

RISK MANAGEMENT COMMITTEE MEETING: NOVEMBER 7, 2014

STATE ISSUES SURVEY RESULTS

ARIZONA

A few months ago Scott Drucker sent a broker claims survey to 20 of the largest brokers throughout the state. The survey requested that the brokers identify and advise us of their five most frequent claims. Additionally, he requested the same information from Richard V. Mack, Esq. (Hotline Attorney for AAR) and Lisa Robinson, (E&O Insurance Broker). The information is as follows:

- Based on the brokers' response, Scott reached the following conclusions:
 - The most common claim involves roofs, namely roof leaks that were discovered following close of escrow.
 - The second most common claim pertains to landlord/tenant disputes that entangle the property manager. The majority of those appear to involve security deposits and instances in which the landlord does not believe that the property manager adequately protected their interests.
 - Third are claims involving septic/sewer issues. In this case, the claims largely pertain to: (1) the seller failing to properly identify whether the property is serviced by sewer or septic; or (2) septic tank defects discovered after close of escrow.
- Following the above three most popular claims were a handful of additional claims that came up more than once. Those pertain to:
 - Undisclosed HOA fees and transfer requirements following REO sales and investor flips;
 - Boundary disputes;
 - Mold;
 - Zoning; and
 - Warranted items, primarily HVAC related.
- Rick identified soils/settlement claims, roof leaks and mold. He also mentioned "Dodd-Frank type" issues.
- Lisa Robinson was able to provide Scott with national claim statistics published by a prominent carrier. Unsurprisingly, property conditions were number one, broken down as follows:
 - Mold/Water Intrusion

- Structural Defects
- Sewer/Septic
- Insects/Vermin
- Plumbing
- Roof
- Environmental Issues (radon, asbestos, lead)
- HVAC
- Electrical
- Flooring/Walls
- The national statistics also show that after property condition claims are claims pertaining to agency, RESPA, and fair housing. Interestingly, these topics do not appear to be common in Arizona.
- Also specifically from our Hotline attorney:
 - “The “new” trend is Dodd Frank compliance on seller carry backs. Arizona has the 3rd or 4th most seller carrybacks in the country. Additionally, unlike many states, Article 26 gives agents the ability to handle a transaction from start to finish without attorney involvement. In light of those two concepts colliding, (large volume and agents who do it all) my take is that we are going to see significantly more Dodd Frank type issues than other states.”
- And from our newly installed AAR 2015 President, Jim Sexton:
 - “From my perspective and feedback that I got from the IPC, I think NAR Risk Management needs to be carefully following the CFPB and the penalties they are assessing for MSA's, especially agent MSA's. Some direction regarding legal joint marketing efforts is critical as more and more agents and vendors are entering them without really knowing what works and what doesn't. Some sort of "white paper" or best practices is needed ASAP. Finding out what improper by following their \$50,000-multi-million dollar fines is scary and needs to be communicated better.”
- I think the CFPB enforcement actions are another possible topic for Risk Management Committee. It seems that there have been more fines lately and I think all states need to be aware of what they are looking for and what they are fining.
- Also there are more agents looking to do their own MSA's with affiliated companies. Providing agents with the necessary language, disclosure requirements and audit procedures is probably a timely topic.
- Issue of listing broker requirements to report real estate commission payments to

cooperating brokers on form 1099-MISC and to obtain a completed and signed W9 form from each cooperating broker on their transactions.

ARKANSAS

- With the recent tragedy that happened in the Central Arkansas area with the abduction and murder of REALTOR® Beverly Carter, the safety of our agents is the most crucial challenge that we face. The National Association has some great pieces on REALTOR® safety that every company should share with their agents on a regular basis. We are committed to making sure that Beverly Carter's death will forever change the way we do business with our clients.
- Arkansas will be facing a challenge to our Landlord / Tennant laws. A group tried to introduce legislation in 2013, but the REALTORS® were able to get it stopped before it gained much momentum. This same group is partnering up with others to mount a large campaign to change things that will make it harder for Landlords' to get tenants out of their property for not paying rent. The REALTORS® feel that we have a good balance between Landlords needs and tenant rights and we will be fighting to keep it that way.

COLORADO

- One concern is the impact the new rules by CFPB - Consumer Financial Protection Bureau beginning August of 2015 whereby the title companies will be required to have figures to buyer at least 3 days in advance of closing or the buyer's lender will not let them close. This will impact real estate brokers and their clients/customers if they are not educated on carefully and responsibly selecting reasonable dates and deadlines in the contract to allow time for the lenders (under writers) and title service providers to meet the new rule requirements and avoid delays.

