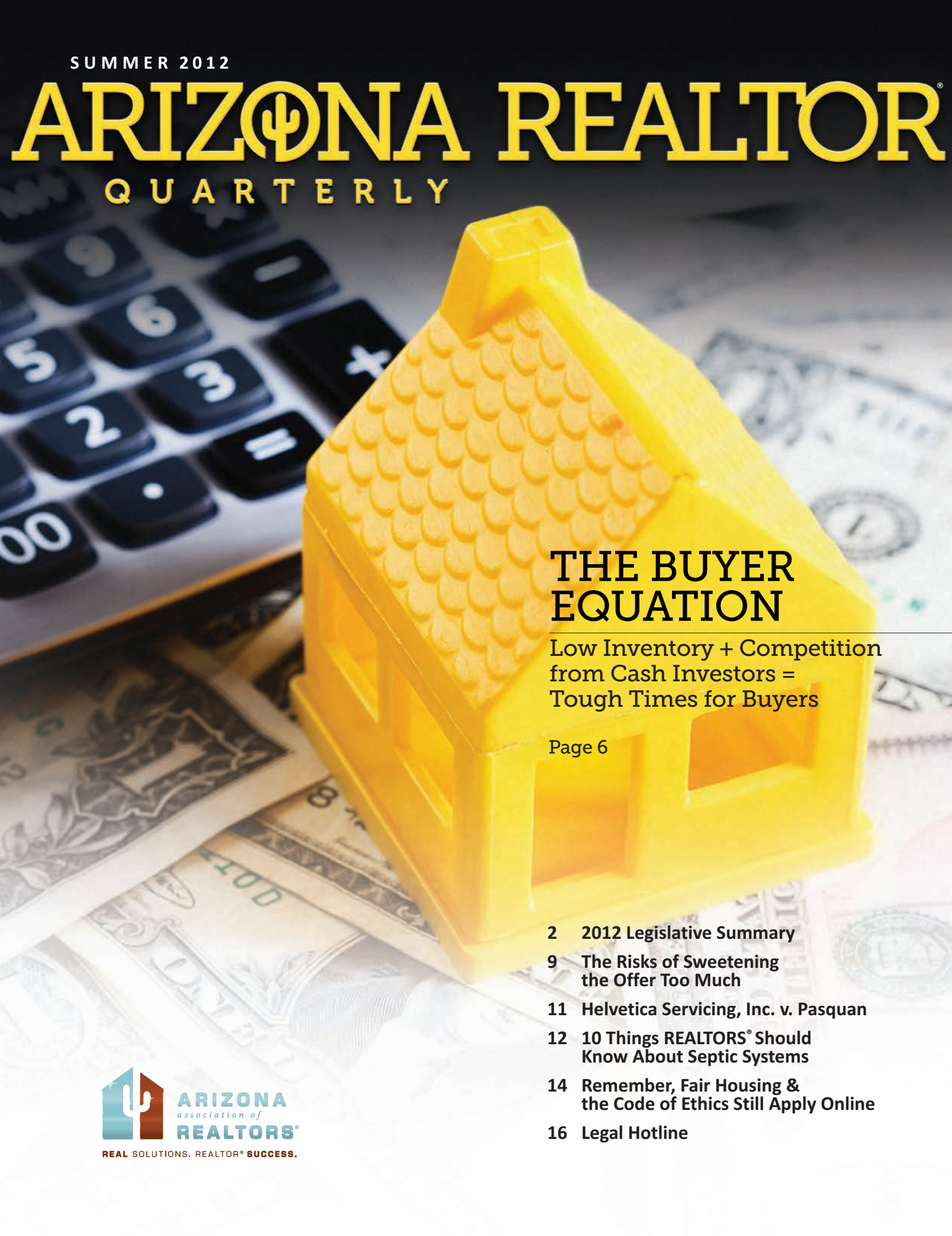
SUMMER 2012

ARIZONA REALTOR® QUARTERLY



THE BUYER EQUATION

Low Inventory + Competition from Cash Investors = Tough Times for Buyers

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ARIZONA association of REALTORS®

REAL SOLUTIONS. REALTOR® SUCCESS.

A MESSAGE FROM 2012 AAR LEGISLATIVE & POLITICAL AFFAIRS COMMITTEE CHAIR LISA SUAREZ

Political advocacy is one of the most important benefits AAR provides.

Lisa Suarez, CRS
2012 AAR Legislative & Political Affairs Committee Chair

1,395 bills were introduced this year in the state legislature. Imagine if you, an active agent or broker, had to dig through that mountain of legislation looking for items that could impact your business. Imagine if it was up to you to help the bad bills get voted down and the good ones passed.

Luckily, as a member of AAR, you have people to do that for you! As chair of the Legislative & Political Affairs Committee this year, I have the honor to work closely with staff and volunteer members who are committed to protecting private property rights and our industry here in Arizona. They stay up late reading bills, talk about real-world impacts of legislation with our representatives and testify before legislative committees.

Some of our greatest victories are nearly invisible—the bills we defeat that would have negatively impacted your business and homeownership in Arizona. One such victory this year was stopping a potential repeal of Arizona's anti-deficiency statute before it even reached the legislative floor.

Want to learn more about how AAR is fighting for you at the state capitol? I encourage you to read the "2012 Legislative Summary" below by Nicole LaSlavic, AAR's Vice President - Government Affairs. Want to influence the discussion? Attend REALTOR® Caucus at the Chaparral Suites Resort in Scottsdale on Wednesday, September 6. (Registration will be available through www.aaronline.com/calendar in July.)

Arizona REALTOR® Magazine — June 2012

2012 LEGISLATIVE SUMMARY

BY NICOLE LASLAVIC, AAR VICE PRESIDENT - GOVERNMENT AFFAIRS

If you have been following the 2012 Second Regular Legislative Session, then you are aware of the struggles that continue to face the Arizona State Legislature. For years, issues such as the economy, immigration, healthcare and taxes have dominated Arizona's political landscape.

Although the 2012 legislative session saw a slight departure from the social issues that plagued many previous legislative years, the economic recovery of the state remained in the forefront.

This year, the legislature introduced 1,395 bills, which is the fourth highest bill total in the last 52 years. Of those bills, 387 won approval in both chambers, 362 bills were signed into law and 25 bills (not including a vetoed resolution) were vetoed by the governor. The general effective date for all legislation, unless specifically established within the bill, is August 2, 2012.

On the evening of May 3, 2012 at 8:22pm to be exact, the legislature adjourned sine die. Although leadership in both the House and Senate had originally established the goal of another 100-day session, the actual session lasted a total of 116 days.

With regard to the real estate industry, the legislature dealt with some important issues, such as real estate signs, regulation of homeowners' associations, the Homeowners' Rebate, exempt wells and the continued protections of Arizona's anti-deficiency statutes.

Of equal importance was the simultaneous and successful effort the Arizona Association of REALTORS® lobbying team made at the Arizona Corporation Commission to reinstate a line extension policy for APS customers in the state of Arizona.

Below are some of the legislative and regulatory issues that AAR successfully advanced or defeated this session.

HB 2357 – REAL ESTATE BROKERS; EDUCATION – SUPPORT

In each of the past few legislative sessions, a bill to address an increase in continued education has been introduced. In some cases, the legislation did not progress very far, and in other years, the legislation almost made it to the finish line. This legislative session, HB 2357 was introduced in an effort to increase broker continuing education hours as well as modify the

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ARIZONA REALTOR® QUARTERLY

SUMMER 2012

If You Read the Quarterly, It Is Imperative You Share Your Feedback

We are evaluating whether to continue or reformat this publication.

Is the print *Arizona REALTOR® Quarterly* valuable to you? Are there ways we could improve it? Complete a short survey and let us know. One lucky participant will receive a $300 gift card.

If you want to continue receiving this publication in 2013, let your voice be heard. *Respond today!*

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necessary course requirements. It was not, however, until the bill received an amendment pushed by AAR that the association changed its official position from neutral to support.

The bill as signed into law increases the number of continuing education hours for license renewal for designated brokers and associate brokers from 24 hours to 30 hours and modifies the necessary course requirements to include courses that address statutory and administrative rule instruction, broker policy development, employee supervision, broker responsibilities and other related topics.

HB 2537 was signed by the governor and contained a delayed effective date of January 1, 2013.

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HB 2486 – HOMEOWNERS' REBATE AFFIDAVIT – SUPPORT

As many will recall, last year the legislature passed HB 2001 in the Second Special Session. Buried within the 214-page bill was a policy change to remove second or vacation homes as Class 3 property and reclassify them as Class 4 property, thus removing their eligibility to receive the Homeowners' Rebate. Despite the change in policy, the main problem with the bill was the creation of an affidavit that would have been sent out with the notice of full cash value by each county assessor to the over 1.8 million homeowners in Arizona. The homeowner would have had to complete and return the affidavit stating, under penalty of perjury, that the home was the owner's primary residence, essentially guilty until proven innocent.

After many months of discussions with various county assessors, lawmakers and the governor's staff, HB 2486 was brought forth by AAR to address HB 2001's problematic affidavit process. The bill eliminates the current affidavit requirements and establishes that the county assessors are required to mail a notice every four years beginning in 2013 to each Class 3 property owner if the owner has a mailing address outside the county in which the property is located, has a mailing address that is different than the situs address or property (excludes post office boxes), has the same mailing address listed for more than one parcel of Class 3 property, or appears to be a business entity.

HB 2486 was signed by the governor and will become effective on the general effective date of August 2, 2012.

HB 2471 – HOMEOWNERS' ASSOCIATIONS; CONFLICTING ENACTMENTS – SUPPORT

After the completion of the 2011 legislative session, there were various versions in the planned community act and condominium statutes pertaining to HOAs and for-sale or for-rent signs. As a result of the various versions, HOAs once again creatively interpreted the law and in some cases continued to follow their own "rules" as they pertained to for-sale/for-rent signs. This bill cleans up the various versions by condensing and clarifying the statute.

HB 2471 was signed by the governor and will become effective on the general effective date of August 2, 2012.

