Federal and State Laws and Regulations Affecting Oregon Residential Real Estate

Introduction. The purpose of this chapter is to identify and explain those federal and state laws affecting residential real estate that Oregon lawyers will most likely come across in their practice. With the seemingly endless laws and regulations that have proliferated since the credit and housing crises, the task of staying current is becoming increasingly difficult. The practice of residential real estate law is no longer a state-centric endeavor, and there are important federal laws, regulations, and agencies, that practitioners should become familiar with.

1. Environmental

Lead-Based Paint. If inhaled or swallowed, lead can be very toxic, especially to small children. If ingested, it accumulates in the body's bones and other tissues and is known to impair the physical and mental development of children and aggravate blood pressure problems in adults. In older homes lead is principally found in the paint and plumbing.

In 1992, Congress enacted the Residential Lead-Based Paint Hazard Reduction Act,* directing the Environmental Protection Agency (EPA) and the U.S. Department of Housing and Urban Development (HUD) to establish regulations requiring disclosure of lead-based paint and lead-based paint hazards in the sale or lease of residential housing constructed before 1978, which is referred to in the Act as "target housing." On March 6, 1996, the EPA and HUD issued the final rules known as "Title X Regulations." Compliance for owners of four or fewer residential properties began on December 6, 1996. The Lead-Based Paint law affects most private housing, public housing, Federally owned housing, and housing receiving Federal assistance.

Even though the regulations are directed toward owners of residential property, they also provide that any real estate agents involved in the transaction must ensure that the seller's disclosure obligations to the buyer are met.

Sellers, as well as real estate agents, can be held liable for federal penalties up to $10,000, as well as costs and attorney fees for noncompliance with the regulations. Intentional violations may also result in civil liability for three times the amount of the actual damages incurred by the buyer. However, real estate agents cannot be held liable for information intentionally withheld by their sellers.

Practice Tip: *Rarely do prospective buyers or tenants ask for a LBP inspection or assessment for target housing. However, the consequences of failing to deliver the necessary information and forms can be significant. First, the sale or lease agreement is not legally binding until compliance has occurred. Second, there can be sizeable fines for intentionally or negligently ignoring the law. Third, tort liability is potentially significant.*

**[Public Law 102-550 102nd Congress - 2nd Session [H.R. 5334] 102 P.L. 550; 106 Stat. 3672 1992 Enacted H.R. 5334; 102 Enacted H.R. 5334 DATE: OCT. 28, 1992 -- PUBLIC LAW 102-550.]*

2. **Internal Revenue Code**

Cancellation of Debt (IRC Section 108). Receiving significant attention for the past five years is Internal Revenue Code §108, dealing with the sale or other disposition of distressed housing, i.e. housing in which the owner-seller has "negative equity." In the vernacular they are "underwater," meaning that they owe more to their lender(s) than the home is worth. When the lender or its servicer forecloses the home, it is treated as a sale or disposition, and the shortfall that was never repaid is normally treated as "cancelled debt." Under IRC §108, subject to certain exceptions, such as bankruptcy or insolvency, the cancelled debt may be treated as ordinary income if it was "recourse debt."

Rather than trying to figure out whether the debt is or is not "recourse" following a foreclosure, the bank or servicer will routinely issue a 1099-C to the IRS and the taxpayer, creating the appearance, at least, that the taxpayer received ordinary income in an amount equal to the bank's shortfall due under the promissory note.

A 1099-A form may also be sent to the taxpayer, which helps establish a fair market value, sale price, and date of sale for the home. This is used to help determine whether there was any capital gain realized on the disposition. In most, but not all cases, there is no "gain" on a foreclosure, but as discussed below under IRC 122, there will likely be no capital gain consequences in any event.

The Mortgage Forgiveness Debt Relief Act is a 2007 law enacted to relieve taxpayers of the burden of having to pay taxes on cancelled debt. It has been extended through December 31, 2013, and as of the date of this writing, we do not know if it will be extended into 2014. The portion of the Act applicable to homeowners – known as "the Qualified Principal Residence exemption" – has limited application. First, it only applies to loans used to buy, build, or substantially improve the home. This means that it would not apply, for example, to a second trust deed on the home, obtained for the purpose of debt consolidation, student loans, or a new car. It would apply to refinancing of the original purchase money loan, but not to any funds that were paid directly to the taxpayer. Second, in order to take advantage of the exemption, the home must have been occupied as a primary residence for two of the last five years.

