

**SCOPE OF REAL ESTATE AGENTS' "DUTY TO VERIFY"
PROPERTY INFORMATION**

One question that constantly arises in the minds of real estate agents is the extent to which they are obligated to verify or question the accuracy of listing information or other information provided regarding a property.

Generally, in Arizona a real estate agent does not automatically have a duty or obligation, whether as listing or selling agent, to verify information provided about a property.¹ This assumes, however, the absence of a "red flag" concerning the accuracy of the information, and that a principal has not specifically directed the agent to take reasonable steps to verify the information. Moreover, where the agent makes a representation based upon information received from another (typically the seller's agent) versus simply receiving information (typically the buyer's agent), the agent must be careful to qualify the representation. Otherwise, the agent risks liability for making a representation, even if in good faith, that turns out to be erroneous.

Arizona case law addresses the "duty to verify," to the extent such a duty exists, under negligent misrepresentation principles. Negligent misrepresentation claims against professionals, including real estate agents, are governed by the test set forth in the Restatement (Second) of Torts § 552 (1979). See, e.g., Standard Chartered PLC v. Price Waterhouse, 190 Ariz. 6, 945 P.2d 317, 340 (App. 1996). Section 552 states, in part:

Information Negligently Supplied for the Guidance of Others

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise *reasonable care or competence in obtaining or communicating the information*.

Id. Importantly, Section 552 does not require an agency relationship between the agent and the person to whom the agent "supplies false information." As noted in the case of Aranki v. RKP Investments, Inc., 194 Ariz. 206, 208-09, 979 P.2d 534, 536-37 (App. 1999), an agent's duty to deal fairly with non-clients will suffice to create a duty for purposes of negligent

¹ This article does not address the affirmative disclosure and public report obligations that apply to subdivision offerings by a subdivider, under A.R.S. §§ 32-2181, et seq.

misrepresentation claims. This duty has limits, however; in Aranki the court held that the duty to deal fairly does *not* require a seller's agent to conduct investigations to discover defects in the seller's property. Aranki v. RKP Investments, Inc., 194 Ariz. 206, 208-09, 979 P.2d 534, 536-37 (App. 1999); see also Lopata v. Miller, 122 Md.App. 76, 712 A.2d 24, 27-31 (1998); Mahler v. Keenan Real Estate, Inc., 255 Kan. 593, 876 P.2d 609, 618 (1994).

The holding in Aranki is consistent with a much older Arizona Supreme Court case, Diamond v. Chiate, 81 Ariz. 86, 300 P.2d 583 (1956), in which the court held that a seller's agent was entitled to rely on the statements of his principal, and that the agent "ordinarily need not conduct an independent investigation" as to the condition of the seller's title. *Id.*, 81 Ariz. at 93, 300 P.2d at 587.

The Department of Real Estate's "Commissioner's Rules" might initially be understood to impose a duty on an agent to verify information employed in advertising a property:

A salesperson or broker shall ensure that all advertising contains accurate claims and representations, and fully states factual material. A salesperson or broker shall not misrepresent the facts or create misleading impressions.

A.A.C. R4-28-502(C).² But, the Department has also confirmed in one of its Substantive Policy Statements that the duty to verify applies only to the following extent:

Licensees are expected to take reasonable steps to assist their clients in confirming or verifying information under circumstances in which a reasonably prudent real estate professional has reason to question the accuracy of the information being provided in a transaction, or where the client has questioned the accuracy of the information.

These considerations are intended to provide a reasonable standard for licensees to follow in complying with their duties and obligations under statute and rule.

See ADRE Substantive Policy Statement ("SPS") 2005.13 (rev 4/2005) (emphasis added). Where the matter is beyond the expertise of the agent, SPS 2005.13 recognizes that "reasonable care or competence may include recommending that a client seek professional or technical advice when the matter is beyond the expertise of the agent." *Id.*

Therefore, any duty to verify may require affirmative verification of information only to the extent it is reasonably within the scope of the agent's knowledge and ability. For example, it is more than reasonable to expect an agent to verify that a house being listed does indeed have "three bedrooms and two baths, new paint and a brand new roof" as listed. On matters that are not easily ascertainable, such as the condition of title as in the Diamond case cited above,

² "Advertising" is broadly defined to include all oral or written statements to induce, directly or indirectly, any person to enter a contract or acquire real estate. See A.R.S. § 32-2101(2).

presumably the agent may rely upon what her principal tells her. Of course, it is usually the things that are not easily ascertainable that later become the subject of lawsuits.

In cases where the agent is simply receiving and passing on the information, the agent should make it clear to the principal that the information should not necessarily be relied upon, and that the agent is not in any way endorsing the reliability of the information. The agent should also advise the client to hire qualified professionals to verify any matters the client deems material, such as home inspectors, plumbers, electricians, surveyors, etc. See SPS 2005.13, supra. Of course, this does not equate to say that a buyer's agent who accompanies his client to see a property does not have a duty to point out potential problems or issues that do not require expertise beyond that of the average real estate agent.

In conclusion, a real estate agent does not automatically have a duty to verify information or discover defects in a property, whether acting in the role as the seller's, or buyer's, agent. Nevertheless, an agent will be liable for making representations or "supplying information" that is false where he or she does not exercise "reasonable care or competence in obtaining or communicating the information." The question of what is "reasonable care" will depend upon numerous factors, including whether the agent can easily verify the information, and/or whether the agent has any reason to suspect (perhaps in light of other information of which the agent is aware) that the information is incorrect. Moreover, an agent's fiduciary duty to a principal presumably includes a duty to discover problems that are reasonably discoverable without special expertise, and to properly advise the client of the necessity of obtaining special expertise when appropriate.