA enforcement issues.

Question 1: How can an Association begin a program of enforcement if there has been a long period of non-enforcement, or lackadaisical enforcement in the past?

This issue arises many times upon the transition of control of the Association from the Developer to the Owners; however, it can come up anytime a newly-elected Board begins its term. A history of non-enforcement can undermine an Association's enforcement authority. Concurrently, Owners may object when existing violations that went unnoticed or unenforced for a period of time are now being pursued by the Association.

In Heritage Heights Home Owners Association v. Esser, control of the Association had just transitioned from Developer control to owner control. During the previous several years, the Developer had not pursued correction of violations, and the owner-controlled Board began a program of enforcement to eliminate violations already existing, and to prevent further violations. The Esser case particularly addressed "grape stake" fences, which were prohibited in the CC&Rs, but were used on a number of lots in the subdivision. The Board adopted a policy that required replacement of all grape stake fences within the ensuing five years. Mr. Esser installed such a fence after the policy was adopted and insisted he was entitled to keep it for five years.

The Court's opinion recognized that the Board's enforcement policy addressed not only grape stake fences, but also other violations that the Developer overlooked. The Board gave several notices to owners in its newsletter of its intention to enforce the restrictions for the good of the community and outlined a program for doing so. The evidence also showed that many existing violations were corrected; however, in some cases, the Board granted variances or an extended period of time for the removal of violations (as with the fence replacement program).

The Court accepted the Association's program as justifiable, reasonable, and fair. Further it concluded that there was nothing arbitrary or inequitable about providing reasonable accommodations for good faith violations, as described above. And, Mr. Esser was required to remove his fence since his violation occurred after the enforcement program was put into place.

The Court stated unequivocally that when an owner accepts a deed to a property that is restricted by CC&Rs, that the owner consents to and is bound by those restrictions, which amount to a contract between the owner and the Association. However, the Court also implicitly adopted an additional standard that enforcement of the restrictions must be reasonable and equitable.

Question 2: How much discretion does an Association Board have in determining whether a particular violation should be enforced?

In Johnson v. The Pointe Community Association, a Board of Directors chose not to enforce a violation of the CC&Rs that appeared to be minimal. Here, the Johnsons and their neighbors, the Boyles, were in a dispute over a trellis the Boyles had constructed in their backyard without first seeking approval from the Architectural Review Committee (ARC). However, after the ARC took notice of the trellis and other architectural violations, the Board failed to take further steps to ensure that the Boyles brought their lot into compliance. The Board took the position that it reasonably interpreted and enforced the CC&Rs, in an exercise of its discretion, and the Court was required to defer to the Board's decision.

CONTINUED ON NEXT PAGE

The Court refused to defer to the Board and stated: "In the absence of declaration [CC&Rs] provisions providing alternative means of resolving disputes arising from the enforcement of [CC&Rs], both homeowners and their associations are entitled to bring their case before the courts without either party's position receiving deference. The civil courts afford a neutral interpretation of the development's declaration and "significant protection against overreaching" by either homeowners or their association. However, the broad reach of this decision has been limited by another, more recent case from the Arizona Court of Appeals.
In Tierra Ranchos Homeowners Association v. Kitchukov, the Court addressed its previous conclusion in Johnson, and narrowed its view significantly. At issue in this case is the placement of a garage on the Kitchukovs' Lot. After the ARC refused to approve the garage placement because it would be too close to the northern Lot line, the Kitchukovs challenged the ARC's discretionary decision as arbitrary and unjust.

The Court, looking at Johnson and other law, adopted the rule from the Restatement (Third) of Property, and concluded that in cases involving the interpretation of a CC&Rs provision [i.e., whether an action by an owner on his property constitutes a violation under the CC&Rs], the Court has the power to make an independent determination, but in a case involving an ARC's discretionary decision, made within the scope of its authority and upon reasonable investigation, a court should defer to the ARC's decision.

Taking both of these decisions together: although a Board is not permitted to interpret and enforce the CC&Rs in any manner that is wholly inconsistent with the actual provisions, it may reasonably exercise its discretion, when faced with a violation, as to how enforcement will proceed.

Question 3: How should an Association enforce restrictions if the CC&Rs are unclear as to whether a violation exists?

This may be the most important of the three questions, because it must be settled before either of the first two questions can be addressed. Many times, to abuse a familiar phrase, a possible violation may walk like a duck, and talk like a duck, but may not be described or listed under the "duck" provision in the CC&Rs. So is it a duck? In Arizona Biltmore Estates Association v. Tezak, the Tezaks parked a large customized bus on their property. The applicable restriction stated that no trailer, camper or "similar equipment" shall be permitted on any property within Biltmore Estates. The Tezaks argued that the plain wording of the restriction did not include the word "bus" or any similar term that could adequately describe their customized bus, which was not used for living space or camping or any other purpose that would put it in the same category as the vehicles mentioned in the restriction.

At the time of the Tezak case, the law was settled that restrictive covenants (i.e., restrictions in CC&Rs) were to be strictly construed in favor of the free use and enjoyment of property. However, the Court instead applied the principle that the intention of the parties to the CC&Rs is paramount. Pursuant to this principle, the Court found that the intent behind the restriction was to prohibit bulky vehicles, such as the Tezaks' bus, and concluded that the restriction did apply.