Practice Tip: *The cancellation of debt rules under IRC §108 apply to any disposition, e.g. a foreclosure, short sale, deed-in-lieu of foreclosure, and in some cases, loan modifications involving principal write-downs. Practitioners should always encourage their clients to seek expert accounting advice in advance of the 1099 event, since the rules can be complicated.*

Practice Tip: *IRS Publication 4681 contains a useful discussion of the cancellation of debt law, and the qualified principal residence exemption. See, http://www.irs.gov/pub/irs-pdf/p4681.pdf.*

Internal Revenue Code – The Gain Avoidance Rules Under IRC Section 121. 26 U.S.C. § 121(a) provides that "gross income shall not include gain from the sale or exchange of property if, during the 5-year period ending on the date of the sale or exchange, such property has been owned and used by the taxpayer as the taxpayer's principal residence for periods aggregating 2 years or more." The particular requirements are set forth below.

To qualify, the property sold must have been used as the taxpayer's principal residence for two years during the five-year period ending on the date of sale. Whether the property is used as a principal residence depends upon all the facts and circumstances. If a taxpayer alternates between properties, the property that the taxpayer uses a majority of the time during the year ordinarily will be considered the taxpayer's principal residence.

Ownership and use requirements may be satisfied by establishing ownership and use for 24 full months or for 730 days. The ownership and use periods need not be concurrent. To meet the use requirement, occupancy is required, but short temporary absences do count as periods of use.

A taxpayer may exclude up to $250,000 of gain from the sale. If married taxpayers file a joint return, then they may exclude up to $500,000 of gain from the sale, but only if (a) *either* spouse meets the 2-year ownership requirement, (b) *both* spouses meet the 2-year use requirements, and (c) *neither* spouse excluded gain from a prior sale of property within the last two years. If either spouse fails to meet the requirements, the maximum amount of the exclusion is determined as if the spouses had not been married.

Lastly, the exclusion does not apply if, during the 2-year period ending on the date of sale, the taxpayer excluded gain from the sale or exchange of another property under Section 121.

Practice Tip: *For many people, following the housing crash and Great Recession, the equity in their homes all but disappeared. The upshot has been that rarely has IRC §121 posed much of a problem, since the equity from a sale, if any, usually fell within the $250,000/$500,000 exemption, thus permitting the homeowner to avoid paying any capital gain taxes. As noted above, most 1099 events arising from a foreclosure or similar disposition do not generate taxable capital gains. However, one little known consequence of being forgiven of the income tax burden IRC §108 is that it results in a reduction of the taxpayer's basis – meaning that more of the "gain" could be subject to capital gains tax. This is why residential real estate practitioners should make sure their clients work closely with a tax expert.*

Foreign Investment in Real Property Tax Act of 1980 ("FIRPTA").* Upon closing of a real estate transaction in the U.S., a Federal law known as the Foreign Investment in Real Property Tax Act ("FIRPTA"), may require that escrow withhold a portion of the seller's proceeds if the property is located within the United States and seller is a "foreign person." A "foreign person" includes a non-resident alien individual, foreign corporation, foreign partnership, foreign trust and foreign estate (hereinafter "a foreign entity"). The amount deducted from the seller's proceeds is ten percent (10%) of the gross sale price and is required to be delivered over to the Internal Revenue Service.

The <u>buyer</u> may become responsible for payment if FIRPTA applies and escrow is not instructed to withhold the funds. This means that if a transaction closes and funds are distributed to the seller who was legally a "foreign person," the buyer may be held liable. There are some instances in which the real estate agents may become liable as well.

The major FIRPTA exclusions are: (a) the sale price is $300,000 or less; (b) the property is to be used by buyer as a residence; *and* (c) the buyer is an individual and not a foreign entity.