HB 2513 – CONDOMINIUMS; PLANNED COMMUNITIES' RENTAL PROPERTIES – SUPPORT

The bill would have established numerous protections for homeowners and tenants against continued abuses by HOAs to over-regulate, interfere in contractual relationships between the homeowner and tenant, require sensitive personal information be provided to the HOA, and unjustly assess costly fees on the property owner. Unfortunately, the protections established within the bill will not be afforded to the citizens of Arizona as a result of the veto by Governor Jan Brewer.

It is important to note that, the association plans to introduce legislation in the following session to combat the continued unscrupulous antics that HOAs utilize to prey on the citizens of Arizona.

HB 2513 was vetoed by the governor.

REPEAL OF ARIZONA'S ANTI-DEFICIENCY STATUTES – OPPOSE

This year, the idea of repealing and/or modifying Arizona's anti-deficiency protections was touted as a way for Arizona to avoid future financial and real estate meltdowns. By educating members of the legislature on the severe negative impacts that modifying or repealing deficiency protections would have on homeowners, AAR was successful in staving off attacks from individuals who would like to see the protections eliminated.

Although early attempts to repeal or modify the current protections were avoided, the association must remain vigilant to attacks in the future.

Repeal was quashed before any bill was introduced.

SB 1062 – LANDLORD TENANT HANDBOOK; HOUSING DEPARTMENT – NEUTRAL

This bill moves the Arizona Residential Landlord and Tenant Act and the Arizona Mobile Home Parks Residential Landlord and Tenant Act from the Arizona Secretary of State's website to the Arizona Department of Housing's website.

The bill was signed by the governor and contained a delayed effective date of January 1, 2013.

SB 1085 - STATE REAL ESTATE DEPARTMENT; CONTINUATION – SUPPORT

This bill extends the statutory life of the state real estate department for an additional 10 years to July 1, 2022.

SB 1085 was signed by the governor and will become effective on the general effective date of August 2, 2012.

SB 1281 – PUBLIC ROADS; COUNTY MAINTENANCE – SUPPORT

This bill allows the Board of Supervisors (BOS) to spend public monies for maintenance of public roads and streets that were laid out, constructed and opened before June 13, 1990. Prior to the passage of this bill, the Board

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of Supervisors was allowed to spend money on maintenance of public roads and streets that were laid out, constructed and opened before June 13, 1975.

SB 1281 was signed by the governor and will become effective on the general effective date of August 2, 2012.

APS LINE EXTENSION POLICY

In addition to handling issues that arise at the Arizona State Legislature, the lobbying team at the association is also responsible for protecting our members' interests and the interests of homeowners at state regulatory agencies. Since the reversal of the line extension policy in 2007, AAR has been actively involved in working with the Arizona Corporation Commission, legislature and stakeholders to address concerns regarding the negative affects the removal of footage allowance has had on homeowners, small businesses and property values throughout Arizona.

As many will recall, last year AAR was successful in reinstating line extension policies for TEP (Tucson Electric Power) and UNS Electric. On May 15, 2012 the Arizona Corporation Commission voted 4-1 to reinstate a line extension policy for APS. The provisions of the adopted policy are as follows:

750 feet of line extension for individual residential applicants up to a $10,000 maximum (the transformer is included at no cost to the applicant) with a non-refundable payment by the applicant for costs in excess of $10,000.

The new line extension policy will take effect on July 1, 2012.

ANOTHER SUCCESSFUL TEAM EFFORT

These are just a few of the legislative efforts in which AAR was involved during the 2012 legislative session. While the legislative session may have had its share of ups and downs, AAR volunteer members and staff worked very hard on your behalf. Your 2012 leadership team of AAR President Holly Mabery, Legislative & Political Affairs Committee Chair Lisa Suarez, Legislative Committee Chair Bill Arnold and their respective committees deserve your thanks for the many hours they volunteered on your behalf at the Arizona Legislature.

As we close out this legislative session, we are already engaging in efforts for the 2012 elections and the 2013 Legislative Session, which begin with the REALTOR® Caucus held on September 6 at the Chaparral Suites in Scottsdale. More details on this event will be available soon, and we hope you will consider attending this important event.

ABOUT THE AUTHOR

Nicole LaSlavic *is the Vice President – Government Affairs at the Arizona Association of REALTORS®. Along with CEO Tom Farley, LaSlavic represents the association at the Arizona capitol. In the past, LaSlavic has worked as a lobbyist for a law firm as well as at a local government relations lobbying firm. She has advocated and implemented 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, 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 2012

Short Sale Decision Timelines Set by Fannie and Freddie

On April 17, in a five-page bulletin, the GSEs issued new guidelines for Fannie Mae- and Freddie Mac-backed loans. As of June 15, 2012, agents working with distressed homeowners should expect to receive a decision on the short sale offer within 30-60 days. Service providers must comply with the new time frames as described in the bulletin[1]. For more information about the initiation of the time frames, read the DSNews article "Fannie and Freddie Set Timeline Requirements for Short Sales[2]." (This update[3] was originally published on the short sales portion of AAR's blog[4].)

1 http://www.freddiemac.com/sell/guide/bulletins/pdf/bll1209.pdf

2 http://www.dsnews.com/articles/fannie-and-freddie-set-timeline-requirements-for-short-sales-2012-04-17

3 http://blog.aaronline.com/2012/04/short-sale-decision-timelines-set-by-fannie-and-freddie/

4 http://blog.aaronline.com/category/short-sales/

Arizona REALTOR® Magazine — May 2012

Doing the Right Thing: Compensation for Lease Agreement

AAR Risk Management Specialist Jan Steward posted on AAR's blog about a common complaint received by our Professional Standards Department:

> *"Despite a compensation offer in the MLS for a lease agreement, REALTOR® B does not pay REALTOR® A the promised compensation. Is it ethical not to pay a fellow agent if it is under a certain amount, say $600 or $700?"*

Read more.

http://blog.aaronline.com/2012/04/doing-the-right-thing-compensation-for-lease-agreement/

THE BUYER EQUATION

Low Inventory + Competition from Cash Investors = Tough Times for Buyers

What happened to our inventory? That's what real estate professionals in metro Phoenix wonder as they troll the MLS for listings to show their eager buyers.

Remember just a few months ago when we wooed those potential buyers with low prices, low interest rates and plentiful inventory? Now the inventory has dried up, cash investors are on the prowl, and the owner-occupant buyers who finally jumped off the fence are finding it challenging to get an offer accepted. "We went from kind of normal to crazy almost overnight," reports Bob Hertzog, designated broker at Summit Home Consultants in Scottsdale.

OUTSIDE MARICOPA COUNTY

If you live outside metro Phoenix and haven't encountered this phenomenon yet, get ready. It may be coming to a market near you.

In Tucson, Sherie Broekema, ABR, CRS, GRI, SRES with Long Realty Company, reports that "inventory is down 22% from a year ago, but we still have enough for a good selection right now." If the oft-repeated adage that Tucson's market usually follows Phoenix's is true, that selection may soon be slimmer.

In Flagstaff, "inventory is very low right now," reports Eileen Schreiber, ABR with HomeSmart Fine Homes & Land. "There are not as many bidding wars as in the Valley, but a really well-priced home is going to go quickly."

PREPARING BUYERS FOR THE *NEW* NEW NORMAL

Buyers often come to you with unrealistic expectations. They've been hearing the doom and gloom on the news for the last few years, and they've finally come to believe that NOW is the time to get the deal of a lifetime. When the reality of today's market sinks in, they're disappointed and looking for someone to blame. Who is that conveniently located person there in the driver seat? Yep, that would be you, dear buyer's agent.

So what can you do to prepare your buyers for today's market? Arizona REALTORS® share their tips.

1. Show and tell. The key to retaining buyers in a challenging market is education. "The first time I meet a buyer, we don't really get into finding the house," says Cory Whyte with RE/MAX Infinity in Chandler. "We just talk about today's market, where supply is currently." By explaining the current market in detail, you can help them develop realistic expectations—and help them understand it's the market, not you, when the going gets tough.

Show charts and reports—solds with dwindling days on market, for example—so the buyers understand why you are telling them to be prepared to move quickly. Where possible, reference outside sources that reinforce your message.

Just be careful, warns Schreiber, to avoid the hard sell. "A lot of people I work with I've never met before, they find me on the Internet," she says. "My first meeting with them has to be low pressure or they'll move on to someone else. My job is to stand out and be really low key—give them a ton of information and let them know that it's their decision."

2. Address reservations up front. Do any of these situations sound familiar? While you're talking your buyer through an offer, he says: "Let's offer 10% less than what we think market value is. My cousin's wife says that sellers are desperate and will take whatever they can get." After four weekends in a row looking at homes and countless dollars spent on gas, your buyers say: "We're going to wait this out and see what happens in a couple of months." After the tenth offer gets rejected, your client comments: "It wasn't meant to be. When it's right, I'll get it."

If you're facing these conversations after you've invested significant time in these buyers, your initial education session may be incomplete. "I have 24 points I cover with new clients before I show the first home," says Ric Felder with Realty USA Southwest in Scottsdale. "Here's the technique: Make a list of every single objection or question you could possibly get from day one to actually writing an offer—anything the client could possibly come up with, every reasonable question or objection. Then before you get started, answer every one. You bring it up before they do. Once you get good at it, you'll be amazed at how agreeable clients can be because you have professionally educated them and anticipated 95% of questions and objections you are *going* to get."

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3. Let them experience it. Education only takes you so far. "I can read minds," says Gerri Bara with West USA Realty in Mesa. "They think, 'Yeah, yeah, she's just telling us this stuff so she doesn't have to a) work so hard, b) so she makes more money or c) both.'"

"Sometimes they just have to lose one or two to get the picture," reports Wendy Cyr, ABR, CRS, GRI of Realty Executives in Scottsdale. All you can do is offer the benefit of your experience and then let them make their own choices. When the situation bears out your advice, it shows them that you are, in fact, telling it like it is.

"There will always be clients who need proof of my expertise," acknowledges Matthew Pellerin with Realty Executives in Phoenix. "I accepted this fact early in my career, and it has made dealing with the lack of trust much easier."

4. Stay in close contact. Several agents report getting calls from buyers frustrated with their current agent. After a quick review of the situation, it becomes clear that the buyers are really frustrated with the current market—but that feeling is exacerbated by a lack of communication. "Believe it or not, the number one complaint I get is, 'I could not get my agent to return my phone calls,'" says Hertzog.

