SUMMER 2011

ARIZONA REALTOR QUARTERLY

LENDER OWNED

Page 5 REO Talking Points
Preparing Your Buyers for the REO Rollercoaster

Page 7 "As Is" Clauses in REO Transactions
A Look at Enforceability

Page 11 FTC Ruling on Mortgage Assistance Relief Services ("MARS")

ARIZONA association of REALTORS®

REAL SOLUTIONS. REALTOR® SUCCESS.

A MESSAGE FROM AAR GENERAL COUNSEL MICHELLE LIND

REOs continue to play a big role in the Arizona real estate market.

According to RealtyTrac, foreclosures made up 45% of home sales in Arizona in the first quarter of 2011.[1] One in every 210 housing units in our state received a foreclosure filing in May 2011—the second highest foreclosure rate in the nation, behind Nevada.[2]

But you don't need numbers to tell you that REOs are a major force in our market today. You see it as you pull comps for your listings, drive buyers around town and talk with homeowners in your community who face limited options.

AAR supports your success—whatever the market—by providing information that is relevant to your business. In this issue, we share talking points to help start a conversation with your buyers about REOs, and attorney Rick Mack addresses the enforceability of as-is clauses in these transactions.

Have a topic that you'd like to see covered in a future issue? Email editor@aaronline.com. We'd love to hear from you.

K. Michelle Lind, ESQ.
AAR General Counsel / Co-CEO

1 http://bit.ly/jP4V4y 2 http://bit.ly/jNNGLm

Arizona REALTOR® Magazine — June 2011

2011 LEGISLATIVE SUMMARY

BY NICOLE LASLAVIC, AAR GOVERNMENT AFFAIRS DIRECTOR

The Fiftieth First Regular Arizona State Legislative Session began on January 10, 2011. After the November general elections, Republicans overwhelmingly gained control over both chambers. Ultimately, this resulted in the ability to pass bills with extreme ease and no need for votes from members of the Democratic Party. Although bipartisanship between both parties has long been expressed as necessary, many involved in this legislative session would say there was little crossover between the two parties, and in some cases, members might even describe the interactions as one political party steamrolling right over the other.

When all was said and done, Senate President Russell Pearce and House Speaker Kirk Adams managed to stick to their ultimate goal of completing the legislative session in 100 days. The legislature adjourned sine die at 5:25am on April 20, 2011. After the 10-day grace period granted to the governor to allow her time to review legislation, the outcome breaks down as follows:

Out of the 1,350 bills "dropped" by members of the legislature,

- **386 bills passed both chambers and were sent to the governor;**
- **29 bills were vetoed by the governor; and**
- **357 bills were signed by the governor.**

In addition, 146 memorials or resolutions were "dropped" by members of the legislature, and 36 memorials or resolutions were passed.

Each session, the Arizona Association of REALTORS®, represented by its lobbyist and statewide volunteers on the Legislative Committee, track roughly 200 bills with potential impact on the real estate industry. Issues are prioritized based on the potential positive or negative impact of the legislation. As the more than 1,300 bills proceed through the process, there is ample opportunity for them to be modified with amendments, resulting in a continuous "sports-like" game of offense and defense.

Prior to session beginning, members of AAR's Legislative Committee are asked to join specialized tasks forces to study and give expert input on specific fields, such as taxation, water issues, land use, industry practices, etc. These members assist AAR staff by providing a great deal of knowledge on specific industry experience and regional application. This collaboration

>>

ARIZONA REALTOR® QUARTERLY

SUMMER 2011

Arizona REALTOR® Quarterly distills the past three months of AAR's most crucial online offerings—on legal issues, regulatory changes and other important topics—into one print product.

5 *REO Talking Points* *Preparing Your Buyers for the REO Rollercoaster*

7 *"As Is" Clauses in REO Transactions* *A Look at Enforceability*

8 *Medical Marijuana & Fair Housing Update*

10 *Understanding the Pool Barrier Laws*

11 *FTC Ruling on Mortgage Assistance Relief Services ("MARS")*

12 *Property Management, Landlord Questions on the Rise*

13 *Legal Hotline Q&A*

© Copyright 2011 Arizona Association of REALTORS®. For reprint permission, contact editor@aaronline.com. Images, with the exception of authors' photos (or if indicated otherwise), are © Copyright 2011 iStockPhoto.com.

MONTHLY ONLINE MAGAZINE
ARIZONA REALTOR® MAGAZINE
Subscription: FREE *(AAR members only)*
Visit www.aaronline.com/azr to view.

QUARTERLY PRINT SUBSCRIPTION
ARIZONA REALTOR® QUARTERLY
$15 | Fall & Winter Issues *(AAR members only)*
Visit www.aaronline.com/azq to subscribe.

2011 LEGISLATIVE SUMMARY — CONTINUED

between staff and REALTORS® provides the industry with its first line of defense in the annual season of lawmaking and stakeholder competition.

Below is a summary of the major policy issues that AAR was involved with during the 2011 session. Note: The regular effective date for the new laws passed this session is July 20, 2011, unless the legislation includes a specific effective date or delayed effective date.

HB 2153 – MUNICIPALITIES: COUNTIES; FIRE SPRINKLERS; CODE

The topic of mandated fire sprinklers once again surfaced as many municipalities were requiring new homes to be equipped with fire sprinklers. Our members voiced their concerns as to the intrusion on private property rights, and as a result, this bill was brought forward. The bill forbids cities, towns or county boards of supervisors from adopting an ordinance that prevents a person or entity from choosing whether to install or not install fire sprinklers in a single-family detached residence or any residential building containing no more than two dwelling units. Furthermore, the bill prohibits a city, town or county board of supervisors from imposing any fine, penalty or other requirement if the property owner chooses not to install fire sprinklers.

HB 2005 – SUBDIVISIONS; ACTING IN CONCERT

This bill initially surfaced in past sessions and was brought forward by a constituent of the sponsor, Representative Burges. Due to the fact that AAR had previously been involved in this issue during past sessions, we once again became involved with the legislation. AAR's legislative committee took the position to monitor the legislation, but directed6 that our lobbyist actively work with the bill sponsor, her constituent and the legislative liaison from the Arizona Department of Real Estate to make sure that our industry was protected and the ultimate goal of the legislation was reached.

The bill, as signed by the governor, does the following:

- **states that either the county where a division occurred or the Arizona Department of Real Estate, but not both, may enforce "acting in concert" statutes;**
- **states that a familial relationship alone is not sufficient to constitute unlawful acting in concert;**

>>

- **permits the county to waive the requirement to prepare, submit and receive approval of a preliminary plat as a condition precedent to submitting a final plat, as well as waive or reduce infrastructure standards or requirements;**
- **states that a creation of six or more lots, parcels or fractional interest is not subject to public report requirements when the sale or lease of a lot, parcel or fractional interest occurs ten or more years after the sale or lease of another lot, parcel or fractional interest and the other lot, parcel or fractional interest is not subject to public report requirements and is treated as an independent parcel, unless upon investigation by the Commissioner, it is found that there was evidence of intent to circumvent the subdivision laws;**
- **removes the provision that states that the commissioner may "take whatever other action he deems necessary to ensure compliance with the subdivision laws of this state;" states that the Commissioner has no longer than five years after an initial complaint is received or the Commissioner initiates an investigation to determine if there was a violation of the subdivision statutes;**
- **limits the liability for developers when an untrue statement of material fact or omission of material fact on a public report is made by limiting the amount in damages that have to be paid.**

HB 2193 – MUNICIPAL WATER CHARGES; RESPONSIBILITY

This bill was brought forward by AAR in conjunction with Representative Jim Weiers in an effort to resolve concerns regarding municipal requirements that held property owners liable for the unpaid water bills of tenants or prior owners. The bill specifies that for a residential property of four or fewer units, a municipality may require payment only from the person who has contracted for water and wastewater service, physically resides or resided at the location and receives or received the services. The bill additionally allows other entities (property owners or immediate family members), at their sole discretion, to contract for water and wastewater service with a municipality and provide payment for those services. Furthermore, the bill prohibits a municipality from refusing service due to unpaid service charges to anyone other than the person who resided and received the service at the property. The passage of this legislation once again recognizes the importance of personal accountability and the continued protection of personal property rights.