For practitioners drafting residential sale agreements for their clients, it is imperative that the seller's FIRPTA status be addressed. One approach is for the seller to affirmatively represent in writing that he/she is <u>not</u> a "foreign person" under FIRPTA. If the seller is unsure about their legal status, he/she should first confer with their tax counsel or a CPA before entering into the real estate transaction.

If FIRPTA is applicable, the next issue is who to designate to carry out the provisions of the law, including the withholding and delivery of funds to the IRS. This is the role of the "Qualified Intermediary." It used to be that the title/escrow company would routinely act in this capacity. Today, standard title industry practice is not to vet the issue unless asked by the parties. If asked, they will usually serve.

Practice Tip: *If no one asks, there is a good chance the FIRPTA withholding requirements will be ignored. And you can be sure that in the stack of documents buyers and sellers sign at closing, is a statement exonerating the title insurance company from vetting the FIRPTA issue. For this reason, practitioners representing buyers should be proactive in vetting the issue of whether the seller is a "foreign person" under FIRPTA.*

**[Codified in IRS §1445.]*

3. **<u>Federal Fair Housing Laws</u>.**

Fair Housing Act and Fair Housing Amendments Act. The laws against discrimination have been in existence ever since the Fair Housing Act (Title VIII of the Civil Rights Act of 1968)* was passed in 1968 and will not be discussed in this chapter. However, in 1989 the Act was amended by adding two new protected classes that, in Oregon, create much more litigation than the other classes already existing in the Fair Housing Act.

The Fair Housing Amendments Act ("FHAA") went into effect on March 12, 1989. That Act amended the Fair Housing Law, which prohibited discrimination based on race, color, religion, sex or national origin in the sale, rental, or financing of residential housing. The FHAA added the following two protected classes: (1) Persons with children (known as "familial status"), and (2) Persons with disabilities. Children include all persons under the age of 18 years.

Virtually all forms of “familial discrimination” became illegal under the FHAA, such as the refusal to rent to tenants because they had children; imposing different terms or conditions of rental depending upon whether they had children; discouraging persons from living in apartments or manufactured housing communities if they had children, etc.

The FHAA created certain “safe harbors;” the primary one was the 55+ age exemption. On May 3, 1999, the Housing for Older Persons Act (HOPA)** became effective. HOPA substantially relaxed the earlier highly restrictive – and unworkable – requirements initially established by the FHAA for housing providers to qualify for the 55+ exemption. Under the FHAA and HOPA, a housing provider may now, without fear of violating the law, legitimately refuse to rent or sell to persons with families, *if the provider properly qualifies under the 55+ exemption.*

Currently, in order to qualify for the 55+ exemption under the FFHA and HOPA, a community must:

- Be intended and operated for persons age 55 or over; and
- Have at least one person who is 55 years of age or older living in at least 80% of its occupied units.
- Publish and adhere to policies and procedures that demonstrate an intent to be operated as a 55+ community.
- Comply with HUD age verification of occupancy procedures to substantiate compliance with the requirement that 80% of the facility be intended to be occupied by at least one person age 55 or over.

Practice Tip*: It is important for practitioners representing 55+ apartments, condominiums, and manufactured housing communities, to make sure that all such age/occupancy requirements be properly reflected in their written rules and policies – and be consistently applied.*

The second major protected class that was added by the FFHA, disability, has equally proven to be a hotbed of litigation, due to the breadth of what constitutes a “disability.”[1] Thus,

[1] Under the FHAA, HUD defines a disability as follows: "Any person who has a physical or mental impairment that substantially limits one or more major life activities; has a record of such impairment; or is regarded as having such

landlords have frequently been asked to approve pets or additional occupants that would normally violate the facility's rules, but for the fact that the resident couches the request in the form of an "assistance animal" or "care provider." This is due to the FFHA requirement that landlords, homeowner associations and manufactured housing communities make "reasonable accommodations" when requested by a person with a disability. The type of satisfactory accommodation can be very subjective, but does not mean that the housing provider must incur substantial financial hardships to accommodate a request.[2]