So educate your buyers, address their concerns, hold their hands when offers fall through AND make sure you reply promptly to their calls, texts and emails throughout the search. Otherwise, when that buyer's seventeenth offer is finally accepted, it may be under a different agent's watch.

5. Evaluate for the long haul. "If a buyer is sincere, I'll work with them for a long time, no problem, and that time and patience is definitely paid back because they refer others to me," reports Cynthia Leggitt with HomeSmart in Gilbert. "But if a buyer 'willfully' won't understand and thinks s/he knows the market better than I do, I refer them out—always letting the other agent know exactly why I'm cutting them loose as a professional courtesy."

TECHNIQUES FOR GAINING THE ADVANTAGE FOR YOUR BUYERS

Once you've gotten the buyers on board with today's reality, it's time to consider ways to help their offer get to the top of the pile. "My young family is so darn cute, hard working and eight months pregnant," reports Judith Watson with Keller Williams Arizona Realty in Scottsdale. "We are previewing homes daily, and we are able to get into the game, but not win the coveted acceptance." Here are items to consider:

1. Include a letter about your clients with the offer. This is an old-school technique that can still yield good results. Some short sale sellers have strong ties to the neighbors and the neighborhood and hate to see their home become a rental. Woo them with a story about your buyers and how much they love this home. "We work the emotional side and make sure the seller knows we're committed," advises Whyte. "That's where communication between the buyer agent and listing agent is important."

2. Submit a back-up offer. Buyer agents often pass up the opportunity to submit a back-up offer, but it might be just the ticket into a home in today's market. "As a short sale listing agent, I can tell you that about 25% of buyers walk, and we have to find another," reports Hertzog.

"The only way to have a true back-up position is to have a fully executed/accepted contract with a contingency that the contract in first position must be cancelled in order for your contract to become first position," warns Randy Hooker with Dreamcatcher Realty in Gilbert. If the seller won't sign a back-up offer, stay in contact with the listing agent via email. "Agents will say, 'Call me if anything happens,'" says Hertzog. "I don't have time to do that when I have 25 listings. But a quick email plants a seed for a listing agent."

3. Look at new builds. "It takes a little longer to move in, but at least they have a home," reports Anna Kruchten, CRB, CRS, GRI with the Phoenix Property Shoppe.

4. If the buyer is FHA, consider Fannie, Freddie & HUD homes. The truth is, sellers are going to look at cash or conventional funding before FHA. "As a listing agent, I'm as guilty of that as anyone else," reports Hertzog. "If I'm representing a client on a short sale and they get a cash offer, even 5% lower, I'll advise them to take that cash offer anytime."

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However, Fannie Mae and Freddie Mac homes are only available to owner-occupants for their first 15 days on the market, reports Matthew Coates with West USA Realty Revelation in Chandler. For HUD homes, it's 30 days. "This is an effort to populate vacant neighborhoods with more homeowners and not renters, which helps property values," he reports. Encourage your buyers to take advantage of these first-look policies.

5. Consider an escalation addendum. "If a property comes on the market for $150,000 and we think the value is closer to $165,000, we'll write an offer but put an addendum in that we'll pay $1,000 over the highest offer up to, say, $167,000," explains Whyte. "That's another way we've been trying to get owner-occupants in."

6. Make your offer as attractive as possible. When you go through the education process with your buyers, talk to them about the ways they can make their offer more tempting. "I encourage them to put down as much as they can, perhaps increase the earnest money and offer as quick a close as possible," says Broekema.

EMBRACE THE NOW

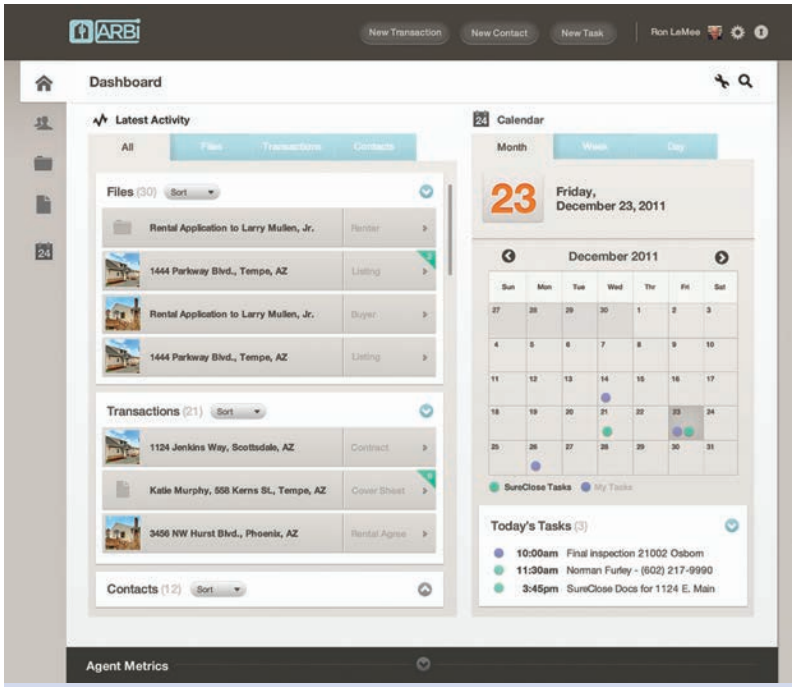
Tight inventory is likely to continue as long as prices stay low, according to Mike Orr, director of the Real Estate Center at ASU's W.P. Carey School of Business. "Sellers are not likely to come off the fence and list their homes for sale until they feel they are getting a fair price for the home," he reports. "Since it would take a substantial rise in prices to get back to the long term trend-line, I am not anticipating an increase in supply without a large increase in prices."

"We are all faced with this discouraging market, but at the end of the day, we all need to sit back and look at where we were just six to twelve months ago, when we had very few buyers looking for homes," says Hertzog. "I'll tell you what I've learned through the years. It's critical that agents use this time to grow their pipeline... When the market does shift back to a buyer's market, those who have clients in their pipeline will reap the rewards."

"It's still a great time to be a buyer," Whyte emphasizes. "Prices are low. Interest rates are low. The only thing buyers have to exercise more than they planned on is patience."

Source: *This article was inspired by and relied heavily on discussions in the Arizona Real Estate Agent Forum Facebook group started by Dane Briggs, ABR, GRI of Firebird Realty in Phoenix. If you're looking for advice, for an outlet for your real estate frustrations or for a supportive group to cheer you on, you should definitely check it out.*

http://www.facebook.com/groups/340087246029833/



Arizona REALTOR® Magazine — June 2012

ARBI—What It Is and Why It Is Important

BY RON LAMEE, AAR SENIOR VP – INFORMATION SERVICES

ARBI is the Arizona REALTOR® Business Interface. ARBI is being created to unify and integrate members' use of MLS, AAR TM, AAR eSign and zipForm® systems. Simply put, ARBI will be the dashboard members log in to when they want to see the status of their transactions and business in progress in one clean user interface.

The last major milestone we reported for ARBI was in late December 2011, when the interface design was completed by Cynergy Systems under the direction of the ARBI Workgroup. In less than two months, AAR's new Application Development Department was created, a senior programmer hired, and development framework set up. Coding began February 21, 2012. By late April 2012, working screen elements were in place and search started for ARBI's second developer. The second developer began work May 14.

The ARBI development team is Ron LaMee, SVP Information Services and Project Manager; Robert Allen, Lead Application Developer; and Predrag Milosavljevic, Application and Database Developer. We will keep members updated on major milestones as they occur.

This post was originally published on AAR's blog on Tuesday, May 22.

http://blog.aaronline.com/2012/05/arbi-what-it-is-and-why-it-is-important/

Arizona REALTOR® Magazine — June 2012

THE RISKS OF SWEETENING THE OFFER TOO MUCH

Why Buyers Should Think Twice Before Waiving SPDS & Other Protections

It's a tough market for buyers right now. Low inventory makes multiple offer situations common, and investors with cash often beat out traditional owner-occupants. In response, some buyers are looking for ways to make their offer stand out.

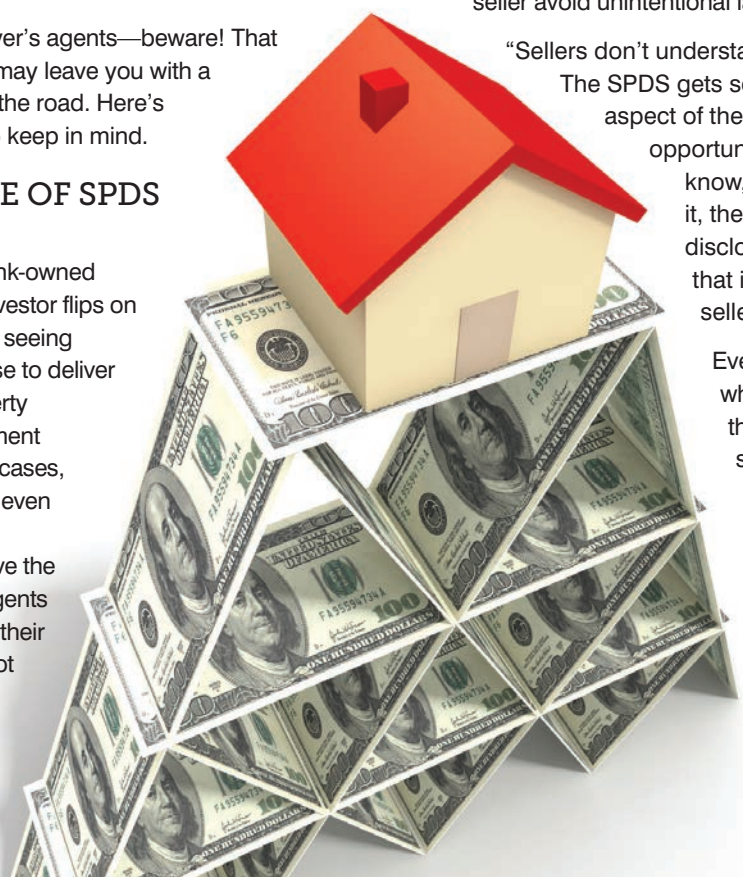
"Buyers get in a competitive mode and are willing to give up disclosures, SPDS and insurance claim history. In some cases, they're even willing to waive inspections of the home," reports Kelly Hand with Tierra Antigua Realty in Tucson. "This creates more risk for buyers, and I think that they're willing to do it because they don't understand the risk involved."

