September 2013

Monroe McDonough Goldschmidt & Molla
Attorneys at Law

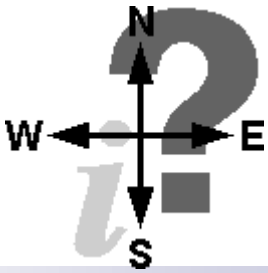
SOUTHERN ARIZONA'S REAL ESTATE LAW FIRM

MONROE McDONOUGH GOLDSCHMIDT & MOLLA

Welcome to the MMGM Newsletter

SEPTEMBER 28—ASK A STUPID QUESTION DAY

The root of this special day goes back to the 1980's. At the time, there was a movement by teachers to try to get kids to ask more questions in the classroom. Kids sometimes hold back, fearing their question is stupid, and asking it will result in ridicule. Teachers created this day on September 28.



Quiet Title and the Mortgage Electronic Registration Systems, By Karl MacOmber, Esq.

In Stauffer v. U.S. Bank, Division One of the Arizona Court of Appeals granted relief to the Stauffers who had sued to quiet title to their property. U.S. Bank had noticed a trustee's sale and the Stauffers filed suit complaining that the Notice of Sale and Substitution of Trustee were "false documents" under ARS §33-420 because there were irregularities in the transfer of the beneficial interests from MERS (Mortgage Electronic Registration Systems) and others to U.S. Bank. Neither the trial court nor the Court of Appeals really resolved whether or not the technical defects were false documents.
The trial court had dismissed the lawsuit on the grounds that the Notice of Sale and Substitution of Trustee, while not themselves liens against the real property, were documents asserting interest in the real property and, therefore, ARS §33-420 potentially applied. The Court of Appeals also reversed the ruling of the trial court that, because they still owed money on the note and deed of trust, the Stauffers, the trustors, were not the "owners" and the trial court decided they did not have standing to maintain such a lawsuit. The Court of Appeals ruled that the Stauffers, as trustors, still qualified as owners under ARS §33-420 and had standing to bring the lawsuit.

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Tucson Association of REALTORS®

National Association of REALTORS®

Tucson Women's Council of REALTORS®

Green Valley Association of REALTORS®

Southeast Arizona Association of REALTORS®

Santa Cruz County Board of REALTORS®

AfBAs Back in the News, *By Michael J. Monroe, Esq.*

First, what is an AfBA? It is short for Affiliated Business Arrangement. Such arrangements exist in the real estate business. For instance, a real estate company enters into a business arrangement with a title insurance company to offer purchasers of real estate title insurance or a loan originator to offer loans to purchasers. Another common AfBA exists with home warranty companies. In contrast it is important to understand that under the Real Estate Settlement Procedures Act (RESPA) a company (for instance a title company) cannot simply pay a referral fee to an agent or a real estate company for the mere act of referring a client. Such referral fees are absolutely prohibited.

So, why is an AfBA legal? Let's examine an example. Real Estate Company XYZ enters into a joint venture (affiliated company) with a title company whereby the real estate company will refer its customers/clients for their title insurance and the other joint venture, the title company will issue a title policy. The customer/client will be charged a fee for the service. When the affiliated company receives its income for a service rendered, a portion of the net profits go to the title insurance "partner" and a portion of the profits from the sale of the title insurance policy goes to the real estate company. It is not simply a case of the real estate company receiving a referral fee for referring its customer/client. Thus, when an agent with the real estate company refers business to the related title company (affiliate) the real estate company hopes to earn a profit on the real estate sale transaction and on the issuance of the title insurance policy. AfBAs are now regulated by the Consumer Financial Protection Bureau (CFPB).

So, is it legal for a real estate company to participate in an AfBA? To answer that question you start with the basic rule that under the federal law known as the Real Estate Settlement Procedures Act (RESPA) mere business referrals for a fee and fee splitting is prohibited. However, under section 8(a), (b) & (c) of RESPA affiliated business arrangements are permitted under certain circumstances. It is important for someone in the real estate business contemplating entering into an AfBA be aware of under what circumstances such arrangements are permitted.