Practice Tip: *Practitioners must be very careful when drafting rules and regulations in rental facilities, condominiums, and manufactured housing communities, etc. that could be deemed discriminatory – e.g. charging a pet fee for an assistance animal; refusing to make a simple accommodation (e.g. wheelchair ramp or closer parking space) for a disabled person. In most cases, it may be easier to meet the request than to contest the validity of the underlying claimed disability.*

[Codified at 42 U.S.C. 3601-3619]

** *[24 CFR Part 100]*

4. Interstate Land Sales Full Disclosure Act of 1968.*

This federal law requires sellers engaging in the sale of a large subdivision across state lines to register with the Department of Housing and Urban Development ("HUD") and provide potential buyers with a Property Report regarding the property. Sellers of more than 100 lots in the subdivision are subject to the Act. Since the jurisdiction of state regulators ended at their border, it was felt that HUD was in a better position to enforce full disclosure and pursue dishonest practices across state lines.

[Codified in 15 USC Chapter 42.]

5. Federal Regulatory Laws and Programs.

Since the collapse of the residential market in 2007-2008, and the concurrent collapse of the credit markets (i.e. lending banks, investment banks and related institutions such as AIG),

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an impairment." See, http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/disabilities/inhousing

[2] In 2004, HUD and the Department of Justice published a Joint Statement to provide technical guidance for dealing with reasonable accommodation request. http://www.hud.gov/offices/fheo/library/huddojstatement.pdf

the federal government has been busy enacting a variety of laws and administrative rules ostensibly designed to prevent a repeat of the crisis leading up to the Great Recession. Herewith are the most notable ones directly and indirectly affecting residential housing, housing providers and residential lenders.

The Dodd-Frank Wall Street Reform and Consumer Protection Act.* This 2010 law is an 848 page tome that purports to address all of the abuses leading up to the housing and credit crisis that continues to inflict pain in many parts of the country even today. Of the nearly 400 required rulemakings necessary to implement the Act, many deadlines have passed, and many rules have yet to be drafted.

The most significant outgrowth of the Act for the residential real estate practitioner is the creation of the Consumer Finance Protection Bureau or "CFPB" or "Bureau."[3] Although the Bureau deals with many consumer issues beyond residential housing (e.g. credit cards and student loans), supervision over most of the agencies that were previously an integral part of residential lending by federally regulated banks now resides with the CFPB. Two of the most significant new rules set to become law in January 2014 are the Ability to Repay rules ("ATR") and the Qualified Mortgage rules ("QM"). Even though they were rolled out as "final rules" in January 2013, they continue to be updated with technical amendments.

The Ability to Repay Rule.[4] A creditor is prohibited from making a residential loan unless it first makes "…a reasonable, good faith determination of a consumer's ability to repay any consumer credit transaction secured by a dwelling (excluding an open-end credit plan, timeshare plan, reverse mortgage, or temporary loan) and establishes certain protections from liability under this requirement for qualified mortgages." (See CFPB Summary, http://www.consumerfinance.gov/regulations/Ability-To-Repay-and-qualified-mortgage-standards-under-the-truth-in-lending-act-regulation-z/#detailedsummary.)

In making the ATR decision, a lender must consider and verify the following borrower information:

- Current or reasonably expected income or assets *[other than the value of the home that secures the loan]*;

[3] See: http://www.consumerfinance.gov/the-bureau/
[4] The ATR rules are found in Section 129C in the Truth in Lending Act ("TILA").

- Current employment status;
- Monthly payment on the mortgage loan;
- Monthly payment on any simultaneous mortgage loan that the creditor knows or has reason to know will be made;
- Monthly payment for mortgage-related obligations *[e.g., insurance, taxes, assessments]*;
- Current debt obligations;
- Monthly debt-to-income ratio, or residual income; and
- Credit history.