HB 2717 – HOMEOWNERS' ASSOCIATIONS; PENALTIES; ATTORNEY FEES

Last year, AAR was successful in passing legislation that would provide private parcel access to "for sale" signs within HOA communities. Alas, many unscrupulous HOA communities found sneaky ways to skirt the legislation by charging a homeowner for the use or placement of "for sale" signs. Once again, AAR educated members of the legislature on these overreaching practices and the sponsor of HB 2717 (Representative Carter) agreed to amend her bill to include language that would curb this practice. The bill as signed by the governor prohibits a condominium community from charging a fee for the use or placement of a "for sale" or "for lease" sign by a unit/property owner.

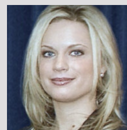
SB 1149 – PLANNED COMMUNITIES; CONDOMINIUMS; DOCUMENT FEES

Once again, AAR had to address the overbearing and costly regulations that HOAs are continuing to force on homeowners. This bill addressed current statute that permitted an association to charge a fee for required documents as long as the fee is "reasonable." The problem with the law was that in many instances, the fee charged was not only astronomical but extraordinarily unreasonable. This bill curtails this outlandish practice by limiting the fee that a planned community and condominium association can charge a unit owner for the preparation of the required documents associated with the resale of a unit to an aggregate of $400. This bill contained a delayed effective date; it will go into effect on January 1, 2012.

SB 1292 – REAL ESTATE; EDUCATION; BROKER REQUIREMENTS

One common theme we hear from REALTORS® is the importance of continuing education being up-to-date and relevant to today's industry issues. Time and time again, members of the association have voiced their disappointment about outdated and irrelevant courses that are offered for continuing education hours. This bill addresses those concerns by raising the continuing education standards for those in the real estate industry. As signed by the governor, the bill holds educators to a higher standard and accountable for the courses they teach.

To review any bill discussed above, visit www.azleg.gov. Insert the bill number at the top, right-hand corner of the screen, then click "Show Versions." If you have questions about AAR's legislative efforts, you can reach me at nicole@aaronline.com. ❇



ABOUT THE AUTHOR

Nicole LaSlavic *joined the Arizona Association of REALTORS® as Government Affairs Director in November 2010, joining CEO Tom Farley in representing the association at the Arizona capitol. In the past, LaSlavic worked as a lobbyist for a law firm as well as a local government relations lobbying firm. In both capacities, she worked to develop, advocate and implement policy and programs on a broad range of issues including health care, retirement, public safety and economic development. Throughout her career, she has developed and maintained relationships with legislators, staff and members of the various state agencies. In addition, Ms. LaSlavic has solid expertise in fundraising and event planning for both political candidates and organizations. You can reach her at nicole@aaronline.com or 602-248-7787.*

Arizona REALTOR® Magazine — May 2011

REO TALKING POINTS

Preparing Your Buyers for the REO Rollercoaster

REOs have been a major part of our market for several years now. Despite their prevalence, the challenges on the buyer side can still throw us for a loop. AAR spoke with agents who have battled through some difficult transactions and come out with a deal. Hands down, the most-often-mentioned advice was the importance of educating buyers about the REO process before you begin driving them around town.

Prior to the influx of distressed properties, Ann Ziller, an agent with Coldwell Banker Mabery in the Verde Valley, had considered her role as more of a consultant than a salesperson. "But now I see myself as a teacher," she says. Take on the role of educator at the outset, and you're more likely to have a happy buyer at the end. Here are some topics you'll want to discuss:

http://www.annziller.com/

Highest and Best. Negotiating with an asset manager is different than negotiating with a traditional seller. If an REO property seems to be a steal, it is more likely to receive multiple offers. Counter offers and demands for "highest and best" are par for the course. Asset managers want to show they got the most money they could for the property. In consultation with you, buyers must decide what the house is worth to them and what negotiation strategy best suits their personality.

Verbal Response. Once an offer is made, the counter offers for REOs are generally verbal—which means that another buyer can swoop in with a better offer anytime. Even once "agreement" is reached, there can be a gap of days or weeks until a contract is actually signed. It is important for your buyer to understand that until both parties have signed the contract, there is no real deal.

Timelines. And yet! Just because you don't the signed contract does not mean that the clock hasn't started ticking on critical time periods. Be sure you understand the terms of the addendum indicating when exactly timelines such as the inspection period begin. "Check. Don't just believe what you hear," warns Mindy Slanaker, an agent with HomeSmart in Tucson.

REO Addendum. AAR's standard contracts are written to balance the interests of buyers and sellers. An REO addendum shifts the balance firmly in favor of the seller. For example, an addendum may require the buyer to pay a per-diem for each day of delay on the closing regardless of who's at fault.

While much of the language is non-negotiable, it is extremely important that the buyer understand the addendum. This is where we remind you to recommend—in writing—that your buyer consult a lawyer. Of course, you'll still have to get out your eyeglasses to read the fine print because important information (such as when escrow opens or when the inspection period begins) is included in there.

As Is. REO properties are typically sold "as is." This means both that it is unlikely repairs will be made and that the bank is trying to protect itself against disclosure issues. The bank's contract documents "purport to disclaim all warranties and representations in an effort to limit potential liability for nondisclosure," as attorney Rick Mack wrote in an article (see page 7) on the enforceability of these as-is clauses. Still, a seller, even in an REO transaction, has a legal obligation to disclose *known* defects.

SPDS. Most REO sellers will not provide a Seller's Property Disclosure Statement (SPDS). AAR General Counsel Michelle Lind recommends that a buyer's broker should nonetheless provide the buyer with a blank SPDS. "The buyer can and should utilize a blank SPDS as a checklist in conducting the desired inspections and investigations," says Lind in an April 2009 article about REOs."

http://www.aaronline.com/documents/reo-transactions.aspx

Due Diligence. "The biggest thing I stress is the inspection period," says Grant Laos with Rock Point Realty AZ in Mesa. "If you don't like what you see, do your inspection, do your due diligence and consider all your options."

http://smoothshortsaleaz.com

For Kent Simpson with Tierra Antigua in Tucson, doing his due diligence as an agent included double-checking that all zoning and setbacks were properly adhered to. He found a newly constructed carport that was right on the property line. "It saved my buyer about $7,000 in the cost of tearing it down—not including possibly city zoning violation fines," he reports.

tucsonkent.com

Some buyers balk at paying for a home inspection when the property is offered as is. But as Ziller tells her clients, "Even if they won't fix anything, you still have to know what you're buying." In fact, in an as-is situation with minimal disclosures, a thorough home inspection may be even more important than usual. "With REOs, it's a

>>

buyer beware world," says Simpson. "A bargain on the sticker price doesn't mean it's a bargain under the hood."

If you recommend home inspectors, make sure they are licensed and insured. If the buyers refuse an inspection, have them sign a letter stating that you have informed them of the importance of an inspection, and they have elected against it.

Utilities. Getting utilities turned on for inspection can be a challenge. The contract obligates the seller to have the utilities on for inspections, but occasionally the addendum may change that. Different banks handle the issue differently. At one property, a listing agent may refuse to be involved in the process. At another, a bank may insist on coordinating the de-winterization itself to ensure it is done properly. At a third, an inspector may arrive to find that the utilities promised to be on still aren't.

Recently, Dean Ouellette [1], a Chandler agent with Thompson's Realty, posted on his Facebook page asking for ideas about how to handle the issue of inspectors finding utilities off despite promises to the contrary. Shar Rundio [2], also with Thompson's in Gilbert, suggested calling the utility company to verify service before the inspector visits. Matthew Pellerin [3] with Realty Executives in Phoenix has instructed his team of buyer agents to make a trip out the day before to verify utilities themselves. And Kerry Melcher [4] with Melcher Agency Real Estate in Phoenix suggested adding a clause in the contract stating the inspection period begins "upon verification (written) that all of the utilities are on and the property is ready for an inspection." (Behold the power of social media!)

1 http://deansellsaz.com/
2 http://www.speakingofphoenixrealestate.com
3 http://www.phoenixhomes.com/
4 http://www.kerrymelcher.com/

Unexpected Expenses. Inspections can also lead to fees for which the buyer isn't prepared. Some banks require the buyer to pay to have the home de-winterized and re-winterized. Depending on where you do business, that may not be the only utilities expense. "If electricity has been off for more than six months, a pre-inspection has to be done by Sahuarita to determine if the house is safe enough to have the utilities turned on," reports Slanaker. "That's a $40 fee right there."

