

**A HARDBALL PARRY FOR A HARDBALL THRUST:
ANECDOTES ON YOUR NEW CAREER AFTER RECORDING AN ABORTED
PURCHASE CONTRACT!**

BY J. Robert Eckley

Okay. So it's 4:30 p.m. on a Friday and you just learned that the seller is going to renege on what you consider to be an iron-clad Purchase Agreement and is going to sell to someone else this weekend. Visions of how to advise your thoroughly outraged buyer (who will likely blame you if this happens) and, without this really big commission, how to cope with your consequently defaulted alimony payments dance most unpleasantly in your head. Now what? And be careful before you answer this one. What you do and say next may cost you your home, car and savings, your license, a criminal charge and more collective misery and grief than you can possibly imagine without being there!

To put a point on it: If your first reaction is to rush to the County Recorder's Office and record the Purchase Agreement or to advise your client to do so, start packing, as this step is likely your first on a slow march to poverty, ignomy....and possibly jail.

Why? Because this state takes a very dim view of clouding someone else's title to land if, perchance, you are wrong in your reasons for doing so. You may think the Purchase Agreement is impregnable, but is it really? At least a hundred sharp local lawyers and probably a dozen or so nit-picky judges stand ready to disagree with you. Perhaps you don't even really think the Purchase Agreement is so great, but you are banking on the likelihood that the seller will want to avoid the legal hassle and will cave in? Brother!: Record a document on that basis and pack your toothbrush and a LOT of toothpaste for where you will be going. That's not just being wrong. That's being positively tickled about it, to boot. The laughing, usually stops, however, when the Superior Court's final gavel comes down....on your life.

So much for garnering your attention. Let's turn to the law for why and start out by restating the proposition that a good lawyer and judge can and will pick your "iron-clad" deal apart, making you look like the dumbest bunny in town. Believe me when I say that it is done all of the time to some very fine and very competent real estate professionals. It's all part of the gamesmanship. Nonetheless, you recorded it or advised your client to record it. The seller and his attorney cry "foul!" Here's how it stacks up:

Complaint Number One: Civil Suit for Filing a False Document: Pursuant to A.R.S. §33-420, a person purporting to claim an interest in, or a lien or encumbrance against, real property, who causes (files it or advises it) a document asserting such claim to be recorded in the office of the county recorder, knowing or having reason to know that the document is forged, groundless, contains a material misstatement or false claim or is otherwise invalid is liable to the owner or beneficial title holder of the real property for the sum of not less than **five thousand dollars**, or for **treble the actual damages caused** by the recording, whichever is greater, **and** reasonable attorney fees and costs of the action. ARS §33-420(A). *Janis v. Spelts*, 153 Ariz. 593, 739 P.2d 814 (App. 1987). Those actual damages could be the profits the seller could have made on resale. *Patterson v. Bianco*, 167 Ariz. 249, 805 P.2d 1070 (App. 1991). Okay, but you have piles of

money and this is only "small change" to you, hmmm? Is this the best these wimps can do? No. They can do better. A lot better.

Complaint Number Two: Handcuff City: A person who violates the statute, above, is also guilty of a class 1 misdemeanor. ARS §33-420(E). Heck: Only a year with the County? You can do that standing on your head, right? It only gets better from here if chain gangs are your favorite clubs.

Complaint Number Three: Civil Suit for Wrongful Lis Pendens: ARS §12-1191 describes certain documents which could be filed on title as a "notice of pendens." Though these are intended for notices of imminent legal action, the filing of a document wrongfully claiming an interest in land could be deemed as an aborted attempt at such a claim. Evergreen West, Inc. v. Boyd, 167 Ariz. 614, 810 P.2d 612 (App. 1991). Mammoth Cave Production Credit Ass'n v. Gross, 141 Ariz. 398, 687 P.2d 397 (App. 1984). One can also be sued for filing a document that is correct in some regards, but incorrect in others as, for instance, one that seemed to suggest in its property description that a claim was asserted in an entire parcel rather than just a part thereof, held actionable in Bianco v. Patterson, 159 Ariz. 215, 745 P.2d 962 (App. 1989). Yahoo! Are we having fun yet? Not even NEARLY over!

Complaint Number Four: Civil Suit and Criminal Charge for Wrongful Attempt to Claim or Collect a Debt: The earnest money stated in the Purchase Agreement could be construed as a claim of debt and the recordation as the attempt to secure it like a mortgage. It's neither as a matter of law. Provident Mut. Building-Loan Ass'n v. Schwertner, 15 Ariz. 517, 140 P. 495 (1914). To the extent this is untrue, this is another violation of ARS §33-420(A). See above. It could also be a wrongful debt collection practice under state and federal law. Sure, why not: Civil suit, Jail time. Add it on, suckers! No one can daunt YOU!