The creditor making the loan is required to calculate the mortgage loan payment based on: (a) The fully indexed rate or any introductory interest rate (whichever is greater)[5]; and (b) Substantially equal monthly installments that will fully amortize the loan amount over the loan term.[6]

Penalties for violation of the ATR rules are harsh and may stifle any types of loans that hint of non-compliance with the ATR rules. If a material violation is established, the borrower has the ability to recover back all of the finance charges and fees paid, plus actual damages, statutory damages, attorney fees and court costs. There is a three year statute of limitations from the date the violation occurred. Although some violations might occur pro-actively by plaintiffs trying to rescind their loans, it is quite possible that ATR non-compliance will be raised in most foreclosure cases, once the law goes into effect next year.

There are several exemptions (e.g. for small creditors and rural and under-served counties) to the ATR rules, and they will likely continue to be re-worked up to the date of implementation in January 2014. For a list of "rural and underserved Oregon counties". (See,

http://files.consumerfinance.gov/f/201305_cfpb_final-list_2013-rural-or-underserved-counties.pdf

The Qualified Mortgage Rule. The Dodd-Frank Act has established a category of loan called a "Qualified Mortgage," or "QM," that provides a safe harbor for lenders. If the loan falls within

[5] E.g. when the loan has an adjustable rate.

[6] In the case of certain hybrid loans, e.g. interest-only loans, negative amortization loans, and loans with balloon payments, special payment calculations will be required.

the definition of a QM, there is a legal presumption that the lender complied with the ATR underwriting rules, and therefore the penalties for non-compliance are either eliminated or substantially reduced.

For a mortgage to be a "Qualified Mortgage," it must meet the following requirements:

- *Elimination of "Non-Traditional" Loan Features* – This refers to features that we saw in the past, e.g. negative amortization, interest-only payments, and certain balloon payments.[7]
- *Limitations on Points and Fees* — If the loan is for $100,000 or more, it cannot have points or fees greater than 3% of the total loan amount. There are different and stricter limits for smaller loans. Certain "bona fide discount points" for prime loans are not included in these limits.
- *Maximum Allowable Loan Term* — The loan may not exceed 30 years.
- *Income Verification and Monthly Debt-to-Income Ratio Cap*
    - Monthly payments must be based on the highest payment that will apply during the first five years of the loan; and
    - The borrower's total monthly debt-to-income ratio (i.e. all housing and non-housing expenses, such as food, automobile, child care, etc.)[8] is no greater than 43%.

The presumptions afforded to lenders making QM loans covers the following two categories:

- *Safe Harbor QM loans – Conclusive Presumption.* These are prime loans that: (a) Meet the ATR compliance rules, including the underwriting requirements above; (b) Are secured by a first lien on the residence; and (c) Carry an interest rate that is less than 1.5% higher than the average prime rate available.[9] The presumption of ATR compliance is conclusive. It is a complete safe harbor.

[7] There are limited exceptions for certain "small" creditors, based upon the number of loans originated during the preceding calendar year, and those operating in predominantly rural or undeserved areas.
[8] This is sometimes referred to as the "back-end ratio." The "front-end ratio" is the monthly housing debt (principal, interest, taxes, insurance, and HOAs, if applicable) compared to the borrowers' gross monthly income.
[9] For subordinate, i.e. "junior" liens, the rate is less than 3.5% higher than the average prime rate available.

- *Higher-Priced QM Loans – Rebuttable Presumption*. Here, the presumption of ATR compliance is rebuttable. These loans include first-position liens with an interest rate equal to or greater than 1.5% over the available prime rate. Essentially, these loans are "higher priced" because the borrowers' credit is less than prime, i.e. the loan is, in the vernacular, "sub-prime."

Practice Tip: *Practitioners with an active residential real estate practice will have to become familiar with the above rules whenever a client requests them to draft a contract or trust deed in a seller carry-back transaction. This is due to the fact that these CFPB rules are being interpreted as applying to* <u>*all*</u> *residential loans, even those being carried back by sellers themselves. Secondly, it is important for real estate practitioners to know that subject to limited exceptions,*[10] *Oregon's Division of Finance and Corporate Securities is interpreting the requirements for mortgage loan originator licensing to apply to seller carry-back transactions. Section 15 of the recently passed House Bill 3482a by the Oregon Legislature creates a three transaction per 12 months exemption from the requirement to become a mortgage loan originator under ORS 86A.203. But even with the MLO licensing exemption (discussed under SAFE Act, below), some seller carry-back transactions will remain subject to the ATR and QM rules.*

The SAFE Act. SAFE is the acronym for *The Secure and Fair Enforcement for Mortgage Licensing Act of 2008*. Although it is federal legislation that was enacted in response to the national credit and mortgage crises, it requires each state to enact regulatory legislation. In response, Oregon enacted ORS 86A.

