

FRBAR Legal Update – Florida Realtors Convention – August 2023

The Florida Realtors/Florida Bar Joint Realtor/Attorney Committee met on August 18th, 2023 at the Florida Realtors Convention at Rosen Shingle Creek Resort. Below is a summary of those discussions.

The subcommittee on the FRBAR Contract met first to discuss two areas of potential revisions to the FRBAR Contract.

Condo Rider

The first discussion revolved around form A. Condominium Rider to the FRBAR Contact (hereinafter “Rider A”). Marcia Tabak, Deputy General Counsel for Florida Realtors invited discussion about whether Rider A paragraph 3(c) needed to be modified to include an expanded definition of “pending” in reference to “special or other assessment.” A Seller is representing that except as disclosed in 3(c), “the Seller is not aware of any special or other assessment that has been levied by the Association or that has been an item on the agenda, or reported in the minutes, of the Association, within twelve (12) months prior to Effective Date.” One of the questions was whether Paragraph 3(c) solely applied to “special assessments” or included regular assessments that were increased due to the high cost of insurance, storm damage to the common elements, or as a result of the Milestone Inspections or SIRS, and who has the obligation to disclose the increased fees.

The suggestion to modify Paragraph 3(c) arose partly because of post-closing litigation (threatened or ongoing) by Buyers against Real Estate Agents, Brokers and Sellers for failure to disclose additional costs or assessments that were levied by condo associations as a result of the Milestone Inspections or Structural Integrity Reserve Studies required for certain condominiums due to the new condo laws. Buyers have claimed that their real estate agents should have disclosed to them the potential for increased assessments. The subcommittee will continue the discussion regarding Paragraph 3(c), and acknowledged the need to revise Rider A next year to address the new requirements under §718.503(2), including a Buyer’s right to receive the Milestone Inspection and SIRS reports, if applicable, and voidability language for contracts executed after December 31, 2024.

Closing Fees

The second issue the subcontract committee addressed was whether to modify FRBAR Contract Paragraph 9 regarding closing fees charged by closing agent to a party who did not select the closing agent or agree to pay for title insurance. Closing agents, whether law firms or title companies, handle closing fees differently throughout the state, and the topic has been debated by the subcommittee since 2016 without resolution.

In some jurisdictions, when the parties check box 9(c)(i) and the Seller selects the closing agent and agrees to pay for the owner’s title insurance policy premium, title search, and closing services fee, it is customary to charge a fee to the Buyer when services are performed on behalf of the Buyer.

Similarly, when the parties check box 9(c)(ii), and the Buyer selects the closing agent agrees to pay the owner’s title insurance policy premium, title search, and closing services fee, some closing agents will charge the Seller a fee for preparation of Seller’s documents required by the title commitment and by the FRBAR contract.

In other jurisdictions, it is customary for a closing agent to only charge the party who selected them, regardless of the additional services rendered for the other party, for fear of being included in class action lawsuits. Some attorneys have taken the position that they must charge for services rendered to either party, because failure to charge for their services would be a RESPA violation for “giving a thing of value” to a referrer of settlement services.

The small subcommittee task force will continue to seek a resolution that allows the Buyers, Sellers, Realtors, and Closing Agents know what kind of fees their clients can be expected to pay at closing, no matter the location of the Property.

Joint Realtor/Attorney Meeting – Panel on SB264 – Certain Foreign Buyers

The Joint Realtor/Attorney committee hosted a panel of attorneys and real estate brokers to discuss the impact of SB 264 and answer some of the frequently asked questions that the Florida Realtors Legal Hotline has received. The new Florida law became effective July 1, 2023, and requires all Buyers to sign an affidavit at the time of purchase that they are either not a foreign entity as defined in the law, or if they are a foreign entity as defined in the law, that they are otherwise not prohibited from purchasing certain real property in Florida. The language in the box above the signature lines in the FRBAR Contracts and the NABOR Contracts informs Buyers and Sellers of the new law.

The panel recognized the difficulty that real estate agents may face in assisting their Buyers in complying with SB264 while avoiding violating Fair Housing regulations, and emphasized the importance of referring a Buyer or Seller who has questions regarding the law to legal counsel. The panel noted that FREC is the designated organization required to promulgate the Affidavit, but FREC's form is not yet available. In the interim, many closing agents are using forms created by their title insurance underwriters and may provide a sample affidavit to the Buyer at the beginning of the transaction, informing them of their responsibility to sign the affidavit at closing and encouraging the Buyer to contact counsel if they have any questions about their ability to purchase certain real property in Florida. Note: For cash transactions, Buyers were customarily able to sign their closing documents electronically, but will now need to arrange for execution and notarization of the Affidavit at closing.