FLORIDA

Re: Discussion of Seller Refusing Access to a Buyer Broker:

- I can see where this can become one hot mess. We have not had such an issue to my knowledge in Florida but I have heard of people who have been victims of domestic violence or stalkers wanting to limit access from specific persons for safety reasons.
- I think for those states that have legalized medicinal marijuana, and potentially Florida at this point, we should look at the issues revolving around it. Without a doubt it will impact the Property Management Companies who will surely have to add at least disclosures to their leases and may have to amend their drug policies. This is an area that may need to be discussed now that we have potential tenants and owners of properties that may use the product. It may be less honourous and issue if it is not smoked in the homes but it may still cause re-sale problems. Would love to hear what is happening across the country and how it's being handled where marijuana use is allowed.

KANSAS

- Patent trolls

LOUISIANA

- In Louisiana consideration is being given to amending our Agency law to better clarify or define the roles of agents with enhanced minimum standards when representing others in a transaction. It would be interesting to know if any other states have tightened up requirements recently. All fees and/or commissions must be paid by and through the qualifying Broker. It was recently brought up that payment to teams often goes to the “lead agent” who then pays others for work done on the transaction. The question has been asked of the Commission to clarify if that practice complies with the law. Has anyone else addressed this as an issue?

NEBRASKA

- High pressure pipelines

NEVADA

- Probably one of the biggest issues we have had lately is the Nevada Supreme Court ruling on HOA foreclosures wiping out the 1st Deeds of Trust.
- Another issue is marketing agreements between ancillary companies and brokerages. Dept. of insurance is telling the Title/Escrow companies that they cannot pay for an agent's marketing even though they have advertising on the page. No more sponsored lunches or sponsored office meetings.

NEW MEXICO

- In New Mexico there are three primary issues with which we are dealing.
 - First, our state Appraisal Act states that the requirement of registration (as an appraiser) does not apply to brokers who perform Broker Price Opinions (BPOs). It also allows brokers to be compensated for BPOs. The compensation provision of the statute is new; this amendment was passed a couple of years ago. Prior to that, brokers could perform BPOs, but could not charge for them. With the increasing number of requests from financial institutions and AMCs to provide BPOs, the brokers fought hard to have the law amended. The appraisers were not supportive. Now, the Appraisal Board is attempting to pass regulations that further limit the use of BPOs and dictate what must be included in a BPO.
 - The second issue involves the licensing of home inspectors. Currently, New Mexico does not have any such licensing requirements. RANM will be

introducing such legislation during the next session.

- Lastly, RANM will be returning to the legislature (with the Greater Albuquerque Association of REALTORS®) to address issues with the recently enacted Homeowners Association (HOA) Act. The biggest complaint received from sellers (through the listing brokers) is the cost of the HOA Disclosure Certificate that the seller is required to obtain from the HOA and provide to the buyer. Currently the Act allows HOAs to charge a "reasonable fee" for the Disclosure, but that term is not defined by law and some HOAs and HOA management companies are charging exorbitant fees for this Certificate.
- A few other issues that keep arising involve the seller disclosure form, MLO licensing and non-compliant sellers (specifically, banks).
 - First, we get feedback from a considerable number of brokers that RANM's Seller Disclosure Form which is quite lengthy and detailed causes a significant amount of angst for sellers and is often the source of conflict and on occasion, litigation between buyers and sellers.
 - Secondly, New Mexico's Mortgage Loan Originator licensing statute carves out an exception for "a person that only performs real estate brokerage activities and is licensed or registered in accordance with New Mexico law, unless the person is compensated by a lender, a mortgage loan company or other mortgage loan originator or by any agent of such lender, mortgage loan company or other mortgage loan originator." We have brokers who are now doing nothing, but negotiating with lenders in short sales. They are hired by listing brokers. There is concern that since these brokers are not providing any real estate-related services, that they are not exempt from the MLO licensing law.
 - Lastly, brokers continue to deal with banks that refuse to comply with state and federal laws (LBP, HOA and Public Improvement District disclosure laws and septic regulation requirements). The brokers keep taking these listings knowing the banks/sellers will not comply with the laws, and this opens the brokers up to considerable liability.

NEW YORK

- Recently, at our state legal update, we were advised that a Seller cannot refuse access to a Buyer Broker.

There has been some case law on this and the inference was that the "public" has a right to view a listing. However, it is commonly also the right of a Seller to refuse access and to refuse to sell to a member of the public. They do not have to sell to a "nasty" neighbor.

An owner in my locale, that is a REALTOR® and attorney intends to sell her house. She specifically wants to ban a particular REALTOR® from going into her house. Her view

is that a client (Seller or Buyer) belongs to the company and not to the individual REALTOR®. The company is the "Agent" and they can assign a different REALTOR® to show the property. Of course, that approach wouldn't resolve the problem for a single practitioner.

I think this is a grey area for many real estate practitioners, not well publicized and it may be a new area of concern that has grown with the expansion of buyer brokerage in recent years.