Since the Tezak case, the Arizona Supreme Court, in Powell v. Washburn, has shifted its view away from upholding the "free use" of property and adopted the intent principle in Tezak. The more modern focus, on upholding the intent of the parties to the restriction, establishes a clear standard for the interpretation of CC&Rs regarding enforcement provisions: if it walks and talks like a duck, and the terms evidence the intent for the provision to restrict ducks … well, I'm sure you know the rest.

MARK YOUR CALENDAR—April Events

1-30—Birdathon

5-26—Venus in Fur

8-15—ISSF World Cup

11-13—Spring Fling

11-13—Rose Tree Festival

11-27—Arizona International Film Festival

11-14—Triple A Baseball Showdown

12-13—DMAFB Air Show

12—Earth Day Festival

12-13—AZ Opera—Don Pasquale

12-13—Cowboy Musical Festival

17-27—Pima County Fair

18—Soweto Gospel Choir

19—EGGstravaganza

19—Breakfast with the Easter Bunny at Colossal Cave

19—Star Party Astronomy Event

23-26—Police & Fire Games

25—Tejano Shootout 2014

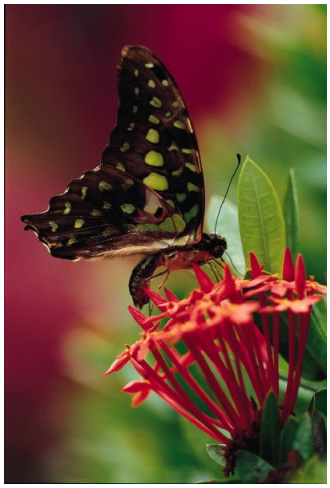
25—Solar Potluck and Exhibition

26—Tucson Glass Festival IV

26-27—Tucson Regional Ballet—Spring Spectacular

Remember

By Dawn Jensen/Family Friend Poems



As I walk through life, I look at all I have done. I had wandered aimlessly, and wondered what I have become.

I have been through so much; it is amazing I made it through. The lessons I have learned I am shocked I pulled through.

The times I wondered what life was all about; the trials experienced in life, Can make all the good come out.

We try to make it day by day. Remembering what we were taught. Just remember some time to pray. It is important, we need it every day.

Life can be short; unexpected at that. We try to take its punches just hoping it won't break our back.

Remember who you are; who you want to become. Everything will fall into place, When the time comes.

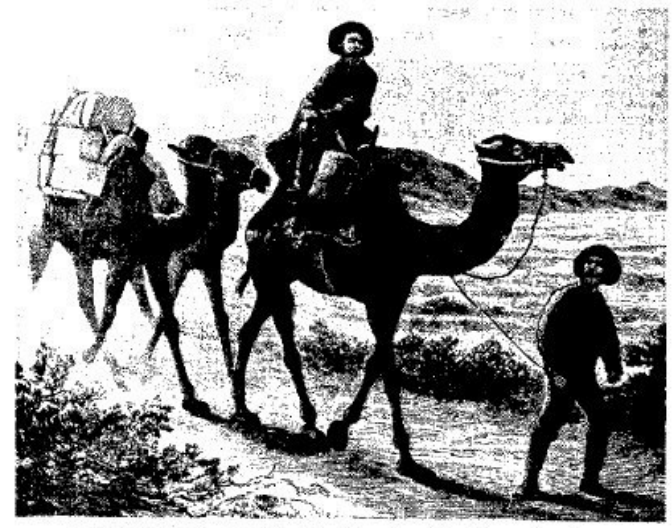
Don't forget I love you's, every chance you get. The time may be short; there is no time to regret.

Life can be exciting, as we all have found out. Eventful, even busy there is no time to be left out.

Remember who you are, And Who you want to become. The time can be short; don't leave things undone.

Remember your families; they are the only ones you've got. To carry you in times of need they cannot be bought.

Remember they love you, either here or there. They will always be with us. Help for things to bear.



A pack train of camels in the American Southwest in the 1850s. The illustration is from Harper's Weekly.

ARIZONA FASCINATING FACTS

CAMELS WERE IMPORTED IN THE 1850S TO SURVEY THE FUTURE ROUTE 66 ACROSS NORTHERN ARIZONA

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EXPERIENCE THE DIFFERENCE

Monroe McDonough Goldschmidt & Molla (MMGM) is a real estate and business law firm. Our attorneys and staff believe that each client must experience the difference that genuine care and concern can make. We strive to achieve the client's objectives while delivering unwavering personal service in an honest, aggressive and comprehensive manner. We refer to this as our Clients for Life program. MMGM provides outstanding counsel and unparalleled representation in the following areas of law:

Real Estate - Personal Injury
Business and Entity Formation
Civil and Commercial Litigation - Construction Defect
Contracts - Estate Planning—Probate
Homeowner Association (HOA)
Appeals - Arbitration and Mediation Services
Motor Vehicle Warranty Defense
Product Liability - Transactional
Labor and Employment

HONEST AGGRESSIVE PROFESSIONAL