The fundamental key to such arrangements is the element of disclosure. The customer/client must be notified of the existence of the AfBA arrangement at the time the referral is made to the affiliated company. The CFPB can penalize a company for failing to provide the appropriate written disclosure.

Additionally, at the time the referral is made, the agent or real estate company must provide the customer/client with a written estimate of either the fee or the range of fees which the affiliated company will charge. Also, the referring party must clearly inform the customer/client that they need not utilize the AfBA. The customer/client must be free to seek competitive quotes for similar services. Also, the referring party must inform their customer/client that the only thing of value that the referring party gains from the relationship is a return on the ownership interest in the AfBA.

The written disclosure is also required to be on a separate document which is not part of another form or document. The customer/client should sign an acknowledgement that he or she was informed of the fact of the AfBA.

AfBA can be lucrative for real estate companies since they provide new avenues for the real estate company's income stream. However, the owners of real estate companies participating in AfBAs must be extremely vigilant to insure they are constantly in compliance with CFPB rules and regulations pertaining to such arrangements.

Damages Against Homebuilder—New Change in Arizona Law

By Michael J. Monroe, Esq.

In Arizona, pursuant to what the courts call the 'economic loss doctrine', a person(s) acquiring a new home from a builder is generally precluded from bringing a claim of negligence against the homebuilder for any defective construction. The owner is limited to the agreed upon contractual remedies provided for in the contract between the builder and the homeowner. Such rights generally preclude important elements of damages such as the "stigmatization loss" occasioned by the defective construction. The theory behind this doctrine is to foster parties to negotiate for and to provide for the remedies that will be available to them if the contract is breached. Naturally, and historically, the contractor has superior bargaining rights. The contractors generally limit the remedies of the owner/purchaser of the new home. Therefore, in the event of defective construction, the homeowner is limited in the scope of damages or remedies that are provided for in the contract. Tort damages for such things as consequential damages are usually precluded as a remedy for the purchaser in the event of defective construction. The original owner also is limited by law (A.R.S. § 12-552) to bringing a claim within eight or nine years of purchase (depending on when the problem is discovered) or the claim lapses. There are situations where defects don't manifest themselves within that time period. In a tort claim, such as for negligence, the claim does not arise until the owner would reasonably discover the defect which may be past the eight or nine year time frame. But such claims are generally ruled out in the builder contracts.

However, on July 31, 2013 the Arizona Supreme Court, in the case of Sullivan v. Pulte Home Corp, CV-12-0419-PR, held that a subsequent home purchaser (not the original purchaser from the home builder) was not barred from bringing a tort claim for negligence against the homebuilder for a defect discovered even though more than nine years had elapsed since the house was sold to the original owner of the home. Under the Pulte contract the original purchaser would have been barred from bringing such a claim against Pulte. The second or subsequent owner, the court held, could have a claim for breach of an implied warranty (a type of contract action) but such a claim would lapse after eight or nine years (depending on when the defect was discovered) under A.R.S. § 12-552) but the subsequent homeowner had the right to bring a claim against the contractor for negligent construction for two years after the homeowner discovered the defect even if it was more than eight or nine years after the initial sale of the property. One difficulty is that if the subsequent homeowner sues the contractor in implied warranty or negligence and is successful, the homeowner is not entitled to recovery of attorney fees under the current law in effect. So, even if successful in suing the contractor for defective construction, the homeowner may recover the loss due to the defective construction but will not be entitled to an award of attorney fees. Thus the judgment, even for the full amount of the subsequent owner's loss, will not include the amount of the attorney fees required to be incurred in obtaining such a recovery against the builder.

