Representing Distressed Property Owners – What I Have Learned Along The Way
By Laura Bramnick, Esquire

There are different rules for owners of the Note than there are for servicers when it comes to collecting on delinquent mortgage accounts.

The Fair Debt Collection Practices Act is a federal law that was passed to curb abusive and deceptive debt collection practices by third party collectors. Third party collectors are those that collect the debt owed to someone else. As a result, this law applies to servicers but not the actual noteholders. The result has been that lenders that have not sold the Note or have not assigned the servicing of the Note are not restricted in several ways. Debt collectors must call after 8am and before 9pm, must not communicate with the debtor if the debtor is represented by an attorney, must not call debtor at work under certain circumstances. None of these rules apply to the owner of the Note. This is why sometimes lenders seem relentless in pursuit of payment of their debt.

The 90 Day Statute of limitations does not apply to the 2nd lienholder if the 1st lienholder is the one that foreclosed.

ARS 33-814 (A) states that an action to recover a deficiency must be filed within 90 days of the trustee sale. If the action is not filed within that time period the proceeds of the sale will be deemed full satisfaction of the debt. This applies to the lienholder that held the sale. It has been my experience that the lienholder in 1st position almost always is the one to foreclose. Therefore, the 90 day statute of limitations only applies to them. It does not apply to a lienholder in 2nd position. They have a six year statute of limitations. This was upheld in Wells Fargo Credit Corp. v. Tolliver, 183 Ariz. 343, 903 P.2d 1101 (App. 1995). The court stated that the 90 limitation does not apply to a junior lienholder that sues on their Note after the trustee sale. A lawsuit would be prohibited if the Note held by the junior lienholder was purchase money.

How do you prove that a loan is purchase money if a lender attempts to collection after the trustee sale?

It is not unusual for the junior lienholder to charge off and sell the Note to a collection company after the senior lienholder has foreclosed. If the Note is purchase money, even though in second position, neither the lender, nor anyone the Note is sold to, can attempt to collect. However, they attempt to collect anyway. What do you do? Send them a copy of the original HUD 1 showing both loans were closed on the same day. Also send a copy of the Note showing

that it is dated on the close of escrow. This should solve the problem. If not, the collection company is in violation of the Fair Debt Collection Practices Act because they are collecting on a debt that is not owed. There are penalties for this.

The Arizona Anti Deficiency Statute applies to investment properties and second homes as well as primary residences.
I am surprised when I consult with clients or speak to real estate agents and brokers how many believe that our statute only applies to a primary residence. The statute applies to all property that is 2.5 acres or less, single or two family dwelling that someone has lived in. It does not state that the protection only applies to a primary residence. Therefore, investment properties and second homes are afforded the same protections under Arizona law. There is currently different income tax treatment on forgiven debt for a primary residence but that is a federal, not a state law.

Insolvency is not bankruptcy as far as the IRS is concerned.
The direct result of negotiating a short sale and getting the lender to agree to forgive any deficiency balance, or having a lender foreclose on a property that is protected by the anti deficiency statute, is a 1099. The IRS requires that lender to send a 1099 to the borrower if debt is forgiven. The 1099 can be a large amount because properties have lost so much value. Once a borrower knows the debt is forgiven they need to see what, if any tax exemptions apply. If the property was a primary residence and the mortgage loans were used to buy, build or improve the property, there is no need to worry. If however, this is not the case, many borrowers resort to the insolvency exemption. This, unlike the exemption for the primary residence, does not expire on December 31, 2012. Basically the IRS defines insolvency as liabilities exceeding assets. Unlike bankruptcy, assets include IRA, 401K and other pensions. The IRS has an insolvency worksheet on their website. It is in the online pamphlet that explains Cancellation of Debt. Once the worksheet is filled out, the borrower can determine the amount that liabilities exceed assets. The tax exemption only protects the borrower from taxes to the extent of the insolvency. In other words, if a borrower receives a 1099 for $150,000 but is only insolvent by $100,000, he will have to pay taxes on $50,000. It is strongly recommended that the borrower seek advice from a tax attorney or CPA in this situation.

All credit, good and bad, stays on your credit report for seven years, except bankruptcy which stays on for ten years.
Clients are very concerned about their credit. Missing mortgage payments, short sale, and foreclosure all have a negative impact on credit. Most think that their credit will be ruined for seven years if they experience foreclosure. The foreclosure will appear on their credit report for seven years, as will any payments they missed for other debts. What will also appear on their

credit report will be all payments made on time for all other debts. As a result, their credit score will increase slowly once the foreclosure has occurred, assuming all other debts are paid on time in the future. They should be able to obtain a credit card or purchase a car in less than seven years. They will also be eligible for an FHA mortgage after three years. The negative entries will drop off after seven years, but this does not mean that they cannot obtain credit for that length of time.

Details and Fine Print Can Make or Break a Contract

The term "the devil is in the details" rings true when it comes to real estate contracts. It is so important to read and understand the entire document. Since the document can be hard for a consumer to understand, it may be necessary to seek help from an attorney. One word or phrase can change the meaning to your benefit or detriment. Oral revisions or explanations, with a few exceptions, are not part of the contract. Each contract is unique. Templates and forms are a good starting point but should not be relied upon. One check box that is left unchecked can end up costing one party a lot of money. Taking the time to understand all of the terms before you sign on the dotted line can prevent problems later.