May a Seller preclude an entire real estate company from not showing their property? What are the obligations to advise and show on the part of REALTORS®? Where is the liability? Should or must the REALTOR® refuse the listing if a Seller is adamant about refusing access? Could the refusal be a mask for discrimination? If the Seller thinks the REALTOR® is untrustworthy, must the Seller be forced to allow entry? What are the rights of a Seller?

I do not know at this time if the case law is limited to New York State or has been emerging in other parts of the country. If other members of this committee are also hearing of this as a growing area of concern, then perhaps this might be an issue to discuss at our meeting.

OHIO

- In Ohio there are still some concerns with the by-products of drilling for gas and oil. See link for recent article <http://www.dispatch.com/content/stories/local/2014/07/13/fracking-water-reuse-questioned.html>
- Finally the state gov't is finishing their new legislation on septic systems.
- Not sure if environmental or not, but Heroin is a big problem in our communities and some are taking up residence in vacant properties or stealing aluminum or copper from vacant homes for quick money.
- Radon seems to be a sleeper. Buyers are having tests, doing research and some are not mitigating the gas. Thinking it really isn't an issue.
- Also in Ohio, we are experiencing (and partially due to a recent court decision) issues with non-disclosure of past negative home inspection reports to subsequent agents and buyers.

SOUTH CAROLINA

- Mold is an issue in S. C.
- We have been getting calls on our legal hotline in regards to the liability limitation clauses in our forms. We would be interested to know how other states address this issue.
- Another big topic we have been dealing with are the battle between the need for pre-crime alerts of potential criminals and the risk of defamation lawsuits.
- The last big issue we have dealt with frequently is the issue of cameras/microphones in listings and the invasion of privacy rights associated with those products.

- Cities trucking human waste sludge to rural areas and spraying overland...biosolids is an issue.
- Smell, bacteria, human waste contains medicines that get into soil, animals, groundwater....
- Neighbors of fields sprayed with human waste sewage complain.
- Trucks carrying the human waste wreck and spill waste on highways.
- <http://charmeck.org/city/charlotte/utilities/environment/pages/biosolids.aspx>
- Downside to biosolids:
<http://www.beyondpesticides.org/infoservices/pesticidesandyou/documents/Biosolids.pdf>
- For REALTORS®, the issue is that rural REALTORS® and homeowners have to list and sell property that may be impacted by nearby application of urban human wastes to fields (smell, psychological, medicines, chemicals, hormones). Often rural areas rely on well water and these contaminants can leach into ground water and wells.

TEXAS

- Along with others ...coming soon and pocket listings, use of drones for photography, and continuing low appraisal issues in some areas
- In Texas...the Supreme Court will hear a Texas case regarding disparate impact claims under Fair Housing, which challenge the theory that certain housing or lending practices can illegally harm minority groups, even when there is no proof of intent to discriminate. Disparate impact allows the government or private plaintiffs to use statistics to show that seemingly race neutral policies disproportionately harm racial minorities.

TENNESSEE

Risk management is an important topic in Tennessee continuing education, both legislatively and statutorily. The Tennessee Association of Realtors (TAR) has maintained the highest standards in this arena and integrated Realtor concerns on several of these issues.

In 2014, TAR continues to search out needs and establish new benchmarks to help fulfill risk management principles to meet the needs of its members

So far, this year, TAR has maintained professional risk management beliefs through situations that include:

- Partnered with a prominent Nashville law firm, Bradley Arant Boult Cummings LLP, and hosted a commercial real estate seminar with six attorneys to inform and discuss with Realtor members about state and federal laws and regulations dealing with landlord & tenant contracts, broker agreements, real estate disputes, arbitration and receivership issues.
- Assisted in establishing a Real Estate Commission certified continuing education course to assist Realtors to work with issues surrounding divorce, elder clients and their attorneys with legal real estate issues, Through a partnership with Vanderbilt Law

School, an available twelve-hour certified continuing education session is now available, across the state, to help Realtors master their Real Estate Collaborative Specialist-Divorces (RCS-D) and Real Property Information (RPI) designations.

- TAR is a lead driving force in helping establish and clarify proposed rules with the Tennessee Real Estate Commission in clarifying language formed by Commissioners to clarify issues dealing with regulations dealing with earnest money, advertising, and teams. This is a fluid issues and up for public comment in November but TAR representation will be made available for discussion.

WASHINGTON

- Washington voters legalized marijuana last year. Now the problem is siting the grow operations, processing facilities, and retail outlets. The NIMBY gang is diligent in its protestations. My county has the only elected Director of Community Development in the country. She is likely to lose her re-election bid because she is seen as working with the marijuana entrepreneurs.
- Water issues remain huge. While Western Washington is sort of known for its rainfall, the Department of Ecology has issued extremely restrictive rules which are making particularly large tracts unusable. The court has found in favor of a tribe in Skagit County and there is a moratorium on wells now.

WEST VIRGINIA

- West Virginia has lots of litigation concerns that impact the way we do business and a very pro-plaintiff judicial system