In the Sullivan case, Pulte built and sold the home in question to the original purchaser in the year 2000. The original owner then sold the home to Sullivan in 2003. Thus, Sullivan did not enter into any contract with Pulte. It was not until 2009 that Sullivan began to notice some issues with a retaining wall. Pulte was notified but refused to remedy the defective condition. All of the claims were dismissed for various reasons except for the tort claim (negligence). The court, creating new Arizona law on the subject of the economic loss doctrine held that the economic loss doctrine did not apply to subsequent purchasers. Under the economic loss doctrine in Arizona a claim for money damages, including any decreased value of the property or repair costs for the property itself, is the subject of a contract between the plaintiff (owner) and the defendant (contractor) and consequential damages such as lost profits are not recoverable. The initial owner who contracts with the contractor is subject to the economic loss doctrine limitations and is limited to the remedies provided for in their contract. But subsequent purchasers are not limited by this doctrine.

The court declined to extend the economic loss doctrine to subsequent non-contracting parties, such as Sullivan, who, in this case, had not contracted with Pulte. The court stated that the court's position "protects" the expectations of the contracting parties but in the absence of a contract (such as in the case of Sullivan) it does not pose a barrier to tort claims that are otherwise permitted by substantive law. This does raise an interesting question of whether this issue should be a matter of disclosure, especially to subsequent purchasers, especially where a real estate agent is involved. Another possibility raised by Phoenix attorney Jim Eckley, in his analysis of this case, is for the original seller and subsequent sellers, to assign any and all rights, including their contract rights, against the contractor, to subsequent purchasers. He is recommending such a clause be inserted into the standard resale agreement. Good idea, Jim. This subject is a technical one. Defective construction can involve very complex litigation. If confronted with a defective construction case, be certain to speak with counsel and experts that understand the complexity of the law that applies in such situations.

Lien Foreclosure: What About Title Insurance?

By Michael Shupe, Esq.

Lien foreclosure, for many homeowners associations, is a measure of last resort to collect severely delinquent association assessments. It is the process by which a homeowners association can file a lawsuit to obtain a judgment against the homeowner and his or her Lot or Unit for the delinquent assessments and associated late fees and legal expenses, and then to have the homeowner's Lot or Unit sold by the Sheriff at auction to satisfy the judgment. As you might expect, this process does not come without expense and financial risk to the Association; therefore, several factors should be considered before the decision to pursue lien foreclosure is made, including alternative cost-effective collection methods.

A relatively new consideration in the lien foreclosure decision process has arisen due, in large part, to concerns about improper judicial foreclosures in the wake of the nationwide mortgage meltdown: Will the purchaser of a foreclosed property be able to obtain title insurance? In the vast majority of cases, the answer is "No."

Title Insurance is generally issued to buyers of property as protection against claims by third parties contesting the nature and extent of the buyer's legal interest in the property. In the case of most real property transactions, the title history of the property can be determined with reasonable ease, and involves a series of mutual conveyances. However, in the case of a judicial foreclosure, title to the property is transferred by court order, and generally extinguishes subordinate interests in the property. In addition, most foreclosures of homeowners association liens are for debts less than $10,000.00 inclusive of all costs, for properties that may be valued 10 to 20 times as much.

Therefore, there is a much higher likelihood that someone, typically the former owner of the property or his heirs, may contest the sale. This increased risk has led most title insurance providers and underwriters to shy away from issuing policies to buyers after judicial foreclosures. In fact, some insurers will not issue a title insurance policy on a new sale of a judicially foreclosed property until five years or more after the judicial sale took place.

When title insurance is not available, the buyer takes on a substantial risk having to defend title personally against any adverse claimant without the financial protections that come along with title insurance. This risk can be transferred to the seller through a Warranty Deed, wherein the seller generally agrees to defend the buyer against adverse claims to the property. It is not unusual for the homeowners association that foreclosed its lien to acquire the property at the Sheriff's sale because there were no other interested bidders. Without the possibility of title insurance, a homeowners association could have difficulty in finding a willing buyer of the property, and may have to consider leasing the property to a tenant until such time as the property can be sold.