No agent wants to see their buyers hit with fee after unexpected fee. You may warn them about HOA doc prep fees and start-up fees but forget to mention that they may need to re-key the house after closing. It's helpful to mention some of the standard fees that will arise, but you should also prepare the buyer for surprises.

Title Issues. REO properties have changed hands recently under what can be acrimonious circumstances, so it is especially important to double check title work. "There are a lot of things that title can find out if they're doing their job," says Van Welborn with HomeSmart in Glendale.

Ziller reports that she has found many title mistakes. In one instance, she looked up the owner of record and saw that it had not been updated. The listing agent assured her it would be handled, but when it came time to close, it was still incorrect and held up the deal.

And some issues aren't discovered until after the home has closed. For that reason, Simpson recommends that buyers increase their title insurance coverage. "With all of the problems we've seen in the foreclosure process, paying a little bit extra now can save a headache later on," he says.

Late Closings. An REO transaction can easily hit a snag on its way to closing. Talk with your buyers and their lenders about allowing room for a late closing when locking in the loan. No buyer wants to expend additional dollars or risk losing a good rate when re-locking the loan. For the same reason, you may want to counsel your clients to schedule the move only after the final HUD-1 is approved.

In each transaction you complete, you'll find new wrinkles based on the neighborhood or lender. They'll help prepare you for the next time the home your buyers fall in love with is lender-owned. And remember that even while you may have adjusted to the "new normal" of real estate in 2011, your buyers still need to be prepared for the REO rollercoaster before they strap on that seatbelt. ❊

Related Articles

As Is Clauses in REO Transactions – Rick Mack (April 2011)
http://www.aaronline.com/azr/2011/April/As-Is-Clauses-in-REO-Transactions.aspx

Don't Let Mold – or Other Defects – Poison Your Real Estate Career (May 2010)
http://www.aaronline.com/AZR/2010/May/dont-let-mold-or-other-defects-poison-your-real-estate-career.aspx

Is an Easier REO Possible? (October 2009)
http://www.aaronline.com/AZR/Oct/09REO.aspx

REO Transactions – Michelle Lind (April 2009)
http://www.aaronline.com/documents/reo-transactions.aspx

REO Reality Check – 10 Tips To Get Your REO Offers Accepted And Closed (July 2008)
http://www.aaronline.com/documents/reo-reality-check-10-tips-to-get-your-reo-offers-accepted-and-closed.aspx

"AS IS" CLAUSES IN REO TRANSACTIONS

A Look at Enforceability

BY RICK MACK

With the influx of Real Estate Owned (REO) properties obtained by lenders post-foreclosure over the last several years, the use of "as is" contracts in the sale of residential property has increased substantially. In standard contracts, buyers can expect certain representations and warranties regarding the condition of property, including seller's obligation to disclose known defects. With REO properties, however, lenders typically require "as is" provisions in contract documents, which purport to disclaim all warranties and representations in an effort to limit potential liability for nondisclosure.

The enforceability of such disclaimers in the context of an REO sale has not recently been considered. However, in a reported Arizona decision, the question of "as is" clauses in general real estate transactions was directly confronted by the Arizona Court of Appeals in *S Dev. Co. v. Pima Capital Management, Co.,* 201 Ariz. 10, 31 P.3d 123 (App. 2002). In that case, two years after the close of escrow the buyer discovered defective plumbing in two apartment buildings and brought suit against the seller for nondisclosure. In response to the claims, the seller moved for summary judgment, relying on the following "as is" provision within the purchase contract:

> **Disclaimer of warranties. Buyer acknowledges that except as expressly set forth in this Agreement, Seller makes and has made no representations or warranties of any kind whatsoever, including but not limited to warranties concerning the condition of title, physical condition, encroachments, access, zoning, value, future value, income potential, any survey, environmental report, or other information prepared by third parties, loan assumption, or the presence on or absence from the Property of any hazardous materials or underground storage tanks. Buyer is purchasing the Property as a result of its own examination thereof in its "AS IS" condition, and upon the exercise of its own judgment and investigation.**

Despite this language, the trial court denied the seller's motion for summary judgment and the case proceeded forward. Following a trial by jury, the buyer prevailed and was awarded $3,690,000.00 for its nondisclosure claim.

On appeal, the seller argued the "as is" clause removed a critical element of the buyer's nondisclosure claim—the duty to disclose facts material to the transaction. Accordingly, the seller contended, it was under no obligation to disclose the existence of known plumbing defects and summary judgment was appropriate.

In affirming the trial court's denial of the seller's motion for summary judgment, the Arizona Court of Appeals focused on two issues. The first was whether the defect was latent or patent. While the court acknowledged the determination of a patent versus latent defect is a fact-specific inquiry, and ultimately an issue for the jury to decide, the court expressed that "as is" provisions may shield liability for the nondisclosure of patent defects that the buyer is given an opportunity to investigate. On the other hand, if the known defect is latent or the seller does not provide the buyer an opportunity to investigate, the seller may be liable for nondisclosure, notwithstanding an "as is" provision. Therefore, under *Pima,* "as is" clauses will not protect a lender from failing to disclose known latent defects. Furthermore, "as is" clauses should not protect the seller where the buyer is prevented from inspecting the property for latent defects.

Another issue to consider is the knowledge of the lender. Under *Pima,* it is clear a seller is obligated to disclose known latent defects. What about a lender that has never visited the property and, therefore, likely has no knowledge of property condition or defects? According to the court in *Pima,* the lender may nonetheless have liability for nondisclosure of latent defects where its agent has knowledge of a defect, even if the lender does not itself have actual knowledge. As a general proposition, knowledge acquired by an agent within the course and scope of employment is imputed to the principal. See *Manley v. Ticor Title Ins. Co. of California,* 168 Ariz. 568, 816 P.2d 225 (1991). Accordingly, if the listing agent has knowledge of an undisclosed latent defect, the lender may be charged with the same knowledge and be liable to the buyer for nondisclosure.

Has the law changed since the *Pima* decision? Several recent decisions in Arizona have confirmed the general enforceability of limiting liability through contract. In *Elm Retirement Center v. Callaway,* 2010 WL 4312757, 594 Ariz. Adv. Rep. 27, the buyers of real property sued the agents and sellers after discovering that the square footage of the property had been misrepresented in the purchase contract. The contract at issue contained a typical provision that any reference to square footage was "approximate" and that it was the buyer's obligation to verify the square footage if material to the buyer. Relying on that provision, the court held that the seller had disclaimed any liability for representation of the

>>

square footage of the property and, for that reason, the buyer could not state a claim for breach of warranty.

Another recent case addressing a party's ability to limit liability through contract is in *1800 Ocotillo, LLC v. WLB Group, Inc.,* 219 Ariz. 200, 196 P.3d 222 (2008). In *1800 Ocotillo,* the Arizona Supreme Court considered a limitation of liability clause in a contract between a construction developer and an engineering firm the developer hired. Pursuant to the parties' agreement, the liability of the engineering firm was limited to the amount of its fee, which in that case was approximately $14,000.00. Noting judicial hesitancy to declare contract provisions unenforceable on public policy grounds, the court held that the provision was effective to limit the engineering firm's liability as set forth in the parties' agreement.

While the *Elm* and *1800 Ocotillo* decisions support the enforceability of contract terms, whether to disclaim warranties regarding property size or to limit liability to a specific amount, neither case changes the result in *Pima* nor suggests that a subsequent decision will overturn that case.

AN "AS IS" PROVISION WILL NOT SHIELD A LENDER/SELLER FOR FAILING TO DISCLOSE KNOWN MATERIAL FACTS.

Similarly, an "as is" provision will not protect a lender/seller if the buyer is not given an opportunity to inspect for defects before the close of escrow. However, if the lender/seller is unaware of any defects and the buyer is given an opportunity to inspect, recent decisions suggest that an "as is" provision will be enforced as written. ❇

ABOUT THE AUTHOR

Richard V. Mack *is a partner at Mack Drucker & Watson, P.L.L.C., 3200 North Central Avenue, Suite 1200, Phoenix, Arizona 85012. www.mackdruckerwatson.com, (602) 778-9900.*

Arizona REALTOR® Magazine — April 2011

MEDICAL MARIJUANA & FAIR HOUSING UPDATE

BY ANDREW M. HULL, ATTORNEY AT LAW

As many know, the hot issue of the impact of the new medical marijuana law in Arizona has many confused as to how they should proceed with their tenants and employees. As of March 1, 2011, Arizona is still working on putting together guidelines to enact this new law.