The Department of Housing and Urban Development ("HUD") monitors compliance, although it does not have legal authority to grant exemptions. On August 30, 2011, HUD published its final rule for SAFE. See: http://www.gpo.gov/fdsys/pkg/FR-2010-08-23/pdf/C1-2010-18148.pdf

HUD is responsible for setting minimum standards for states to follow in the licensing of providers of certain residential mortgage services. It also has set up the Nationwide Mortgage Licensing System and Registry ("NMLSR"), which is a national database of all mortgage

[10] E.g. the sale of a residence that the seller previously lived in, or certain transactions with relatives.

companies and mortgage loan originators. Responsibility for oversight falls under the authority of the Consumer Financial Protection Bureau (CFPB) pursuant to the Dodd-Frank Act.

See, http://mortgage.nationwidelicensingsystem.org/Pages/default.aspx

SAFE was designed to increase consumer protection in residential lending. It applies to mortgage companies and their mortgage loan originators, or "MLOs," acting either as employees or independent contractors. An individual is in the business of loan origination if they, "in a commercial context and habitually or repeatedly" engage in: (1) Taking a residential mortgage loan application; <u>and</u> (2) Offering or negotiating the terms of a residential mortgage loan for compensation or gain (or representing to the public through advertising or other means, that they will perform these two activities). The phrase "taking a residential mortgage loan application" means that the MLO receives it for the purpose of facilitating a credit decision. The phrase "offering or negotiating" means that the MLO presents particular lending terms for consideration by a borrower. It is the activity – not its label or the title of the person – that determines whether one is a mortgage loan originator. The law does not make one a mortgage loan originator if they engage in the above-described conduct exclusively for public, charitable, or family purposes.

In order to obtain a license as an MLO, SAFE requires testing, pre-licensure and continuing education, criminal background checks, and financial responsibility. SAFE applies to certain mortgage transactions. A "mortgage transaction" means a credit or loan transaction that is or will be used by the debtor primarily for personal, family, or household purposes <u>and</u> is secured by a mortgage or equivalent consensual security interest.

Practice Tip: *Real estate practitioners should be aware that although attorneys are exempt from the MLO licensing requirements under both the federal and state law, as of the date of this writing, it appears that the Oregon Division of Finance and Corporate Securities is taking the position that subject only to very limited exceptions,*[11] *even licensed attorneys employed by their clients may not participate in the seller-carry-back process without securing a MLO license.*

[11] E.g. divorce, bankruptcy, probate, foreclosure, etc. Essentially, their position seems to be that licensed Oregon lawyers may not, without an MLO license, represent a seller on any *arms-length* residential seller carry-back transaction. These limitations are not found in the agency's administrative rules.

Home Owner Equity Protection Act ("HOEPA"). This 1994 law deals with equity lending, i.e. loan refinancings or home equity installment loans. The Act does not regulate loans to buy or build a home, reverse mortgages, or home equity lines of credit. A loan is covered by HOEPA if it meets the following criteria:

- The first mortgage: The annual percentage rate ("APR") exceeds the rates on Treasury securities of comparable maturity by more than eight percentage points;
- (F)or a second mortgage, the APR exceeds the rates on Treasury securities of comparable maturity by more than 10 percentage points; or
- (T)he total fees and points payable by the borrower at or before closing exceed the larger of $625 or eight percent of the total loan amount. (The $625 figure is for 2013. This amount is adjusted annually by the Consumer Financial Protection Bureau, based on changes in the Consumer Price Index.) Credit insurance premiums written in connection with the transaction are counted as fees.