"Buyers are willing to waive a lot right now," agrees Ronald L. Moore, designated broker with Keller Williams Integrity First in Mesa. "We're talking contingencies, appraisals, inspections, CLUE—things I wish they wouldn't waive. They're doing it to compete, I get that. And as inventory continues to drop, I expect we'll see more rather than less of it."

Buyers—and buyer's agents—beware! That sweetened offer may leave you with a belly ache down the road. Here's what you need to keep in mind.

IMPORTANCE OF SPDS FOR BUYERS

With so many bank-owned properties and investor flips on the market, we're seeing more sellers refuse to deliver the Seller's Property Disclosure Statement (SPDS). In some cases, listing agents are even asking buyers to preemptively waive the SPDS. Buyer's agents who want to give their client the best shot at the home they love are put in a tough spot.



Designated brokers don't want to see buyers waive the SPDS, especially not up front. "It's just not in the buyer's best interest," cautions Trudy Moore, CRB, CRS, the designated broker for HomeSmart in Phoenix. "If you were buying a home, wouldn't you want the seller to put in writing everything they know about the property?"

The SPDS is a useful tool for both sides in the transaction.

If the buyer wants the agent to write the offer waiving the SPDS, it's critical that the agent have good documented communication with the buyer about the ramifications of doing so. It's also a good idea for the buyer's agent to provide a blank SPDS and get written acknowledgement that the buyer received it, such as by initialing and signing a copy, advises AAR General Counsel Michelle Lind. Hand follows this practice so that his buyers can see "what would or could have been disclosed." Plus, he says, "it gives them a better idea of what to look for during the inspection."

"Lawsuits against real estate agents often have to do with the condition of the property," explains Trudy Moore. "These are very difficult suits for a brokerage to defend."

IMPORTANCE OF SPDS FOR SELLERS

Listing agents should be aware that the SPDS is a useful tool for both sides in the transaction. A seller has a legal obligation to disclose all known defects to a buyer, even when selling a property "as is." The SPDS can help a seller avoid unintentional lack of disclosure.

"Sellers don't understand that it really protects them. The SPDS gets sellers thinking about every aspect of the home and gives them the opportunity to disclose all that they know," says Hand. "If they remove it, they may not feel obligated to disclose anything. But you can bet that if something happens, that seller will get caught."

Even if the seller is an investor who has never lived in the home, they will be able to fill out at least some portion of the form, such as the address and ownership information. "I work with a lot of investors and require them all to fill out the SPDS," reports Dane Briggs, ABR, GRI with Firebird Realty in Phoenix. "In the listing, I state that seller will

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provide a limited SPDS as they have never occupied the home. But I still make them fill out every question honestly and disclose in the additional comments how long they have owned it, repairs that were made and not previously disclosed, and any issues they know about and did not fix."

HomeSmart requires that a listing agent get the SPDS when they take a listing. "It helps us better represent the seller," says Trudy Moore. "If the listing agent knows from the SPDS that the pool heater hasn't worked for ten years, the agent can remove it from the warranted items. Otherwise, the seller will have to spend money to replace that." If you do get a SPDS up front, make sure that the seller updates it if the listing is on the market for an extended period of time.

INSPECTIONS & THE AS-IS ADDENDUM

"As is. Just those two words mean 100 different things to 100 different people," laughs Hand. Some buyers think that if there is an As Is Addendum in place, they shouldn't bother to do any inspections. If they do pay for an inspection, they think that they can't ask that items be fixed or cancel if something's wrong with the home. For these confused buyers, waiving the inspection seems like no big deal.

Buyers may be willing to forego the protections available to them, but you should not.

"AAR's As-Is Addendum absolutely allows buyers to get an inspection and ask for repairs," Hand says. "If the seller says no, the buyers can either accept that response or they can cancel." But at least they'll have a better feel for the integrity of the home.

If a buyer wants to waive the inspection period to make their offer more competitive, pull out that (possibly blank) SPDS or a sample home inspection report and talk to them about the risks involved in not thoroughly vetting the home. Document the conversation and put it in your files. Buyers may be willing to forego the protections available to them, but you should not.

A side note about the inspection period: "We're seeing a lot of agents submitting offers prior to the buyer ever even viewing property. Then the buyer relies upon the inspection period to decide if they really want the property or not," report Trudy Moore. "That's not what the inspection period is for. It's the time to find out new information about the property. Not, 'If the offer gets accepted, then I'll get in the car.'"

THE APPRAISAL CONTINGENCY

When cash is king and homes are scarce, conventional buyers can start to feel that they'll have no chance of getting their offer accepted unless they waive the appraisal contingency. But do they really understand the ramifications of doing so?

Agents need to educate their buyers on the risks involved. "Explain to the buyer: If the property appraises for less than you've offered to pay, you'll need to come up with the extra money to close—unless the seller will reduce the amount, which a lot of banks will not," advises Ron Moore. It's their earnest money at stake. "Most of the time, if you counsel them correctly and the buyers realize what they're actually waiving away, they decide against it," says Ron Moore.

Of course, appraisals do not always keep up with rising prices. If a buyer feels that the home is worth more than the appraisal and has access to additional funds, they may be willing to come in with more money. That's a very different situation than waiving the appraisal contingency from the get-go. The agent should still document the discussion about risk in writing, Ron Moore warns.

Note: AAR's Additional Clause Addendum has language for waiving the appraisal that clarifies what is really means to do so.

Rather than waive the contingency in the offer, some buyer's agents have included language indicating that if the property appraises below the purchase price, the buyer will agree to pay a certain amount over the appraised value. This keeps the contingency but limits the buyer's exposure.

THIS TOO SHALL PASS?

It's a little nuts out there right now. "If a house goes on the market under $200,000—and is remotely priced correctly—the listing agent is going to get 100 telephone calls," acknowledges Trudy Moore. "They'll get 15 offers, and no one will even have been to the property."

So what's a buyer's agent to do in this environment? Talk with your buyers about today's challenges. Educate them about the risks involved in waiving the protections available to them. And document your conversations. Then do your darnedest to get them that home.

Or you could just focus on listings—convincing possible sellers to get off the fence and get their homes on the market. Just think of it: Then all of the buyer's agents will be knocking down your door!

Arizona REALTOR® Magazine — May 2012

HELVETICA SERVICING, INC. V. PASQUAN

Arizona's Anti-Deficiency Law Continues to Evolve

BY SCOTT M. DRUCKER, ESQ. – MACK DRUCKER & WATSON

With the increased number of foreclosures experienced in Arizona over the last several years, the Arizona Court of Appeals continues to issue significant decisions addressing previously unresolved questions pertaining to the protections afforded by Arizona's anti-deficiency statutes. This trend continued on March 20, 2012 with the court's published opinion in *Helvetica Servicing, Inc. v. Pasquan,* 1 CA-CV 10-0418.

In *Pasquan,* the Court of Appeals addressed three significant legal questions pertaining to Helvetica's judicial foreclosure of the Pasquans' Paradise Valley home, which was secured by a loan with *Helvetica* in the principal amount of $3,657,793.30. Specifically at issue was Helvetica's right to a deficiency judgment against the Pasquans in the approximate amount of $3,200,000.00 following Helvetica's purchase of the property at a sheriff's sale pursuant to a $400,000.00 credit bid.

In an effort to determine the Pasquans' alleged deficiency liability, the Court of Appeals first addressed the issue of whether a purchase money loan loses its purchase money distinction and thus its deficiency protection following a refinance. Upholding its previous decision in *Bank One v. Beauvais,* 188 Ariz. 245, 934 P.2d 809 (App. 1997), the court held that a refinance in and of itself does not destroy the loan's purchase money status, stating that "A change in the lender's identity does not, standing alone, alter the nature of the underlying purchase money debt." Accordingly, refinancing a purchase money loan with a new lender does not cause the borrower to forfeit their anti-deficiency protection.

The second issue addressed by the Court of Appeals is whether a construction loan qualifies as purchase money in nature, and is thereby eligible for anti-deficiency protection. This issue is not directly addressed by Arizona's anti-deficiency statues because the borrowed funds on a construction loan are not used simply to purchase a qualifying residential property. Rather, construction loans are typically used in part to purchase raw land and in part to pay for the services performed by contractors. Although property improvement loans do not constitute purchase money obligations, the Court of Appeals in *Pasquan* ruled that "a construction loan qualifies as a purchase money obligation if: (1) the deed of trust securing the loan covers the land *and* the dwelling constructed thereon; and (2) the loan proceeds were in fact used to construct a residence that meets the size and use requirements set forth in A.R.S. § 33-729(A)" i.e. - a single one-family or single two-family dwelling on less than two and one-half acres.

Finally, the Court in *Pasquan* addressed "cash-out" refinances and examined whether a lender is entitled to a deficiency judgment following the foreclosure of a loan where only a portion of the borrowed funds constitute purchase money. While lenders have long argued that the entire deficiency is a recourse obligation on blended loans of this nature, borrowers have asserted that the entire loan receives the protection afforded by Arizona's anti-deficiency statutes. In what appears to be a well-reasoned compromise, the Court of Appeals very simply held that the purchase money portion of the loan is eligible for anti-deficiency protection while the cash-out portion is not.

In explaining its rationale, the Court expressed that on the one hand, "it appears unnecessarily punitive and contrary to the consumer-protection goals of Arizona's legislature to convert an entire obligation into a recourse loan simply because it happens to include non-purchase money sums." Alternatively, "it seems similarly inappropriate to shield borrowers from deficiencies for loan disbursements unrelated to the acquisition or construction of a qualifying residence." Following a foreclosure, the lender may therefore seek to recover a deficiency judgment only on the non-purchase money portion of the loan. However, in order to obtain such a judgment, the lender must first trace and segregate the non-purchase money funds.

While the decision in *Pasquan* may be appealed to Arizona's Supreme Court, for now the case provides further clarification of Arizona's evolving anti-deficiency statutes and their application to construction loans and "cash-out" refinances.