The new Arizona Law is located at Title 36, Chapter 28.1 et seq. This statute describes the restrictions for the legal use of medical marijuana. Interestingly, §36-2802 does not authorize the user to smoke marijuana on any form of public transportation, on a school bus or grounds of any preschool/primary/secondary school, in any public place, or operating any vehicle or boat while under the influence of marijuana. Both employers and landlords are impacted by these new rules. The law states in §36-2813 that no landlord shall refuse to lease to or otherwise penalize a person solely for his status as a cardholder. That does not mean that the landlord may not evict a person who uses medical marijuana on the premises, however. §36-2814 specifically states that this new law does not require any establishment to allow a client or guest to use medical marijuana on that property.

One of the real issues is that marijuana is still a Schedule 1 substance under the Controlled Substances Act (CSA). See U.S.C. § 801 et seq. It rare that a state law is passed that is in direct contradiction of a federal law. In the event that it occurs however, federal law is controlling. Because there are a number of states with medical marijuana laws, the Office of Fair Housing and Equal Opportunity (FHEO) requested an opinion from the US Department of Housing and Urban Development as to whether federally assisted housing programs may permit the use of medical marijuana as a reasonable accommodation.

On January 20, 2011, the U.S. Department of Housing and Urban Development issued a Memorandum on the Subject of Medical Use of Marijuana and Reasonable Accommodation in Federal and Public Housing. The Memorandum details the history of federal Controlled Substances Act, the numerous states that previously enacted medical marijuana laws, the Quality Housing and Work Responsibility Act, the Americans with Disabilities Act (ADA) and the Fair Housing Act. The analysis was exhaustive, enough to bore almost everyone who loves to read legal opinions, so it is a fair guess that a lay person's eyes would glaze over after the first three or four pages. However, a part of the analysis is very important to fully understand what the Memorandum stands for and how it affects rental housing in Arizona, even though the Memorandum only specifically addresses medical marijuana in public and government subsidized housing.

>>

DO LANDLORDS HAVE TO PERMIT MEDICAL MARIJUANA USE ON THEIR PROPERTIES?

The Fair Housing Act, Section 504 of the Rehabilitation Act (Section 504), and Title 11 of the ADA prohibit discrimination against persons with disabilities in public housing and other federally assisted housing. 1 This memo discusses whether a medical marijuana user falls within the definition of "disability" or "handicap" as defined by the Act and whether an accommodation permitting the use of medical marijuana is reasonable.

The Memorandum determines that "under Section 504 and the ADA, current illegal drug users, including medical marijuana users, are excluded from the definition of 'individual with a disability' when the provider acts on the basis of drug use." This means that if the sole condition for which the person claims they are disabled is the use of the medical marijuana, this person does not meet the definition of "handicapped" but the person is not disqualified from the definition if they have some other condition that would otherwise apply.

In the final analysis, it appears that the U.S. Department of Housing and Urban Development have unequivocally determined that at least as to federally funded housing, a landlord can refuse to permit the use of medical marijuana and other medical marijuana –related conduct. The Memorandum states that the federal laws preempt state law so it will be interesting to see how Arizona lawmakers and other governmental entities decide how to apply this new law to housing in Arizona.

One of the tests under the Fair Housing Act is whether an accommodation is "reasonable". The definition of "unreasonable" is if the granting of the accommodation would require a fundamental alteration in the nature of the housing provider's operations or if the requested accommodation imposes an undue financial and administrative burden of the housing provider. The Memorandum goes further and states that even though "otherwise disabled medical marijuana users are not excluded from the Fair Housing Act's definition of "handicap", accommodations allowing for the use of medical marijuana in public housing or other federally assisted housing are not reasonable."

BOTTOM LINE

In the final analysis, it appears that the U.S. Department of Housing and Urban Development has unequivocally determined that at least as to federally funded housing, a landlord can refuse to permit the use of medical marijuana and other medical marijuana — related conduct.

This does not mean that the landlord must evict a tenant if they or their guest use medical marijuana in compliance with state law. There has been a suggestion that if the landlord agrees to grant a "reasonable accommodation request" by a tenant for the use of medical marijuana, the landlord must put in place specific standards for determining when the request would be granted. The landlord may put in place an interactive process once a request is made that would look at the various factors involved in individual cases such as: the physical condition of the medical marijuana user, the extent to which the medical marijuana user has other housing alternatives (if evicted or if any public assistance would be terminated), the extent to which the landlord would benefit from enforcing lease provisions that prohibit illegal use of controlled substances, and whether there is an alternative accommodation that would effectively address the requester's disability-related needs without a fundamental alteration to the landlord's operations and without imposing an undue financial and administrative burden to the landlord. An example of the above would be to permit the non-smoking use of medical marijuana (ie: ingested forms of marijuana).

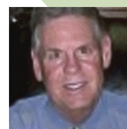
Each property owner must make a decision on whether they will permit medical marijuana use on their property but looking at the pros and cons of the legal issues involved.

If the property owner decides to not permit the use of medical marijuana on their property, it is suggested that they immediately issue the attached notice to all residents to inform them that they will enforce the Crime Free Addendum in full, including any use of marijuana. This issue was actually raised by a judge who was concerned that many Arizona residents may reasonably believe that their actions are legal if they follow the new Arizona restrictions and get a card issued by the state. Clearly sending out this notice to all residents before the rules restricting the application of the law will help eliminate that defense in an immediate eviction action. Make sure you keep a copy for your records so you can produce it for trial if necessary.

It will be interesting to see how Arizona lawmakers and other governmental entities decide how to apply this new law to housing in Arizona. If you have any additional questions or concerns, speak to an attorney.

42 U.S.C. § 3604(f)(1)-(3), 29 U.S.C. § 794(a), 42 U.S.C. §12132. ❄

Reprinted with permission from www.doctorevictor.com.



ABOUT THE AUTHOR

Andrew M. Hull, *Attorney at Law, engaged in landlord/tenant practice since 1975 and author from www.doctorevictor.com. Mr. Hull has served as Justice of the Peace Pro Tem since 1989 and is the author of Arizona Rental Rights (currently in 6th edition), Arizona Rental Housing Blue Book (1987) and the Arizona Multihousing Legal Reference Handbook (1996); Colorado Rental Rights and Apartment News. In addition to being an Instructor for Arizona Multihousing certified Apartment Manager Courses (CAM); Arizona Department of Real Estate; and Arizona School of Real Estate, Mr. Hull also serves on the Board of Directors for Arizona Multihousing Association and Brookline College.*

Arizona REALTOR® Magazine — May 2011

UNDERSTANDING THE POOL BARRIER LAWS

Answers to Three Common Questions, Plus Contact Information by Municipality

Because of the number of drownings and near-drownings in Arizona, most of which involve small children, the State of Arizona and most counties and cities within the state have enacted swimming pool barrier laws. Generally, these laws require that all affected swimming pools (or certain other contained bodies of water) be protected by an enclosure surrounding the pool area, or by another barrier, that meets specific requirements.

In general, pool barrier laws require that a swimming pool be completely enclosed by a fence to restrict access to the swimming pool from adjoining property. These pool barrier laws also generally require that certain barriers be installed to restrict easy access from the home to the swimming pool. Therefore, pool barrier laws contain specific requirements regarding the height and type of fences, gates and doors from the home leading directly to the swimming pool and regarding windows that face the swimming pool.

The Arizona Association of REALTORS® has gathered this information to assist you in obtaining the information to determine which pool barrier law applies to your property and the specific requirements of the applicable law. You should obtain and read the entire current applicable pool barrier law prior to purchasing a home with an existing pool; prior to erecting pool barriers; prior to altering, repairing or replacing pool barriers; or prior to building a pool.

COMMONLY ASKED QUESTIONS REGARDING SWIMMING POOL BARRIER LAWS:

QUESTION: I'm ready to make an offer on a house with a pool. What information should I receive?

ANSWER: The Arizona Association of REALTORS® (AAR) Residential Resale Purchase Contract, used in most resale home transactions, includes a "Notice to Buyer of Swimming Pool Barrier Regulations," in which the buyer and seller acknowledge the existence of state laws as well as possible county and municipal laws, and the buyer agrees to investigate and comply with these laws. The seller is required by law to give the buyer a copy of the pool safety notice from the Arizona Department of Health Services. The contract also requires the buyer be given a Seller's Property Disclosure Statement, which discloses any known code violations on the property.

