CHANGE TO C.A.R. INDEPENDENT CONTRACTOR AGREEMENT (ICA) DUE TO RECENT COURT CASE

A California Court of Appeal decision has held that the arbitration clause in the C.A.R. Independent Contractor Agreement (ICA) is unenforceable as written (Wherry v. Award, Inc, February 9, 2011) and the California Supreme Court has now rejected a petition to hear the case. The case held that the ICA was a contract of adhesion, and, accordingly, under the Fair Employment and Housing Act (FEHA), a pre-dispute arbitration clause must have certain features to be enforceable including: a written award with specific legal and factual findings sufficient to allow judicial review; discovery; allowing a complaining Associate-licensee to file without paying fees; and prohibiting an award of attorney fees against a complaining Associate-licensee. The Association of REALTORS®' (AOR) arbitration rules do not contain all of these features. Although, in most cases an AOR would not hear a FEHA claim such as this one involving allegations of sexual harassment, the court also found unenforceable the private arbitration alternative specified in the ICA. The language of the case appears broad enough to bring within its scope the arbitration provision for all matters covered by the ICA. Therefore, brokers and real estate agents may not rely on the clause to mandate arbitration before the AOR when the dispute is between the broker and salesperson. As a result, C.A.R. has changed the arbitration clause in the ICA, which has previously remained substantially the same for almost 20 years in the ICA and its predecessor. The form with the new language is anticipated to be available on zipForm® on June 15, 2011.

The new arbitration clause in the ICA will no longer mandate arbitration either before the AOR or otherwise. Instead, the parties to the ICA are obligated to mediate disputes first. If the case is not settled, they are invited, but not required, to subsequently agree to arbitrate at the AOR. Since the parties would then be aware of the nature of the claim, C.A.R. believes a post-dispute arbitration agreement entered into voluntarily at that point would not be subject to the same limitations as required by the Wherry case. (It should be noted that while it is common for AORs to hear compensation disputes, more legally complex matters, such as the sexual harassment claim in Wherry, will most likely not be accepted for AOR arbitration.) Another change to the ICA, that was already planned to be introduced into the ICA, and that is unrelated to the lawsuit discussed above, will also appear beginning June 15, 2011. That change allows the broker and Associate-Licensee to agree on what types of licensed activity can be conducted under the brokerage name.

C.A.R. is also creating an addendum that mirrors the change inserted into the June 15, 2011 version of the ICA and that can be used to modify previous versions of the ICA. The ICA Addendum will be available shortly. Use of either the June 15, 2011 version of the ICA or the ICA Addendum should avoid the outcome specified in the Wherry case. Those brokers who wish to follow a different approach should consult their own attorney. C.A.R. is not advising that all ICAs must be replaced, or amended, but rather that those parties who do not make a change be aware that they may not rely on the previous versions of the arbitration clause as enforceable.

This case, and C.A.R. form change, gives all brokers an opportunity to review their files for compliance with DRE Regulation 2726 which requires all brokers to have a written agreement with all Associate-licensees, whether broker associates or salespersons, that is signed, dated and covers all material

aspects of the relationship. Please note that this case does not impact the overwhelming majority of arbitrations which are those between REALTORS® of different firms. It also does not impact the arbitration clause contained within the RPA or other purchase agreements for buyer and seller disputes.

Any feedback on this issue may be addressed to neilk@car.org.