ABOUT THE AUTHOR

Scott M. Drucker, *a shareholder and founding partner of Mack Drucker & Watson, PLC, focuses his practice in civil litigation, with an emphasis on real estate litigation, commercial litigation and construction law. His clients range from individuals to large corporations, which he represents in both federal and state courts, mediation, arbitration and appellate practice.*

Arizona REALTOR® Magazine — May 2012

10 THINGS REALTORS® SHOULD KNOW ABOUT SEPTIC SYSTEMS

BY DR. KITT FARRELL-POE & DAWN LONG

As long as people have lived in relatively concentrated populations, there has been a need for sanitary disposal of human wastes. Over 3,000 years ago, Indus Valley residents had bathrooms with water-flushed latrines that emptied into pits similar to modern septic tanks. In the United States, early sanitation consisted of outhouses with earthen pits. Today, many homes are connected to public sewers; homes not connected to public systems usually have separate onsite treatment systems to treat and disperse household wastewater. This article gives a brief overview of how our modern septic systems work and 10 things that REALTORS® should know about them.

HOW A SEPTIC SYSTEM WORKS

Septic systems are designed to hold, treat and disperse household wastewater. Household wastewater contains bacteria, viruses, household chemicals and excess nutrients such as nitrates. All of these contaminants can cause health-related illnesses if not treated properly.

Septic systems have two major parts: a septic tank and a soil treatment area. Wastewater from toilets, sinks, showers and other drains flows from the household sewer drain to an underground septic tank. Waste components then separate with the heavy solids settling on the bottom, forming a sludge layer. The grease and fatty solids float to the top, forming a scum layer. Normal bacterial action in the tank will partially decompose the solids.

Related AAR Form

ONSITE WASTEWATER TREATMENT FACILITY ADDENDUM

http://www.aaronline.com/documents/OSWWTFA.pdf

This discloses to the buyer that an onsite wastewater treatment facility exists on the property and outlines what information the buyer will receive from the seller and in what timeframe.

(Last revised 10/06)

With normal use, solids will build up in the tank and must be removed periodically by a professional contractor. The relatively clear layer of wastewater in the middle is called effluent. Effluent flows from the septic tank outlet to the soil where most of the treatment process occurs.

The soil treatment area, also known as the drainfield or leach field, consists of gravel-filled trenches containing plastic chambers or perforated plastic pipe. This underground portion of the system accepts effluent from the septic tank outlet. Effluent moves through the pipes and seeps into surrounding soil for final treatment. Soil particles filter out small suspended solids and organic matter, while soil bacteria break down potentially harmful microorganisms and other organic components. Most viruses adhere to clay particles in the soil and eventually die. The now treated effluent continues its flow through the soil layers.

A properly designed, installed and maintained septic system should protect the environment and provide your clients many years of good service.

10 THINGS THAT REALTORS® SHOULD KNOW ABOUT SEPTIC SYSTEMS

1. Do you know the difference between a conventional and alternative system in Arizona? Arizona defines a conventional septic system as one that has a septic tank followed by a trench, bed, chamber or seepage pit. An alternative system is anything else.

2. Did you know that using a cesspool as the property's wastewater system is illegal in Arizona? Cesspools take the property's wastewater and deliver it to a hole in the ground. These systems have been illegal since the 1970s.

3. Did you know that your septic system is supposed to treat and disperse the sewage from the property (not just make it "go away")? A well-functioning septic system will prepare the property's sewage so that the effluent is safe for people and the environment.

4. Did you know that your septic system works much like your body in the way it treats and disposes of wastes? If you shouldn't put it in your body, then you probably shouldn't send it down the drain to your septic system. You can actually make your septic system sick or kill it.

5. Did you know that a septic system is truly a system and not just a tank in the ground? The soil treatment portion of the system is critical to the life of the system. If it has been built on, covered over (including improper landscaping) or disturbed, it will not treat the sewage properly, and the system will probably not last long.

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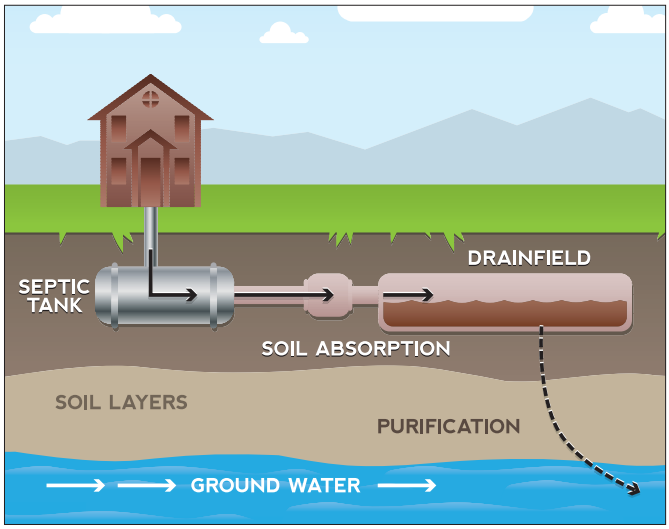
10 THINGS REALTORS® SHOULD KNOW ABOUT SEPTIC SYSTEMS — CONTINUED

6. Did you know that septic systems have a limited life span? The usual design life of a septic system is 20 years. With careful management and care of the system, it can last much longer. But if the septic system has been overloaded or otherwise abused, then the system might not last its full design life.



7. Do you know two of the most common causes of failure for a septic system? 1) Using too much water; and 2) Not checking the septic tank for solids and scum. Using too much water can disrupt the septic tank settling and push solids into the soil treatment area, clogging the soil pores. A septic tank should be checked for the level of solids and scum in the tank. It is not necessary (and it's expensive) to pump a tank that does not have an excessive build up of solids and scum layers, BUT it's equally as bad to not pump out a tank that is becoming too full.

8. Did you know that a malfunctioning septic system can pollute the groundwater and adversely affect the public health and that of the environment?

9. Did you know that septic tanks are not supposed to leak? Since 2005, wastewater tanks, including septic tanks, are supposed to be watertight. Many older tanks leak untreated sewage into the environment. This can be caused by many things such as cement deterioration, cracks caused by settling, being driven over or rotting of fiberglass or steel tanks. When you look into a septic tank, it should have liquid right up to the outlet pipes. Effluent below the outlet pipe could mean that the septic tank needs to be inspected for leaks.

10. Did you know that all conventional and alternative septic systems are required to be inspected when a property is sold? The only exception is for systems that are new and have not been used yet.

REALTORS® are a primary source of information for the buyer and seller. This article is intended to help you inform your client. For more information on household septic systems, visit the Arizona Extension publications web page.

http://ag.arizona.edu/pubs

Thanks to Dave Bartholomew, Jonathan Catlin, Brian Chiordi, Jake Garrett and Randy Phillips for their contributions to this article.

ABOUT THE AUTHOR

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Arizona REALTOR® Magazine — May 2012

Maternity Discrimination in Lending Is Illegal, Says HUD

"It is against the law for any lender to deny a mortgage loan to a woman because she is pregnant or on paid maternity leave," said John Trasviña, HUD Assistant Secretary for Fair Housing and Equal Opportunity, in an April new release. Read more.

http://portal.hud.gov/hudportal/HUD?src=%2Fpress%2Fpress_releases_media_advisories%2F2012%2FHUDNo.12-066

Arizona REALTOR® Magazine — April 2012

What to Include in Your Advertising

AAR has received several questions from members about what should be included in advertisements. This article from our archives, "Real Estate Advertising Complaints on the Increase[1]," lays out the rules. You may also want to review NAR's trademark rules[2] on the use of REALTOR® and consider including the Equal Housing Opportunity logo[3].

1 **http://www.aaronline.com/documents/advrules.aspx**
2 **http://www.realtor.org/letterlw.nsf/pages/trademarkmanual**
3 **http://www.realtor.org/about_nar/nar_graphics/eqhouse**

Arizona REALTOR® Magazine — April 2012

REMEMBER, FAIR HOUSING & THE CODE OF ETHICS STILL APPLY ONLINE

AAR Talks with Evan Fuchs & Paula Monthofer about How to Avoid Risks While Getting Social

*Do you think about Fair Housing and the Code of Ethics when you interact online? Questionable behavior is popping up on Facebook and other social sites—from linking to a map with inappropriate labels handwritten over areas of town to retweeting an off-color joke to disparaging another agent. AAR spoke with REALTORS® and real estate instructors **Paula Monthofer**, ABR, GRI, an agent with Realty Executives in Flagstaff, and **Evan Fuchs**, ABR, CRS, GRI, e-PRO®, the designated broker at Bullhead Laughlin Realty in Bullhead City, to find out what's going on—and what you can do to protect yourself from an ethics complaint or a hefty Fair Housing fine.*

***Paula Monthofer**, ABR, GRI*
Real Estate Instructor & Agent with Realty Executives, Flagstaff

***Evan Fuchs**, ABR, CRS, GRI, e-PRO®*
Real Estate Instructor & Designated Broker at Bullhead Laughlin Realty, Bullhead City

REALTORS® get an awful lot of education on Fair Housing. Yet problems persist. Why do you think we are seeing these types of violations on social media sites?

Evan Fuchs (EF): While they're engaged in social media, people may get a little bit too comfortable with the social side and maybe forget that they are still a REALTOR®. They might also lose sight of the fact that this is on their permanent record. It's out there forever. It's great to engage and be casual and have those relationships, but you have to be professional at the same time.

Paula Monthofer (PM): Agents just get too comfortable. Plus, there is a false sense of anonymity online. They feel freer than they really should.

Is social media advertising? What if an agent uses Facebook to connect with friends, not clients?

PM: I think that's a really easily crossed, thin line. It doesn't matter if it's in a chat box, a comment on someone else's post or a status update that mentions you were doing an open house. If you're talking about yourself being a REALTOR®, you need to include your brokerage name on your profile and you need to pay attention to Fair Housing law when you're online.

EF: I'm one person. I can't separate myself. Imagine that someone is searching for you on Google. One result that comes up is a personal page that has nothing to do with real estate. The second is your LinkedIn profile. It's not hard to connect those dots: "This person talking about hot rods is an agent with Such-and-Such Realty."

PM: You can't take your REALTOR® hat off. The Code of Ethics, Fair Housing—everything still applies.

How do you respond to agents who say it is the obligation of a REALTOR® to let people know the truth about an area? Or who say they should be able to choose who they do and do not want to work with?