QUESTION: The house I want to buy has a fence around the pool, but it doesn't meet code. Who is responsible for bringing it up to code and how long do we have?

ANSWER: The AAR Purchase Contract states: "During the Inspection Period, Buyer agrees to investigate all applicable state, county, and municipal swimming pool barrier regulations and, unless reasonably disapproved within the Inspection Period, agrees to comply with and pay all costs of compliance with said regulations prior to possession of the Premises." Check city and county ordinances for their specific requirements.

QUESTION: We have an above-ground pool in our backyard, so we don't have to worry about pool barrier laws, do we?

ANSWER: Above-ground pools are covered by the same state legal requirements for an enclosure around the pool. The pool must be at least four feet high with a wall that is not climbable and steps or ladders that are locking or removable. Again, check city or county ordinances for different requirements. ❇

>>

Pool Barrier Law Information for Your Area:

Phone numbers are subject to change without notice.

Below is local area contact information for governmental departments in Arizona with information on swimming pool barrier law requirements affecting your property. If your area isn't listed, contact your local governmental offices to find out if a swimming pool barrier law has been enacted; if not, current state laws are in effect.

Apache Junction
Development Services Dept:
480-671-5156

Arizona State Law,
A.R.S. §36-1681
Arizona Maricopa County
Law Library:
602-506-3461

Avondale
Building Safety:
623-333-4000

Buckeye
Building Safety:
623-349-6200

Bullhead City
Community Development Dept:
928-763-0124

Carefree
Building Department:
480-488-3686

Casa Grande
Building Department:
520-421-8651

Cave Creek
Building Department:
480-488-1414

Chandler
Development Services:
480-782-3000

Coconino County
Community Development:
928-679-8850

El Mirage
Building Safety:
623-933-8318

Flagstaff
Building Division:
928-779-7631

Fountain Hills
Building Safety:
480-816-5177

Gilbert
Building Department:
480-503-6700

Glendale
Development Services:
623-930-2800

Goodyear
Building Safety:
623-932-3004

Guadalupe
Code Enforcement:
480-505-5380

Kingman
Development Services Dept:
928-753-8123

Lake Havasu
Development Services Dept:
928-453-4149

Litchfield Park
Building Safety:
623-935-1066

Marana
Building Services Dept:
520-382-2600

Maricopa County
Planning Department:
602-506-3201

Mesa
Office of City Clerk:
480-644-4273

Oro Valley
Building Safety:
520-229-4830

Paradise Valley
Town of Paradise Valley:
480-348-3692

Peoria
Building Safety Division:
623-773-7225

Phoenix
Development Services Dept:
602-262-7811

Pima County
Building Codes:
520-740-6490

Scottsdale
Planning & Development:
480-312-2500

Surprise
Building Safety:
623-583-1088

Tempe
Building Safety Dept:
480-350-8341

Tolleson
Building Inspector:
623-936-7111

Yavapai County
Development Services:
928-771-3214

Yuma
Development Services:
928-817-5000

Arizona REALTOR® Magazine — August 2011

FTC RULING ON MORTGAGE ASSISTANCE RELIEF SERVICES ("MARS")

BY K. MICHELLE LIND, AAR GENERAL COUNSEL

The Federal Trade Commission has announced that it will not enforce most MARS Rule provisions against Short Sale Brokers and has transferred MARS rule making authority to the Consumer Financial Protection Bureau as of July 21, 2011.

The Federal Trade Commission ("FTC") announced that it will not enforce most of the provisions of the Mortgage Assistance Relief Services ("MARS") Rule against Short Sale Brokers. (See, *FTC Press Release: 07/15/2011* at www.ftc.gov/opa/2011/07/mars.shtm).

THE FTC MARS ENFORCEMENT POLICY STATES:

Until further notice, the Commission will forbear from taking any enforcement action for violation of the MARS Rule with the exception of the Rule's prohibition against misrepresentations in Section 322.3(b) against a real estate professional who provides "any service, plan, or program, offered or provided to the consumer in exchange for consideration, that is represented, expressly or by implication, to assist or attempt to assist the consumer [in]… [n]egotiating, [o]btaining or [a]rranging… [a] short sale of a dwelling."(footnote omitted)

NOTABLY, THE FTC ENFORCEMENT POLICY ALSO STATES:

Additionally, on July 21, 2011, the Commission's rulemaking authority with respect to the MARS Rule will transfer to the (CFPB) (footnote omitted). Thus, the CFPB will have the authority to determine whether any modification of the MARS Rule is warranted with respect to real estate professionals who assist a consumer in negotiating or obtaining a short sale.

To read the entire Enforcement Policy, go to www.ftc.gov/os/2011/07/110714marsrealestatepolicy.pdf

What does this mean? It means that the MARS Rule has not yet been revised or repealed. The FTC is stating that it will not enforce the MARS Rule disclosure and advance fee provisions against brokers assisting a seller in a short sale transaction at this time.

Short sale brokers still must comply with Arizona state law, which prohibits a real estate licensee from receiving additional compensation for negotiating a short sale, unless the real estate licensee is also licensed as a loan originator by the Arizona Department of Financial Institutions ("DFI").

There may be more changes to come, so agents should be advised to check with their brokers about their firm's short sale policy. ❄

ABOUT THE AUTHOR

AAR General Counsel Michelle Lind *is a State Bar of Arizona board certified real estate specialist and the author of* Arizona Real Estate: A Professional's Guide to Law and Practice.

These articles are of a general nature and may not be updated or revised for accuracy as statutory or case law changes following the date of first publication. Further, these articles reflects only the opinion of the author, and are not intended as definitive legal advice and you should not act upon them without seeking independent legal counsel.

PROPERTY MANAGEMENT, LANDLORD QUESTIONS ON THE RISE

Plus: 5 Risks for Property Management Newbies

BY JAN STEWARD, AAR RISK MANAGEMENT SPECIALIST

Many homeowners, unwilling or unable to compete with REOs and short sales or who need to relocate in advance of their ability to sell, are becoming the newest landlords. As a consequence, REALTORS® who have not previously been involved in property management may be asked to offer those services to owners for the short or long term. REALTORS® are being challenged to develop new skills and learn new tools to adapt their business to meet the needs of the market.

Disputes can arise between a landlord and a property manager from a simple misunderstanding of their respective responsibilities due to a poorly crafted management agreement. If you are involved in property management or contemplating offering such services, review AAR's recently adopted Property Management Agreement. It is a valuable tool for communicating the responsibilities of each party. The form is not only timely for market conditions but describes the obligations of both the property manager and landlord in simple yet well-defined terms.

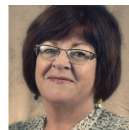
http://www.aaronline.com/ForRealtors/Forms/property-management-forms.aspx

NOTE: You should consult with your broker before undertaking any property management duties. The brokerage will need to ensure that property management is covered by their E&O policy.

A predominant amount of calls and complaints that are filed with AAR's Professional Standards Department are related to property management issues. The best way to protect yourself is to follow the Code of Ethics in your business practice and to pursue continued education. AAR offers a variety of property-management articles [1] and related Legal Hotline Q&As [2]. ❇

1 http://www.aaronline.com/Documents/LegalLandlordTenant.aspx

2 http://www.aaronline.com/documents/HL_L_T.aspx



ABOUT THE AUTHOR

Jan Steward *brings a wealth of experience to the Arizona Association of REALTORS® as the Risk Management Specialist. She is a former title company manager and escrow officer with paralegal training. As a REALTOR® and broker, Jan served the Northern Arizona Association of REALTORS® (NAAR) as board president, vice-president, director, MLS chair, delegate to NAR's national convention and a member of the Professional Standards and Grievance Committees. Jan was honored as REALTOR® of the Year by NAAR. She also has served on AAR's Professional Standards Committee and a variety of ad hoc committees.*

5 Risks for Property Management Newbies

Many sales associates have entered the field of rental property management as a way to shore up income. But do they know the risks?

Here, Barbara Holland, CPM, of H&L Realty & Management Co. in Las Vegas, identifies some of the biggest liability mistakes common among those who haven't yet learned the ropes.