Complaint Number Five: Civil Suit for Slander of Title. Publishing anything deemed false (and "incorrect" is deemed false) is separately actionable as a slander of title. City of Tempe v. Pilot Properties, Inc., 22 Ariz.App. 356, 527 P.2d 515 (App. 1974). The claim may be for consequential and punitive damages of any amount. Barnett v. Hitching Post Lodge, Inc., 16 Ariz.App. 147, 492 P.2d 27 (App. 1971). Well, at this point you are already broke three times over and in jail, so why not just a little more excitement? After all, it will be your last for some time.

Complaint Number Six: Civil Suit for Civil Racketeering: ARS §13-2301(D)(4) defines "racketeering" as any act, including any preparatory or completed offense, committed for financial gain, which is chargeable or indictable under the laws of the state in which the act occurred and, if the act occurred in a state other than this state, would be chargeable or indictable under the laws of this state had the act occurred in this state and punishable by imprisonment for more than one year, regardless of whether such act is charged or indicted, involving: ...(as of 04/19/94) intentional or reckless false statements or publications concerning land for sale, resale of realty with intent to defraud, or a scheme or artifice to defraud. ARS §13-2310 further discusses "fraudulent schemes": Any person who, pursuant to a scheme or artifice to defraud, knowingly obtains (or attempts to attain) any benefit by means of false or fraudulent pretenses, representations, promises or material omissions is guilty of a class 2 felony. ARS §13-2314(A)

provides for civil liability for racketeering. Now you're a racketeer! So a few more years in the Crowbar Hotel, but this time it's state prison rather than the County jail. The food is better but your bunkmate is a lot scarier....and hairier.

Complaint Number Seven: Hey! A Couple More Years with a Tin Cup!: Any person who, pursuant to a scheme or artifice to defraud, knowingly obtains any benefit by means of false or fraudulent pretenses, representations, promises or material omissions is guilty of a class 2 felony by reason of A.R.S. § 13-2310, which is chargeable or indictable under A.R.S. § 13-2310 and § 44-1481. *Garvin v. Greenbank*, 856 F.2d 1392, 1396 (9th Cir. 1988); *Daggett*, 152 Ariz. at 564. Any participation in the act, even if one is not the one who actually committed it, is actionable. *State v. Haas*, 138 Ariz. 413, 418, 675 P.2d 673 (1983). Not only is your bunkmate even scarier, you'll be with him a lot longer!

Complaint Number Eight: Civil Suit and Leg Irons for Extortion:

ARS §13-1804 provides that one who attempts to obtain a gain by a threat to cause damage to property or by performing or causing to be performed any other act which is calculated to harm the other person in their wealth or financial condition to the gain of the one doing it is guilty of theft by extortion. Now we have a class 4 felony. By the time you're out, YOU will be the hairiest and scariest one of all!

Complaint Number Nine: Civil Suit for Malpractice: With you gone until sometime in the mid-2000s, the client will team up with your spouse in a settlement, your spouse will reveal the bank account in Michigan you kept in grandpa's name and where the hidden money is out in the garage, upon which the client will then execute his malpractice judgment and they'll both elope with it.

Complaint Number Ten: The Real Estate Department Shows Up With A Customized Straight-Jacket: You just blew right through ARS 32-2153(A) and (B) and R4-28-1101 of the licensure laws and rules at about 300 miles an hour! You're out of control! It's safe to surmise that your license will become rather abruptly "homeless."

I think the point has been made. Made moreover when the Maricopa County DA has, within the last month, amid a rising tide of such filings, publicly pledged that he is ANXIOUS to prosecute fraudulent filings wherever reported, and members of the legislature have avowed specifically that this area will be revisited in the next session to TIGHTEN IT UP (presuming financial ruination and a two-decade stretch is not tight enough, already?!).

With the temptation to file the Purchase Agreement coming so often in this hard-ball market and the civil, criminal and licensure risk if it doesn't stick so utterly devastating, one has to think of the "Dirty Harry" challenge the next time one is tempted to visit the Recorder's Office with one of these: "Since this is a .44 magnum pointed at your head, the most powerful in the world, and would blow your head clean off if you guess wrong, you really got to ask yourself, 'do I feel lucky?'"

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