EF: As a designated broker, I rely on the law when I have this conversation. I tell my agents that it's not really a matter of opinion. There are federal laws that carry stiff penalties. This is not a decision that I get to make, and you don't either.

PM: The bottom line is that we simply cannot discriminate in our services. Everybody's money is green. Otherwise, you leave yourself open to a claim.

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Talk to us about the change to the Code of Ethics that affects social media.

PM: The Code of Ethics Standard of Practice 15-3 (see box) states that you are responsible for other people's comments on your Facebook profile or page, website, blog or other platform over which you have a measure of control. So you do have to monitor these profiles and review comments from your friends. Even if the real estate professional's name isn't used, if it's easy to figure out who the other person is, that's a violation.

REALTOR® CODE OF ETHICS STANDARD OF PRACTICE 15-3

The obligation to refrain from making false or misleading statements about other real estate professionals, their businesses, and their business practices includes the duty to publish a clarification about or to remove statements made by others on electronic media the REALTOR® controls once the REALTOR® knows the statement is false or misleading. (Amended 1/12)

What are some danger areas that even well-intentioned agents might stumble into?

EF: Often it is content that the REALTORS® are not producing themselves, but they comment on the off-color joke, "like" it or retweet it. I'm seeing more issues with retransmission than production.

Also, if you administer a Facebook group or community page, you need to be concerned with this stuff. If people engage in comments that are Fair Housing violations, take it off the page immediately and talk to them. You should also address these topics in a "Group Guidelines" document. That way if you have people who cross the line, you can refer them to the guidelines.

What should brokers be aware of when it comes to their agents interacting online?

EF: The first step is making brokers aware of the issues. If you're a broker who isn't into social media, you need to know that some of your agents are and the consumers certainly are.

PM: I am concerned for brokers when it comes to social media, to be honest. They definitely need to have a social media policy in place. I would require agents to take classes on avoiding risk in these areas. And I think they should be monitoring as much as possible.

EF: A broker needs to have a monitoring component, for sure, but you can't watch every move agents make—in the same way that I can't be present for every deal my agents negotiate. As a broker, you establish clear policies, make education a part of your culture and trust that those values are instilled in your agents.

Any closing thoughts?

EF: Assume that everything you post is permanent—even if you quickly delete it. When you step in it, if people saw it, they can take a screenshot and go shoot it out there.

PM: You can delete something from your Twitter profile page, for example, but it can't be deleted from the stream. It's a good reason to never engage in any of these activities while upset or inebriated.

LEGAL HOTLINE

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.

BROKERAGE
http://www.aaronline.com/law-ethics/legal-hotline/brokerage.aspx

Designated Broker May Report Agent's Misconduct to Arizona Department of Real Estate and Be Absolved of Administrative Liability

FACTS AS PRESENTED BY THE CALLER:

The broker has a listing for a husband and wife, who live out of state. The broker discovers that, after the husband's death, the agent continues to use blank, pre-signed status change forms signed only by the husband. The broker has since entered into an exclusive listing agreement with the wife to correct the issue.

ISSUE:

Does the broker have an obligation to self-report this issue to the Arizona Department of Real Estate?

ANSWER: No.

DISCUSSION:

The Arizona Department of Real Estate does not require the reporting of this issue. However, A.A.C. § R4-28-1103(F) provides that "[a] designated broker who, upon learning of a violation of real estate statutes or rules by a salesperson or associate broker under the broker's supervision, immediately reports the violation to the Department is not subject to disciplinary action by the Department for failure to supervise the salesperson or broker." Accordingly, disclosure is not mandatory, but disclosure would absolve the broker of any administrative liability for failure to supervise the agent.

Arizona REALTOR® Magazine — May 2012

COMMISSIONS
http://www.aaronline.com/law-ethics/legal-hotline/commissions.aspx

Property Manager Must Receive Compensation Through the Broker

FACTS AS PRESENTED BY THE CALLER:

See Issue.

ISSUE:

Can a property manager, who is a licensed Arizona real estate agent, be compensated directly from the client's property management trust account?

ANSWER: No.

DISCUSSION:

The licensee acting as a property manager should be paid by the broker directly from the broker's business operating account.

Arizona REALTOR® Magazine — June 2012

COMMISSIONS
http://www.aaronline.com/law-ethics/legal-hotline/commissions.aspx

Title Company May Pay Commissions Directly to An Agent Consistent with the Brokerage Firm's Instructions

FACTS AS PRESENTED BY THE CALLER:

See Issue.

ISSUE:

Can a brokerage firm instruct a title company to pay commissions directly to the agent?

ANSWER: See Discussion.

DISCUSSION:

A.R.S. § 32-2155 provides that an agent may receive compensation only from the broker to whom he is licensed. However, the Arizona Department of Real Estate allows a real estate brokerage firm to instruct a title company to disburse a commission check directly from escrow and still comply with this statute.

Arizona REALTOR® Magazine — June 2012

CONTRACTS
http://www.aaronline.com/law-ethics/legal-hotline/contract.aspx

Water Softener that Seller Does Not Fully Own Does Not Transfer

FACTS AS PRESENTED BY THE CALLER:

The agent is representing the buyer in a residential purchase under a standard AAR Residential Resale Purchase Contract. The home has a water softener that was not addressed in the contract. The seller of the house does not own the water softener and is making payments on it.

ISSUE:

Can the seller remove the water softener?

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ANSWER: Yes.

DISCUSSION:

Pursuant to the AAR Residential Resale Purchase Contract at lines 40-43, a water softener system only conveys at closing "if owned by the seller." In this instance, as the water softener is not owned by the seller, it does not convey.

Arizona REALTOR® Magazine — April 2012

CONTRACTS

http://www.aaronline.com/law-ethics/legal-hotline/contract.aspx

An Improperly Signed Counter-Offer Is Binding

FACTS AS PRESENTED BY THE CALLER:

The agent represents a seller under an AAR Residential Resale Purchase Contract. The seller received an offer from the buyer and provided a counter-offer. Pursuant to the terms of the counter-offer, the counter-offer had to be accepted by the buyer no later than 12:00pm the following day. The buyer accepted the counter-offer by 11:00am but signed in the "Response" section rather than the "Acceptance" section of the counter-offer. The seller notified the buyer's agent of the mistake at 2:00pm, who promptly sent a properly executed contract and opened escrow. In the interim, the seller obtained a higher offer and now wishes to cancel.

ISSUE: Is the seller bound?

ANSWER: See discussion.

DISCUSSION:

The seller clearly manifested an intent to be bound to the counter-offer by virtue of presentment of the offer to the buyer. The buyer manifested an intent to be bound by signing that counter-offer and opening escrow. It is unlikely that the buyer's signature of the contract on the wrong line would be found to be material, particularly in light of the buyer's timely correction of the mistake. The seller is contractually obligated to sell to the buyer.

Arizona REALTOR® Magazine — April 2012

CONTRACTS

http://www.aaronline.com/law-ethics/legal-hotline/contract.aspx

Proof of Funds Is Typically Cash or Other Immediately Payable Funds

FACTS AS PRESENTED BY THE CALLER:

An agent represents a seller in a real estate transaction. The contract requires a substantial down payment. The contract therefore provides that the buyer will furnish proof of sufficient funds prior to close of escrow or the seller can cancel the transaction. The buyer has produced a "Contract for Deed" pursuant to which he receives monthly installment payments. The monthly payment is substantially less than the down payment required in the contract.

ISSUE:

Is the buyer's "Contract for Deed" valid as proof of funds?

ANSWER: No.

DISCUSSION:

Evidence of a receivable for the sale of another property does not constitute sufficient proof of funds for the required down payment. Proof of funds for a down payment is typically evidenced by cash or other immediately available funds.

Arizona REALTOR® Magazine — May 2012

CONTRACTS

http://www.aaronline.com/law-ethics/legal-hotline/contract.aspx

Buyer Can Generally Assign Contract Rights

FACTS AS PRESENTED BY THE CALLER:

After commencement of the purchase contract and just prior to the close of escrow, the buyer informed the seller that the buyer was unable to close escrow. The seller provided a three-day cure period notice. Within the three-day cure period, the buyer attempted to cure by assigning his right under the purchase contract to the buyer's private investor. The buyer has provided, pursuant to the contract, a $25,000 earnest deposit. The seller intends on rejecting the buyer's attempt to cure by way of an assignment.

ISSUE:

Can a buyer cure a potential breach of the purchase contract by assigning the purchase contract to another buyer who can meet the terms and conditions of the purchase contract?

ANSWER: See Discussion.

DISCUSSION:

The seller and the buyer are the only parties to the purchase contract. However, in Arizona, the general rule is that a contract for the sale of real property is assignable unless the contract expressly states otherwise. Therefore, generally the seller cannot reject the assignment of the purchase contract so long as it is reasonable to believe that the new buyer (assignee) is capable of closing escrow pursuant to the terms and conditions of the purchase contract.

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CONTRACTS
http://www.aaronline.com/law-ethics/legal-hotline/contract.aspx

Seller May Limit Agreed-Upon Repairs to Two Units in a Six-Unit Apartment Complex

FACTS AS PRESENTED BY THE CALLER:

The agent represents the seller under a standard form commercial real estate purchase contract for the purchase and sale of a six-unit apartment complex (the "Property"). Following the inspection, the buyer issues a written notice (the "BINSR") to seller disapproving various items, including mold found in Units B and E of the Property. The buyer also demands that the seller "remove all mold" in the Property despite discovering mold only in Units B and E. The seller intends on removing only the mold discovered in Units B and E; however, under no circumstances does the seller want to be liable for the costs and expenses associated with any mold in the rest of the Property that may be discovered after close of escrow.

ISSUE:

Can the seller agree to be responsible for the mold only in Units B and E?

ANSWER: See Discussion.

DISCUSSION:

In the response to the buyer's request for repair, the seller should make it clear that he will only repair the mold in Units B and E. The seller should also reiterate that he is not aware of any other mold in the Property and remind the buyer of his obligation to inspect further for mold if he deems it appropriate.