1. **Not having a written property management agreement.** Even if you're just helping out a friend and managing the property for free, you're walking on thin ice if something comes up—like the need to evict the tenant.
2. **Using a makeshift lease agreement.** These agreements are easy to find on the Internet—maybe too easy. If the agreement isn't thorough, or if it doesn't include sections that are required by your state law, you're leaving yourself exposed.
3. **Not depositing the security deposit in a proper trust account.** The proper place for the money isn't with the owner. In some states, the trust account money must be in a separate property management trust account and not in the broker's general sales trust account.
4. **Not having the tenant sign a move-in and move-out form.** This form includes a property condition disclosure. Without it, you have little recourse if a unit is damaged beyond the usual wear and tear.
5. **Trying to incorporate a lease-purchase arrangement into the lease agreement.** There's nothing wrong with doing this, but it's complicated, and if it's not done properly, you could invite trouble. For instance, you could have a difficult time evicting the tenant for nonpayment of rent if the court looks at the arrangement as a purchase agreement.

Reprinted from REALTOR® Magazine Online *(http://www.realtor.org/realtormag) April 2011 with permission of the NATIONAL ASSOCIATION OF REALTORS®. Copyright 2011. All rights reserved.*

LEGAL HOTLINE

BY CHRISTOPHER A. COMBS

Copyright 2011, all rights reserved.

The following is for informational purposes only and is not intended as definitive legal or tax advice. You should not act upon this information without seeking independent legal counsel. If you desire legal, tax or other professional advice, please contact your attorney, tax advisor or other professional consultant.

Q&As are not "black and white,"
so experienced attorneys and brokers may disagree. Agents are advised to talk to their brokers/managers when they have questions.

ADVERTISING

FIND MORE HOTLINE Q&A FOR THIS TOPIC ON AARONLINE.COM:
http://www.aaronline.com/documents/HL_Advert.aspx

Other Broker Must Show Name of Listing Broker in Any Advertising

The owner of a home in a subdivision lists the home with broker #1. Broker #1 does not have any other listings in the subdivision. Broker #2 specializes in the sale of homes in the subdivision. Broker #1 has requested the assistance of broker #2 in advertising the home for sale. Broker #2 has placed an advertising in a local publication with no reference to broker #1 being the listing broker. Does this advertising by broker #2 have to name broker #1 as the listing broker?

Answer: Yes. "[A] licensee who advertises a property that is the subject of another person's real estate employment agreement shall display the name of the listing broker in a clear and prominent manner." A.A.C. R4-28-502(F). Therefore the name of broker #1 must be displayed in a clear and prominent manner in all advertising in the local publication. ❇

Arizona REALTOR® Magazine — April 2011

BROKERAGE: ADRE

FIND MORE HOTLINE Q&A FOR THIS TOPIC ON AARONLINE.COM:
http://www.aaronline.com/documents/HL_Broker.aspx

Broker Can Assign Commission Directly to the Agent

The broker has instructed the escrow company to pay the commission directly to the broker's agent. A.R.S. §32-2155(A) requires a licensee to receive commissions only from their broker and also requires a broker to pay commissions only to licensees. Does this payment by the escrow company of the commission directly to the agent violate A.R.S. §32-2155(A)?

Answer: Probably not. There are at least five exceptions to the specific language of A.R.S. §32-2155. One, if the broker is entitled to the commission as discussed above, the broker is probably allowed to assign the commission directly to the agent and the commission can be paid by the escrow company to the agent at closing. Two, a broker can assign the right to a commission to a non-licensee, *e.g.,* a broker's landlord who is owed rent. Three, a broker can pay the agent directly if the agent is now working for another broker. *ADRE Substantive Policy Statement 2005.08.* Four, after the death of the agent, a broker can pay the commission to the personal representative of the agent's estate. Five, a broker can pay the commission directly to the bankruptcy trustee if the agent has filed bankruptcy. ❇

Arizona REALTOR® Magazine — May 2011

HAVE YOU SIGNED UP FOR THE LEGAL HOTLINE?

The Legal Hotline provides all AAR broker members (designated REALTORS® — DRs) free access to a qualified attorney who can provide information on real estate law and related matters.

Find out how brokers can access the Legal Hotline.
www.aaronline.com/documents/hotline_access.pdf

Browse more Legal Hotline topics.
www.aaronline.com/documents/LH.aspx

CONTRACT: CANCELLATION

FIND MORE HOTLINE Q&A FOR THIS TOPIC ON AARONLINE.COM:
http://www.aaronline.com/documents/HLContCancel.aspx

Forfeiture of Earnest Money Allowed Even if No Actual Damages

The buyer signed a contract with the seller to purchase the home for $100,000 with $5,000 earnest money. The buyer refused to close the transaction. The seller issued a three-day cure period notice and when the buyer still refused to close, the seller cancelled the contract. The seller then immediately signed a contract with buyer #2 to sell the home for $120,000. This transaction with buyer #2 has now closed. Buyer #1 contends that the seller suffered no actual damages due to buyer #1's breach, and therefore the buyer is entitled to the return of the $5,000 earnest money. Is buyer #1 entitled to the return of the $5,000 earnest money because the seller made more money by closing with buyer #2 on the sale of the home?

Answer: No. Under Lines 278-279 of the Contract the seller and buyer agreed that the $5,000 earnest money was a reasonable estimate of damages because it would be difficult to fix actual damages because of the buyer's breach of contract. Therefore, whether or not the actual damages suffered by the seller are more or less than $5,000, or even non-existent, the seller is entitled to the $5,000 earnest money.

Note: *The estimate of damages must be reasonable, e.g., $5,000 earnest money on a $100,000 purchase contract for a home should be reasonable. If the earnest money was $50,000 on a $100,000 home, this estimate of damages may not be reasonable and may be an unenforceable penalty.* ❇

Arizona REALTOR® Magazine — April 2011

CONTRACTS: CANCELLATION[1] & BREACH/DAMAGES[2]

FIND MORE HOTLINE Q&A FOR THESE TOPICS ON AARONLINE.COM:
1 http://www.aaronline.com/documents/HLContCancel.aspx **2** http://www.aaronline.com/documents/HLContBreach_Damage.aspx

Buyer's Agent Can Email Listing Agent to Cancel a Short Sale

The seller and buyer entered into a short sale contract with $1,000 earnest money. The $1,000 earnest money was non-refundable for ninety days. Two weeks after the contract was signed, the buyer drove by the home and decided that he no longer wanted to buy the home. The buyer notified the buyer's agent to cancel the contract. The buyer's agent then emailed the listing agent to say that the buyer is canceling the contract. (The email addresses of both the listing agent and the buyer's agent were on page 9 of the contract.)

After discussing with the seller this email from the buyer's agent, the seller and the listing agent immediately put the home back on MLS as "Active." The listing agent then told the buyer's agent that the $1,000 non-refundable earnest money deposit would be forfeited by the buyer. The buyer then had second thoughts and said that he still wanted to buy the home. The seller said that the contract was cancelled, and the seller is demanding the $1,000 non-refundable earnest money. Was the contract cancelled by the email from the buyer's agent?

Answer: Probably. Under line 40 of the Short Sale Addendum, the buyer is entitled to "unilaterally cancel the Contract by notice to Seller at any time before receipt of the short sale Agreement Notice from seller." Notice by email is sufficient if email addresses are provided for in the contract. *See lines 368-371 of the Contract.* Under general agency principles, the buyer's agent has the implied authority to furnish notices on behalf of the buyer. Therefore, when the buyer's agent furnished the email notice of cancellation to the listing agent, the contract was cancelled. Inasmuch as this cancellation by the buyer was prior to the expiration of ninety days, the $1,000 non-refundable earnest money should be paid to the seller. ❇

Arizona REALTOR® Magazine — May 2011

No Cancellation of Contract by Seller if Seller Already in Breach of Contract for Not Making Repairs

In the BINSR, the seller agreed to do some roof repairs. At the time of closing, however, the seller had not done the roof repairs because the seller did not have the money. The buyer delivered to the seller a three-day cure period notice. The seller still did not do the roof repairs. The seller has now delivered a three-day cure period notice to the buyer to close escrow because the time for closing has passed. If the buyer does not close within three days, will the buyer be in breach of contract and lose the earnest money?

>>

Answer: No. The seller can only cancel the contract if the seller is a "non-breaching party." *See line 276 of the contract.* After the seller failed to complete the roof repairs within three days, the seller was in breach of the contract. The buyer then can either, one, close the transaction without the completion of the roof repairs and then have a claim after closing against the seller for the cost of the roof repairs; or, two, refuse to close the transaction until the seller completes the roof repairs.