See: http://www.consumer.ftc.gov/articles/0246-high-rate-high-fee-home-loans

Homeowner's Protection Act. This law, enforced by the Federal Reserve, is also known as the "PMI Cancellation Act." As the name implies, it is intended to regulate private mortgage insurance or "PMI." PMI is generally required for all conventional loans (i.e. non-government or state insured or guaranteed loans) when the loan-to-value ("LTV") ratio is above 80%. For example, if a borrower had only 5% down payment, PMI would be purchased for the 15% shortfall. However, as homes increased in value, borrowers found themselves still paying PMI insurance even though the LTV ratio based upon a lower principal balance and higher fair market value, was less than 80%. In other words, they were paying for unnecessary coverage. The Act requires certain disclosures to borrowers of their rights under PMI and provides specific rules for termination and return of unearned premiums.

See: http://www.federalreserve.gov/boarddocs/supmanual/cch/hpa.pdf

6. <u>Federal Distressed Housing Programs</u>.

As the housing and credit crises were wreaking havoc throughout the country, Congress passed the Emergency Economic Stabilization Act of 2008 (HR 1424). In addition to funneling billions of dollars to financial institutions and banks to keep them afloat, the Act also resulted in the Treasury Department's creation of the Making Home Affordable Initiative, under which the government programs HAMP and HARP and HAFA exist.

Home Affordable Modification Program ("HAMP") (12 U.S.C. 5201 et seq.) The stated purpose of HAMP is to assist struggling homeowners to stay in their homes by recalculating their mortgage payments based upon certain guidelines.[12] It still exists today, although has been much criticized due to inept handling by lenders and servicers. For the Treasury Department's description of the program go to the following link: http://www.treasury.gov/initiatives/financial-stability/TARP-Programs/housing/mha/Pages/hamp.aspx.

Practice Tip: *Practitioners advising clients in need of modification should be aware that all of the large lenders and servicers have their own "proprietary programs" that, while not free of poor handling and customer service, may produce better results than HAMP. A major constraint to these federal programs is that they are limited to loans that were sold to Fannie and Freddie, the twin government sponsored enterprises ("GSEs") taken over by the government in 2008. However, by some estimates, over half of all loans made during the days of subprime and no-doc loans were sold into the private secondary market and were never purchased by Fannie and Freddie because they did not conform to their lender guidelines.*

Home Affordable Refinance Program ("HARP") (12 U.S.C. 5201 et seq.) The stated purpose of HARP is similar to HAMP, except that instead of modifying the loan, e.g. by reducing interest rates and readjusting payments, the entire loan is refinanced. Due to initial problems with borrower eligibility, HARP quickly became HARP 2.0. It suffers from the same affliction as HAMP, and provides no help for homeowners stuck in loans owned by a non-GSE. For a description of the current program eligibility, go to: http://www.makinghomeaffordable.gov/programs/lower-rates/Pages/harp.aspx

Practice Tip: *Practitioners with clients owning homes with significant negative equity (i.e. the total mortgage debt, including costs of sale, exceed the expected gross sale proceed(s) should exercise caution in such circumstances, since the borrower would be refinancing more than the home's present market value. Unless there is an expectation that the market value will*

[12] For a description of the current HAMP guidelines see: http://www.law.cornell.edu/uscode/text/12/5219a

soon reach and exceed the total mortgage debt (e.g. two to three years) refinancing may just prolong the problem.

Home Affordable Financing Alternatives ("HAFA") This program deals with the disposition of underwater homes, i.e. those with negative equity, where modification won't work or has failed. The two methods of disposition are through short sale or deed-in-lieu of foreclosure ("DIL"). Over the years it has been altered and streamlined. For more information on eligibility, go to: http://www.makinghomeaffordable.gov/programs/exit-gracefully/Pages/hafa.aspx.