Arizona REALTOR® Magazine — June 2012

DISCLOSURE
http://www.aaronline.com/law-ethics/legal-hotline/disclosure.aspx

A Seller Agent Must Disclose Known Defects on an As-Is Sale

FACTS AS PRESENTED BY THE CALLER:

The agent represents a lender selling foreclosed assets. The seller is aware through an inspection report that the home has structural damage.

ISSUE:

Is the seller required to disclose the structural damage as the sale is "as is"?

ANSWER:

Yes.

DISCUSSION:

The seller must disclose known defects regardless of the "As-Is" Addendum. Additionally, pursuant to the AAR "As-Is" Addendum language at line 23, paragraph D, "Seller acknowledges that Selling Property 'AS-IS' does not relieve Seller of legal obligation to disclose all material latent defects to Buyer." As the structural damage is material, the seller is required to disclose that damage to the potential buyer.

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DISCLOSURE
http://www.aaronline.com/law-ethics/legal-hotline/disclosure.aspx

Agent Must Disclose Defects about Which They Know or Should Have Known

FACTS AS PRESENTED BY THE CALLER:

The agent handles REO assets for the bank. The bank instructs the agent not to review any inspection reports obtained from failed transactions. The bank's articulated theory is that if the listing agent is not aware of any defects, there is no need for disclosure.

ISSUE:

Is the listing agent insulated from liability by not reviewing property inspection reports?

ANSWER:

No.

DISCUSSION:

Pursuant to the Commissioner's Rules, an agent must disclose all known material facts regarding a property. A.A.C. § R4-28-1101. Under a negligent misrepresentation theory, an agent must disclose all material facts about which they should have known under the circumstances. Pursuant to this theory of recovery, an agent cannot simply turn a blind eye to potential sources of adverse information and have no liability, even if the lender tells the agent not to review the inspection report. Therefore, if an inspection report identifies a material defect and the agent does not disclose the defect prior to close of escrow, the agent will have liability based on this failure to disclose.

Arizona REALTOR® Magazine — April 2012

FAIR HOUSING
http://www.aaronline.com/law-ethics/legal-hotline/fair-housing.aspx

Apartment Complex Must Reserve Parking for Mobility-Impaired Tenant

FACTS AS PRESENTED BY THE CALLER:

A mobility-impaired tenant has issued a demand for a reserved parking space near her apartment, despite the fact that the complex offers ample unassigned parking and does not have any parking spaces marked as "reserved."

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ISSUE:

Must the apartment complex grant the tenant a reserved parking space?

ANSWER: Yes.

DISCUSSION:

Pursuant to fair housing regulations, a landlord must make reasonable accommodations in rules, policies, practices or services if necessary for the disabled person to use the housing.

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FORECLOSURES, REOS & LIENS

http://www.aaronline.com/law-ethics/legal-hotline/foreclosures-reos-liens.aspx

A Deed of Trust Is the Most Commonly Used Real Property Security Agreement

FACTS AS PRESENTED BY THE CALLER:

Broker's client is contemplating selling his property with carryback financing, and has asked whether a deed of trust and promissory note or an agreement of sale should be utilized. The client's primary goal is to protect his interest in the property.

ISSUE:

Does a deed of trust and promissory note provide greater protection for a carryback seller than an agreement of sale?

ANSWER: Probably.

DISCUSSION:

A deed of trust is the most commonly used real property financing instrument in Arizona. They are commonly recognized, and the foreclosure process only takes 90 days. Because of this common usage and the simplicity of the foreclosure process, a note secured by a deed of trust is usually the best financing method.

It is strongly recommend that the seller consults with a real estate attorney to more fully understand the differences between these two arrangements and to draft appropriate documents.

Arizona REALTOR® Magazine — May 2012

FORECLOSURES, REOS & LIENS

http://www.aaronline.com/law-ethics/legal-hotline/foreclosures-reos-liens.aspx

RESPA Prohibits Kickbacks to Agents for Referral to a Loan Officer

FACTS AS PRESENTED BY THE CALLER:

The agent works with REO properties with XYZ Bank (the "Bank"). The Bank is "encouraging" the agent to refer her clients to the Bank's loan officer. Although the Bank does not require the agent to refer her clients to the Bank's loan officer, the Bank has indicated that the agent's referrals will be considered when determining whether the agent will receive future REO listings from the Bank.

ISSUE:

Is it a RESPA violation for the agent to refer her clients to the Bank's loan officer knowing that her receipt of future REO listings from the Bank may be dependent on the referrals she sends to the Bank?

ANSWER: Probably.

DISCUSSION:

Section 8 of the Real Estate Settlement Procedures Act ("RESPA") prohibits kickbacks and referral fees. Section 8(a) provides:

> No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

Therefore, Section 8 prohibits an agent from giving or accepting any "thing of value" for referrals of settlement service business. As a result, real estate agents/brokers cannot receive gifts, prizes, fees or kickbacks (even if they are disclosed) for the referral of business to other settlement service providers.

A "thing of value" includes, among other things, money, services, discounts, commissions and even the opportunity to participate in a money-making program. Payment of a thing of value does not require transfer of money. Any type of consideration that has value to the recipient is covered by RESPA. Even a referral in expectation of a referral back can be considered a thing of value. For example, a mortgage lender who refers business to a real estate broker in anticipation of the referral of closing business to an employee of the mortgage broker would likely be found to have violated RESPA. Further, it is a violation of RESPA for real estate agents/brokers to receive a thing of value, even if the referral agreement is informal and not in writing. Thus, an agent's referral of business to a settlement service provider in exchange for the referral of REO business would likely constitute a RESPA violation.

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FORECLOSURES, REOS AND LIENS

http://www.aaronline.com/law-ethics/legal-hotline/foreclosures-reos-liens.aspx

Tenant May Recover Overpayment of Rent to Landlord after Foreclosure

FACTS AS PRESENTED BY THE CALLER:

The tenant paid $2,500 in rent to the owner on the first day of the month. On the fifth day of the month, the property was foreclosed by way of a trustee's sale and

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purchased by a third party at the auction. The initial owner retained the entire $2,500 for that month's rent.

ISSUE:

Does the new owner of the property have a claim against the prior owner for a prorated portion of that month's rent?

ANSWER: Yes.

DISCUSSION:

The prior owner is entitled to keep rent only for the five-day period for which he owned the home. Assuming there are 31 days in the month, the prior owner is entitled to keep only $403.23. The individual who purchased the home at the trustee's sale has a claim to the remaining $2,096.77.

Note: In the event that the prior owner's Deed of Trust contains an assignment of rent's provision, the lender may have a claim to the $403.23.

Arizona REALTOR® Magazine — June 2012

LANDLORD/TENANT

http://www.aaronline.com/law-ethics/legal-hotline/landlord-tenant.aspx

Property Manager Must Honor Time Frames in Five-Day Notice

FACTS AS PRESENTED BY THE CALLER:

The property manager presented a five-day notice to the tenant, which incorrectly specified a date that payments would be accepted that was after the five-day period.

ISSUE:

Must the property manager honor the later date before proceeding with a forcible entry and detainer action?

ANSWER:

Yes.

DISCUSSION:

Pursuant to A.A.C. § R4-28-1101(A), a licensee is required "to deal fairly with all other parties to a transaction." In this instance, the property manager's inadvertent inclusion of a date later than the five day period provided for by A.R.S. § 33-1368(B) has created an expectancy on the part of the tenant that additional time will be afforded within which to bring the rent current. As a result, the property manager must honor the later date provided in the five day notice.

Arizona REALTOR® Magazine — April 2012

LANDLORD/TENANT

http://www.aaronline.com/law-ethics/legal-hotline/landlord-tenant.aspx

Tenant Must Give Landlord Reasonable Access to Make Repairs

FACTS AS PRESENTED BY THE CALLER:

During the residential tenancy, the tenant notified the landlord of an issue needing repair inside the residential rental property. The landlord provided the tenant with a two-day notice that the landlord would be entering onto the property to inspect and/or repair the problem. The tenant took the position that he will only provide the landlord access if the tenant is available to accompany the landlord. The tenant further insisted that the landlord provide the tenant with an estimated timeframe in which to make the needed inspections and repairs.

ISSUE:

Can the tenant condition the landlord's ability to inspect and repair the residential leased property?

ANSWER: See discussion.

DISCUSSION:

Under A.R.S. § 33-1343(A), a "tenant shall not unreasonably withhold consent to the landlord to enter into the dwelling unit in order to inspect the premises and make necessary or agreed repairs." Section B goes on to state, "if the tenant notifies the landlord of a service request for maintenance as prescribed in A.R.S. § 33-1341, paragraph 8, the notice from the tenant constitutes permission from the tenant to enter the dwelling unit pursuant to section D for the sole purpose of acting on the service or maintenance request." Section D provides that "the landlord shall not abuse the right of access or use it to harass the tenant, thus the landlord, outside of emergencies, shall give the tenant at least two days' notice of the landlord's intent to enter during a reasonable time."

In this instance, the tenant is most likely unreasonably denying the landlord access by requiring that the tenant be present during the inspection and repair as long as the landlord provided the required minimum two days notice and enters the rental property during a reasonable time.

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MISCELLANEOUS
http://www.aaronline.com/law-ethics/legal-hotline/miscellaneous.aspx

City Cannot Deny Water Service Based on Prior Occupant's Failure to Pay

FACTS AS PRESENTED BY THE CALLER:

The seller's water bill was in arrears at the time that the subject single-family home was sold to the buyer. As a result, the city indicated an intention to deny water service to the buyer until the seller's delinquent water bill was paid in full.

ISSUE:

Can the city deny water service to the buyer until the seller's account is brought current?

ANSWER: No.

DISCUSSION:

A.R.S. § 9-511.01(G) states, in part, "For residential property of four or fewer units, a municipality shall not refuse service within the municipality's service area for the unpaid water and wastewater rates and charges to anyone other than the person who physically resided and received the service at the property." As such, the city cannot deny water service to the buyer based on the seller's delinquent account.

Arizona REALTOR® Magazine — June 2012

SHORT SALES
http://www.aaronline.com/law-ethics/legal-hotline/short-sales.aspx

Regulators View Flipping Short Sales as Mortgage Fraud

FACTS AS PRESENTED BY THE CALLER:

The buyer purchased a residential property through a short sale. Prior to close of escrow, the buyer secured a third-party to whom the buyer would sell the home after obtaining title. As contemplated, immediately following close of escrow on the short sale, the buyer resold the property to a third-party for a small profit.