Note: *Under the contract, there is only a "potential" breach until after the three-day cure period notice has been delivered and the three days has expired.* See lines 272-275 of the contract. *In other words, and despite the fact that the term "breach" is used loosely by REALTORS®, there is never a breach of the contract until after the expiration of the three-day cure period.* ❇

Arizona REALTOR® Magazine — May 2011

Verbal Rejection by Lender of Short Sale Offer Is Valid

The short sale contract was submitted to the lender three months ago. The lender's loan servicer contacted the listing broker and verbally told the listing broker that the lender would never approve any short sale to this particular buyer. The loan servicer refused to give any reason for disapproval of this particular buyer. Can the seller cancel the short sale contract?

Answer: Probably. There is no requirement that the lender furnish a written notice of disapproval of the short sale, or even furnish a reason for the disapproval. The verbal statement of the loan servicer that the lender would never approve any short sale to this particular buyer is a probably sufficient reason for the seller to cancel the short sale contract. *See lines 47-50 of the Short Sale Addendum.* ❇

Arizona REALTOR® Magazine — June 2011

CONTRACTS: GENERAL

FIND MORE HOTLINE Q&A FOR THIS TOPIC ON AARONLINE.COM:
http://www.aaronline.com/documents/HLContGen.aspx

No Walkthrough Allowed to Buyer for Contractor's Bids

A week before close of escrow, the buyer wants to do a walkthrough of the home in order for a contractor to make bids on the cost of drapes that the buyer wants to install after the close of escrow. The seller is refusing this walkthrough. Is the buyer entitled to this walkthrough in order to get bids for drapes?

Answer: No. Under lines 265-268 of the contract, the buyer is only entitled to do a walkthrough for three reasons: one, to determine that the seller has completed the agreed BINSR repairs; two, that the items warranted by the seller are in working condition; and, three, that the home is in substantially the same condition as at the time of contract. Therefore, although many sellers are courteous and will allow walkthroughs for contractor's bids, these additional walkthroughs are not allowed under the contract. ❇

Arizona REALTOR® Magazine — May 2011

Buyer Entitled to Full Ten-Day Inspection Period After Seller Turns the Utilities On

On the eighth day of the ten-day inspection period, and after the listing broker was given reasonable notice, the buyer and the home inspector went to the home. The utilities were off. When the buyer's broker contacted the listing broker, the listing broker apologized and said that the utilities would be turned on the next day. The listing broker said, however, that the buyer now only has two days to complete the home inspection. The buyer's broker said that because there may be some time delay in getting the home inspector back to the home, the buyer should be entitled to the full ten-day inspection period. Is the buyer entitled to the full ten-day inspection period?

Answer: Probably. The seller had the obligation to have all utilities on from the date of acceptance of the contract until close of escrow to permit the buyer to complete any necessary inspections. *See lines 269-271 of the contract.* Therefore, due to the failure of the seller to comply with the contract, the buyer should not be prejudiced by limiting the time necessary to complete the home inspection, and the buyer should have the full ten-day inspection period. ❇

Arizona REALTOR® Magazine — June 2011

If Insurance Claims History Available, Seller Cannot Furnish Own Insurance Claims History

The seller's insurance company charges a fee for the preparation of an insurance claims history as required by lines 137-141 of the contract. The seller does not want to pay this fee and has prepared his own insurance claims history. Is the buyer required to accept the seller's

>>

insurance claims history if an insurance claims history is available from the seller's insurance company?

Answer: No. The contract specifically provides that the seller can only furnish their own insurance claims history if there is not an insurance claims history from their insurance company, an insurance support organization or a consumer reporting agency. *See lines 138-139 of the contract.* Inasmuch as there is an insurance claims history available from the seller's insurance company, the seller must pay the fee and deliver this insurance claims history to the buyer within five days after contract acceptance. ❇

Arizona REALTOR® Magazine — June 2011

REO Seller Required to Have Inspection of the Septic Tank

The REO seller addendum provides that the buyer, not the seller, shall conduct an inspection of the septic tank at the buyer's cost. The Arizona Department of Environmental Quality, however, requires the seller to have an inspection of the septic system within the six-month time period before closing on the sale of a home. *See A.A.C. R18-9-A316.* Is the buyer now required to conduct the septic tank inspection?

Answer: Probably. If the seller and the buyer agreed in the REO seller addendum that the buyer would conduct this inspection, the buyer is required to do the inspection. The buyer will also have to pay for the cost of this inspection.

Note: *A.A.C. R18-9-A316 does not require any certification and does not require that any repairs be made. In other words, even if the septic system needs major repairs, the buyer's only remedy is to cancel the transaction if the buyer does not want the home.*

Note: *The AAR On-Site Wastewater Treatment Facility Addendum should be used in any transaction involving a septic tank.* ❇

Arizona REALTOR® Magazine — June 2011

COMMISSIONS

FIND MORE HOTLINE Q&A FOR THIS TOPIC ON AARONLINE.COM:
http://www.aaronline.com/documents/HL_Commiss.aspx

Verbal Agreement Between Listing Broker and Buyer's Broker to Increase MLS Commission Is Enforceable

The MLS commission offered by the listing broker is 3%. The buyer's broker produces a cash buyer who will close in two weeks. The listing broker verbally tells the buyer's broker that, if this cash buyer closes in two weeks, the listing broker will pay a 3½% commission. The cash buyer closes in two weeks. Is the listing broker obligated to pay a 3½% commission to the buyer's broker?

Answer: Probably. Although a commission agreement between a broker and a seller or buyer, and any amendments to this commission agreement, must be in writing, a commission agreement, and any amendments, between brokers can be verbal. Therefore, if the listing broker verbally agreed to pay a 3½% commission to the buyer's broker if the cash buyer closed in two weeks, this verbal amendment to the 3% MLS commission should be enforceable. ❇

Arizona REALTOR® Magazine — April 2011

Payment of Deceased Agent's Commission

The transaction is scheduled to close next week. The listing agent dies. The listing agent was not married, and two different children of the listing agent have contacted the listing broker to demand payment of the commission. Are either of them entitled to be paid the listing agent's commission?

Answer: If the listing agent had significant assets, a probate must be opened. The probate court will appoint a personal representative to administer the estate. The listing broker can then pay the commission to this personal representative. If the listing agent died with less than $50,000 in personal property, after thirty days an individual, *e.g.,* one of the children, can deliver an affidavit to the listing broker claiming the right to the listing agent's commission. *A.R.S. §14-3941(B).* The listing broker is required to comply with this affidavit and pay the commission. If the listing broker knows, however, that more than one individual is claiming a right to the commission, the listing broker can demand a court order directing payment by the listing broker of the commission.

Note: *If the commission is less than $5,000 and there is a surviving spouse, the listing broker can pay the surviving spouse the commission immediately. A.R.S. §14-3971(A).* ❇

Arizona REALTOR® Magazine — May 2011

ORDER A PRINT SUBSCRIPTION TO
ARIZONA REALTOR® QUARTERLY
FOR YOUR MANAGERS AND AGENTS!

$15 | Fall & Winter Issues
Sign up at www.aaronline.com/azq.

(AAR members only)

FAIR HOUSING

FIND MORE HOTLINE Q&A FOR THIS TOPIC ON AARONLINE.COM:
http://www.aaronline.com/documents/HL_FairHous.aspx

Fair Housing Protection of "Familial Status" Not Limited to Tenant's Children

The prospective tenant has completed a rental application for the apartment. The prospective tenant states in the rental application that his twelve-year-old nephew will be living with him until his nephew completes middle school. There are no other children currently living in the apartment complex, and the landlord does not want to make an exception. Can the landlord refuse to rent the apartment to a tenant with a twelve-year-old nephew?

Answer: Probably not. Under the Fair Housing laws, "familial status" extends to persons with legal custody of any child under the age of eighteen, or with written permission from the parent or legal custodian of a child under the age of eighteen. Therefore, the landlord can request from the prospective tenant written permission from the twelve-year-old's parent or legal custodian. If the prospective tenant is unable to furnish such written permission, only then can the landlord refuse to rent the apartment to this prospective tenant. ❇

Arizona REALTOR® Magazine — June 2011

FORECLOSURE AND LIENS

FIND MORE HOTLINE Q&A FOR THIS TOPIC ON AARONLINE.COM:
http://www.aaronline.com/documents/HL_F_L.aspx

Anti-Deficiency Protection after Foreclosure Does Not Apply if Vacant Lot

Buyer purchased with a mortgage loan a "tear down" home on a beautiful lot. After closing, the buyer tore down the home and applied for construction financing to build a new home. Due to changing economic times, the buyer's original lender was no longer in business, and the buyer could not qualify for construction financing with any lender to build a new home. The lender that made the loan for the buyer to purchase the "tear down" home has now foreclosed, and there is a deficiency of $180,000. Is the buyer liable for this $180,000 deficiency?