MEET THE STAFF

By Sally Myers, Office Administrator

WENDY CARPENTER, PLS
Legal Assistant to Karl E. MacOmber, Esq. and Anne B. Morales, Esq.

Wendy Carpenter has been a legal secretary/legal assistant for attorneys at Monroe McDonough Goldschmidt & Molla since 1999. She has worked in the legal field since 1987 in Albuquerque, New Mexico and Tucson, with experience in many areas of the law, including real estate, business, insurance defense, medical malpractice, personal injury, tax law, estate and probate law, domestic relations, foreclosure, and creditors' remedies.

She is sought out by firm members, including new attorneys, for her vast knowledge across multiple areas of law as well as civil rules, procedure, general court filing issues, and electronic filing in Bankruptcy, Federal and Superior Courts.

Wendy is a member of NALS of Tucson and Southern Arizona and has held the positions of Secretary, President-Elect, President, and is the current Vice President and Membership Chair. Wendy also is a card-carrying (non-voting) Member of the Pima County Bar Association and is the Liaison between the PCBA and NALS of Tucson & Southern Arizona.

MARK YOUR CALENDAR—Tucson September Events

13-21—Arizona Underground Film Festival

13-14—Bisbee Blues Festival

13-30— Dia De Los Muertos Exhibit at Tohono Chul

19-22—Tucson Flamenco Festival

20-21—Glow Festival

21—Oro Valley Car Show

20-22—Santa Cruz County Fair

22 & 29—Music Under the Stars

21—Bead Challenge

21—El Tour Adventure Run/Walk

21-22—Oktoberfest on Mt. Lemmon

26-29—USA Diving Championships

26—Flavors of Tucson

27-28—Desert Museum Plant Sale

27-30—Nightfall at Old Tucson

27-30—Architecture Week

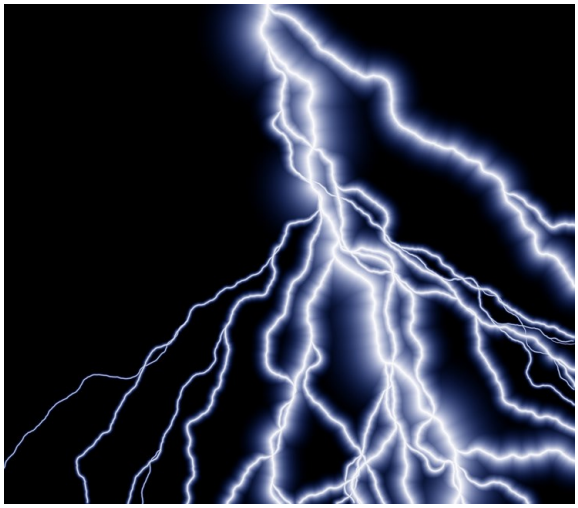
27-28—SalsaFest

28—Great Tucson Beer Festival

28—American Indian Arts Show

28-29—Harvesting of the Vine Festival

ARIZONA FASCINATING FACTS



Palo Verde Nuclear Generating station, located about 55 miles west of Phoenix, generates more electricity than any other U.S. Power Plant.

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EXPERIENCE THE DIFFERENCE

Monroe McDonough Goldschmidt & Molla (MMGM) is a real estate and business law firm. Our attorneys and staff believe that each client must experience the difference that genuine care and concern can make. We strive to achieve the client's objectives while delivering unwavering personal service in an honest, aggressive and comprehensive manner. We refer to this as our Clients for Life program. MMGM provides outstanding counsel and unparalleled representation in the following areas of law:

Real Estate - Personal Injury
Appeals - Arbitration and Mediation Services
Business and Entity Formation
Civil and Commercial Litigation - Construction Defect
Contracts - Estate Planning—Probate
Homeowner Association (HOA)
Motor Vehicle Warranty Defense
Product Liability - Transactional
Labor and Employment

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