ISSUE:

Is the buyer's conduct legal?

ANSWER:

See discussion.

DISCUSSION:

The Arizona Department of Real Estate and the Federal Bureau of Investigation view flipping of short sales as mortgage fraud. State and federal agencies are therefore aggressive in pursuing short sale flips. If, before completion of the short sale, the buyer had an undisclosed arrangement in place with a third-party to purchase the home, the short sale buyer could face significant regulatory and/or criminal exposure.

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SHORT SALES
http://www.aaronline.com/law-ethics/legal-hotline/short-sales.aspx

Second Position Mortgage Used to Improve Real Property Does Not Receive Anti-Deficiency Protection Following Trustee's Sale

FACTS AS PRESENTED BY THE CALLER:

The agent represents a seller on a short sale. The seller has a second mortgage on their property that was taken out after purchase to install a pool.

ISSUE:

Is a second position mortgage afforded protection under Arizona's anti-deficiency statutes following a trustee's sale conducted by the first position lender based on the fact that the loan was used to improve the property?

ANSWER:

No.

DISCUSSION:

Pursuant to A.R.S. 33-729, a second position lender is precluded from maintaining an action for a deficiency following a trustee's sale instituted by the first position lender, where the following apply: (1) the loan was obtained to initially purchase the property (considered a "purchase money loan"); (2) the property is less than 2.5 acres; and (3) the property was utilized as a single family residence or duplex. Because the second position loan was obtained following the purchase of the property, it does not receive deficiency protection even though it was used to install a pool.

Arizona REALTOR® Magazine — April 2012

SHORT SALES
http://www.aaronline.com/law-ethics/legal-hotline/short-sales.aspx

Seller Should Not Transfer Title to a Trust Prior to a Short Sale

FACTS AS PRESENTED BY THE CALLER:

The agent would like to enter into a contract with a company who will negotiate her short sale contracts. The company says they have contacted the Arizona Department of Real Estate, and they are in full compliance with Arizona laws. The company does not charge the seller anything for negotiations, although they do offer a deed audit for a $500 fee. As part of the negotiation, the company places the house in a trust, which remains in control of the seller.

ISSUE:

Does placing a house into a trust as part of a short sale transaction violate any real estate or banking laws?

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ANSWER: See discussion.

DISCUSSION:

As set forth in the Arizona Department of Real Estate Short Sale Seller Advisory, short sale transactions are susceptible to a number of predatory scams. A "red flag" associated with many schemes to defraud involve a scenario in which title to the property is transferred from the borrower's name immediately prior to initiation of the short sale negotiations. Simply put, there is no reason why title should be conveyed from the borrower to any other individual or entity, including a revocable family trust.

In evaluating the propriety of a title transfer in conjunction with a short sale, the borrower should understand why such a transfer is allegedly beneficial. Some third-party negotiators claim that a transfer of title to a revocable family trust is necessary to "protect…the property from any future liens being attached to title." Assuming title is conveyed to avoid any future liens that may legitimately attach to the property, the conveyance of title for this purpose likely constitutes a fraudulent conveyance.

Other third-party negotiators claim that conveyance of title to a revocable family trust is needed to attract potential purchasers and enable specific forms of financing. Claims of this nature rarely prove true, and in fact, if the home was not originally purchased by the trust that is now the seller, this arrangement will often slow the short sale approval process.

In most instances, the use of a revocable family trust is of no benefit to the borrower. Rather, it is designed to maximize the profits of the third-party short sale negotiator who intends to flip the property in a manner often referred to as the "Dovetail Method." Many "investors" use trusts to overcome title seasoning requirements they encounter in the flipping of short sale properties, a scenario in which Party A sells the property to Party B, which then sells the property to Party C. Because such deals virtually never disclose the dual contract to the lender, AKA the flip, they constitute lender fraud. Ultimately, third-party short sale negotiators that instruct a seller to convey their home into a revocable family trust are almost certainly doing so as part of a scheme to flip the property and keep the profit for themselves.

Furthermore, virtually all deeds of trust contain a due-on-sale clause. By conveying title without the lender's approval, the borrower runs the risk that the lender may accelerate the promissory note, declaring the entire balance of the loan immediately payable.

Ultimately, there appears to be no legitimate reason why a property should be conveyed from the borrower to a revocable family trust in advance of a short sale. Rather, such a conveyance is likely being used to facilitate a short sale flip. However, even if the conveyance is for a legitimate purpose, it is critical to have the borrower obtain independent legal counsel to prepare the trust and ensure that the borrower's ownership rights are protected. The third-party short sale negotiator should never be charged with creating such a trust as doing so creates an opportunity for the third-party negotiator to: (1) swindle the borrower out of title; and (2) assume control of the trust.

Note: Before entering into any agreement with a short sale negotiator the broker should confirm that the negotiator is complying with all Department of Real Estate and Department and Department of Financial Institutions laws and regulations.

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SHORT SALES

http://www.aaronline.com/law-ethics/legal-hotline/short-sales.aspx

Approval Letter from Lender Does Not Constitute "Agreement Notice" Contemplated in Short Sale Addendum

FACTS AS PRESENTED BY THE CALLER:

The listing agent receives short sale approval letters from the seller's creditors. Upon receipt, the listing agent emails the approval letters to the buyer's agent via an email stating: "Attached are the Lien Approval Letters. Please let me know if the buyers are going forward." Neither approval letter was signed by the seller.

ISSUE:

Does the email from the listing agent to the buyer's agent constitute an Agreement Notice, as required by lines 22-23 of the Short Sale Addendum to the Residential Resale Real Estate Purchase Contract?

ANSWER: No.

DISCUSSION:

Lines 22-23 of the AAR Short Sale Addendum state: "If Seller and Seller's creditors enter into a short sale agreement, the seller shall immediately deliver notice to Buyer ('Agreement Notice')." In this instance, the buyer was only informed that the seller's creditors had issued short sale approval. The buyer was not informed that the short sale terms offered by the creditors met with the seller's approval or that the seller intended to proceed under those terms. In other words, although short sale approval had been issued, there is nothing to indicate that the terms of that approval met with the seller's satisfaction. Conveyance of the approval letters, absent

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an express representation that the terms are acceptable to the seller, does not constitute the issuance of an Agreement Notice. Until such time as the seller chooses to issue an Agreement Notice, the seller is not required to proceed with the transaction.

Note: The new AAR Short Sale Agreement Notice should be used in this circumstance to ensure that all parties have a complete understanding of their respective positions.

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ABOUT THE AUTHOR

Richard V. Mack *is a shareholder at Mack, Drucker & Watson, which provides the AAR Legal Hotline service. He is a State Bar of Arizona Board Certified Real Estate Specialist and AV rated by Martindale Hubbell. He has also been designated as a Southwest Super Lawyer. Mr. Mack practices commercial litigation with an emphasis on real estate litigation. He is admitted to practice in the state and federal courts of Arizona and before the 9th Circuit Court of Appeals. Mr. Mack graduated Magna Cum Laude from Southwestern College in Winfield, Kansas with a Bachelor of Business Administration, with an emphasis in economics, and received his Juris Doctor from the University of Arizona.*

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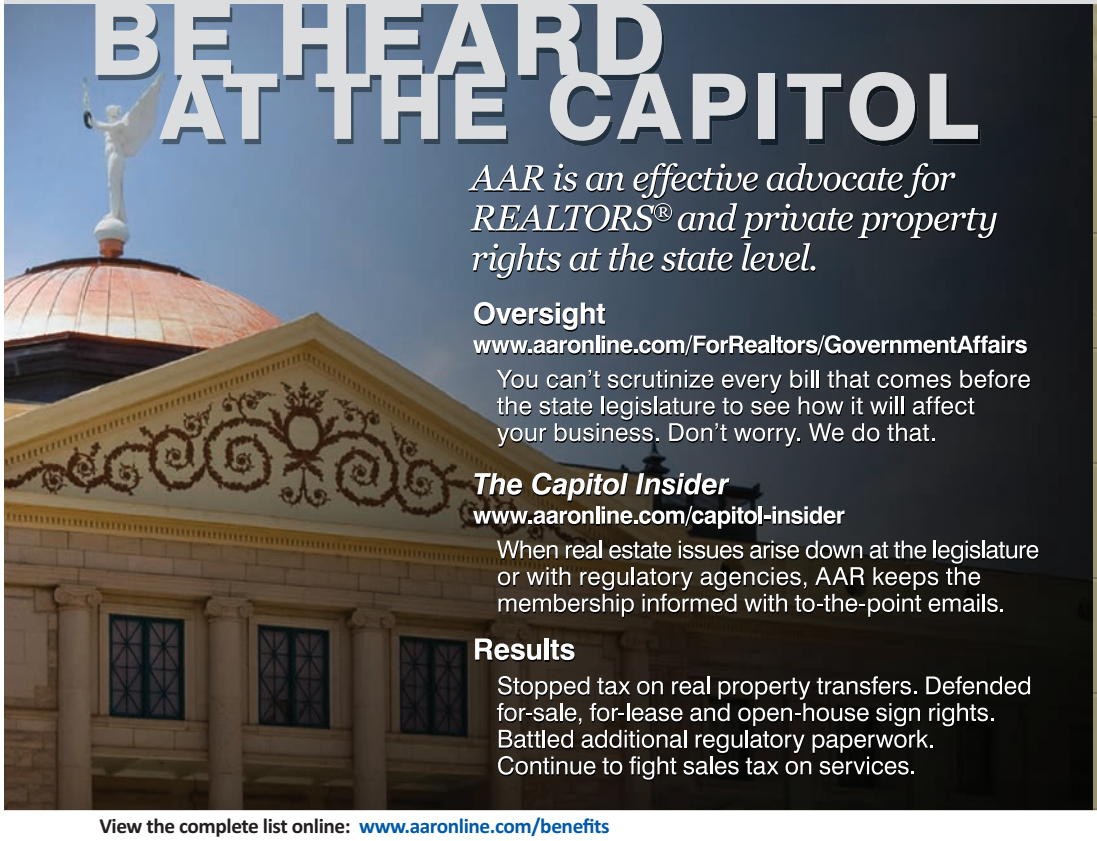

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