Answer: Probably. The anti-deficiency statutes generally protect a purchaser of a home from any deficiency after foreclosure of the purchase money loan. One of the requirements, however, is that the real property secured by the mortgage loan be "utilized" as a home. *A.R.S. §33-814(G).* If there is no longer a home, but only a vacant lot, the real property is no longer being "utilized" as a home and the buyer is probably liable for the deficiency of $180,000.

Note: *Even if the anti-deficiency statutes protected the buyer, the buyer still could be liable to the lender for "waste" by tearing down the home.* ❇

Arizona REALTOR® Magazine — May 2011

LANDLORD / TENANT

FIND MORE HOTLINE Q&A FOR THIS TOPIC ON AARONLINE.COM:
http://www.aaronline.com/documents/HL_L_T.aspx

Girlfriend Entitled to Terminate Lease after Domestic Violence from Boyfriend

A girlfriend and her boyfriend recently signed a one-year lease. Last week there was a violent domestic dispute, and after the police were called, the girlfriend moved out. The property manager has now received a notice from the girlfriend, along with a copy of the police report, demanding that the property manager terminate the lease as to the girlfriend and return the girlfriend's portion of the security deposit. Is the girlfriend entitled to terminate the lease and get her portion of the security deposit?

Answer: Probably. A.R.S. §33-1318(A) provides that, in the event of a domestic dispute, the party moving out is entitled to terminate the lease with a thirty-day notice and a copy of the police report. At the time of termination, that party should also be entitled to receive their portion of the security deposit. ❇

Arizona REALTOR® Magazine — May 2011

If Landlord Is Not Paying HOA Fees & HOA Prohibits Tenant from Use of HOA Facilities, Landlord Is in Breach of Lease

Under the lease agreement, the landlord is required to pay the monthly HOA fees. The landlord has not paid these HOA fees for several months, however, and the HOA has restricted the tenant and his family from the use of the swimming pool and community center. Can the HOA restrict the use by the tenant of the HOA facilities when the landlord is delinquent on the HOA monthly fees?

Answer: Probably. The CC&Rs of many HOAs restrict the use of HOA facilities if the HOA fees are not paid. The tenant, however, is entitled to terminate the lease because of the landlord's failure to pay the HOA monthly fees. Therefore, if the landlord fails to bring the HOA fees current after ten days notice from the tenant, the tenant can terminate the lease. *See A.R.S. §33-1361.* ❇

Arizona REALTOR® Magazine — June 2011

MISCELLANEOUS

FIND MORE HOTLINE Q&A FOR THIS TOPIC ON AARONLINE.COM:
http://www.aaronline.com/documents/HL_Misc.aspx

Tax Withholding of 10% of Sales Proceeds Required for Sale of Home By Non-Resident Alien

A Canadian non-resident alien, *i.e.,* has not acquired a "green card," owns a home in Arizona free and clear. The Canadian non-resident alien has signed a contract to sell the home for $700,000. Will there be any tax withholding of the $700,000 proceeds of sale at closing?

Answer: Yes. Under the Foreign Investment in Real Property Tax Act ("FIRPTA"), 10% of the $700,000 sales proceeds, namely, $70,000, must generally be held at closing by the escrow company and paid to the Internal Revenue Service. When the Canadian non-resident alien files a tax return for the year of the sale, the Canadian non-resident alien may be entitled to a refund of some or all of the $70,000.

Note: *There is no requirement for 10% tax withholding if the sale price of the home is $300,000 or less, and the buyer will occupy the home.* ❇

Arizona REALTOR® Magazine — April 2011

PROPERTY MANAGEMENT

FIND MORE HOTLINE Q&A FOR THIS TOPIC ON AARONLINE.COM:
http://www.aaronline.com/documents/HL_L_T.aspx

Maintenance Man Cannot Perform Move-In / Move-Out Inspections of Rental Property

At the time any tenant in the apartment building moves in or moves out, the property manager sends the maintenance man to handle the move-in or move-out inspection. The maintenance man is not a real estate licensee. Can the maintenance man perform the move-in or move-out inspections?

Answer: Probably not. ADRE Substantive Policy Statement 2005.04 specifies certain acts which can or cannot be performed by a non-licensee. One activity specifically not allowed by a non-licensee is "perform a walk-through inspection." Therefore, the maintenance man is probably prohibited from conducting move-in or move-out inspections on a rental property. ❇

Arizona REALTOR® Magazine — June 2011

>>

TITLE AND INTEREST IN PROPERTY

FIND MORE HOTLINE Q&A FOR THIS TOPIC ON AARONLINE.COM:
http://www.aaronline.com/documents/HL_T_I_L.aspx

Leased Solar Panels Become Fixtures

After purchasing the home with a mortgage loan, the owner of the home leased and installed solar panels from a solar panel company. The solar panel company filed a UCC-1 to protect their security interest in the solar panels. The owner of the home stopped making mortgage payments and stopped making lease payments on the solar panels. The mortgage lender foreclosed. The solar panel company wants to remove the solar panels. Can the solar panel company remove the solar panels?

Answer: Probably not. The solar panels after installation were undoubtedly attached to the home and became fixtures. The filing of the UCC-1 to protect the security interest of the solar panel company occurred after the recording of the mortgage loan used to purchase the home. Therefore, the security interest of the solar panel company in the solar panels was inferior to the recorded mortgage loan, and after the foreclosure this security interest in the solar panels was eliminated.

Note: *At the time that the solar panel company leased the solar panels, the solar panel company should have required the mortgage lender to subordinate the mortgage loan to the security interest of the solar panel company. If there is no subordination, the security interest of the mortgage lender in the home, including all improvements and fixtures, will be superior to any security interest in the leased solar panels or other equipment.* ❇

Arizona REALTOR® Magazine — April 2011

Owner of Home Cannot Replace Existing Fixtures with “Original” Fixtures

After purchasing the home, the owner of the home replaced the “original” sink faucets and built-in microwave with upgraded fixtures. Prior to the foreclosure sale, the owner removed these upgraded fixtures and replaced them with the “original” fixtures. After the foreclosure sale, the new owner is demanding that the “original” fixtures be replaced with the upgraded fixtures. Was the original owner of the home entitled to remove the upgraded fixtures before the foreclosure sale?

Answer: No. The mortgage lender acquired a security interest in any fixtures installed at any time in the home. Therefore, after the foreclosure sale, the bank or other new owner of the home had an ownership interest in both the upgraded fixtures and the “original” fixtures, even though the updated fixtures had been removed from the home.

Note: *In the sale of a home, under line 30 of the contract, the seller specifically agrees that all “existing” fixtures at the time of the acceptance of the contract will be transferred to the buyer at closing.* ❇

Arizona REALTOR® Magazine — June 2011

ABOUT THE AUTHOR

Christopher A. Combs, *Phoenix attorney, is a partner with the firm of Combs Law Group, P.C., and is on the AAR Legal Hotline team.*

http://www.combslawgroup.com

ARIZONA association of REALTORS®
REAL SOLUTIONS. REALTOR® SUCCESS.

255 East Osborn Road, Suite 200
Phoenix, Arizona 85012
602.248.7787 | Toll-free in AZ 800.426.7274

www.aaronline.com

Are You
Making the Most of Your Membership?

AAR is here to help you:

MANAGE RISK

Risk can't be avoided—but it can be managed.

Standardized Forms.
Experienced REALTORS® distill their acquired wisdom into forms that are fair, effective and enforceable.

Legal Hotline.
AAR broker members call the Legal Hotline for answers to specific legal issues.

Legal Information.
AAR has built up quite a library of articles on real estate legal matters, not to mention podcasts, videos, a short-sale game and other resources.

- MANAGE RISK
- INCREASE YOUR KNOWLEDGE
- DO BUSINESS EFFICIENTLY
- MAKE NEW CONNECTIONS
- BE HEARD AT THE CAPITOL
- STAY INFORMED
- RESOLVE DISPUTES

Help us help you better!

Share your feedback with editor@aaronline.com.