Practice Tip: *Although the DIL alternative might seem faster and easier, most lenders will not entertain it unless the borrower has tried and failed to complete a short sale. However, there are exceptions and extenuating circumstances where a DIL will be permitted without making the borrower first attempt a short sale – e.g. the borrower is leaving the country permanently or for several years. Second, practitioners should be aware that banks will not permit borrowers to apply for more than one program at a time. Third, when moving from the short sale to the deed-in-lieu queue, lenders generally require that all of the application documents – including the hardship letter – be completed all over again, even if nothing has changed.*

The main features of the HAFA program are the following:

- Full release of liability for any deficiency on the first position mortgage, and where applicable, the second position mortgage;
- An opportunity to secure $3,000 in relocation assistance from the closing proceeds;
- Purportedly, HAFA has less of a negative impact on the borrower's credit score than a conventional, i.e. non-HAFA, short sale.

Practice Tip: *To apply for the HAFA program, the bank representative will first obtain a broker price opinion ("BPO"). This opinion will be the figure the lender sets as the listing price of the home. (Lenders and servicers will not permit borrowers to sell the home themselves; it must be listed through a real estate agent. Since the commission is paid from the gross sale proceeds and not the seller, there is little reason for a seller to sell the home themselves, anyway.) The potential disadvantage of the HAFA program is delay in getting the home to market – i.e. waiting for completion of the BPO. Almost all lenders and servicers will permit non-HAFA short* *sales if the buyer's offer is subsequently confirmed by a BPO. Similarly, most will waive the deficiency – but most will not pay any relocation expenses. If there is a second mortgage, the first lender or servicer may pay a sum, usually in the $3,000 - $6,000 range, to the second lienholder to incentivize them to consent to the short sale. In summary, there is little difference between a HAFA short sale and a conventional short sale, except the $3,000 relocation assistance payment – which banks and servicers have been known to decline to pay. It is not guaranteed.*

State of Oregon Laws Affecting Residential Real Estate

1. Oregon Landlord-Tenant Laws.

The entire body of statutory law regulating the rental of real property for residential purposes is found in ORS Chapter 90. It covers both manufactured housing communities as well as all other residential rentals, whether apartments or single family homes or condominiums. A major distinction between the rental of manufactured housing spaces and all other forms or rental, is that a tenant owning their home in a manufactured housing community may not be terminated without cause. Floating home communities are treated under Oregon law the same as manufactured housing communities.

Practice Tip: *The Oregon Residential Landlord Tenant Act, or "ORLTA" is very, very, technical. The failure to properly prepare or serve the notice of termination can doom an eviction before it gets to trial – regardless of the underlying merits of the case. Practitioners venturing into this body of law must understand the entire Chapter, as many statutes are interrelated.*

Eviction Laws. The law is found at ORS 105.105 – 105.168. It applies to all forms of tenancies, i.e. residential and commercial.[13] For a description of tenancies for which the

[13] The primary eviction statute of importance to commercial tenancies is ORS 91.090: **"91.090 Termination of tenancy by failure to pay rent; reinstatement.** The failure of a tenant to pay the rent reserved by the terms of the lease for the period of 10 days, unless a different period is stipulated in the lease, after it becomes due and payable, operates to terminate the tenancy. No notice to quit or pay the rent is required to render the holding of such tenant thereafter wrongful; however, if the landlord, after such default in payment of rent, accepts payment thereof, the lease is reinstated for the full period fixed by its terms, subject to termination by subsequent defaults in payment of rent."

eviction laws apply, see ORS 91.010 to 91.115. A complaint for eviction of a residential tenancy must follow the format described in ORS 105.124. If the eviction deals with a commercial tenant, the complaint must follow ORS 105.126.

Practice Tip: *This law is very technical as well. All practitioners should closely read ORS 105.137, which deals with the consequences of failing to timely appear at the "first appearance." This is the time for the landlord and tenant to appear and, usually at the court's invitation, try to settle the matter without a trial. The failure of a tenant or their attorney to appear at that time can result in a judgment of restitution in favor of the landlord; the failure of the landlord or their attorney to appear at the first appearance can result in a judgment of dismissal of the eviction.*

Evictions Relating to Domestic Violence. ORS 105.128 deals with eviction actions brought to remove the perpetrator of domestic violence, sexual assault or stalking. ORS 90.449 permits a tenant to raise, as a defense, that they were a victim of such an incident. If successful, the court may issue an order terminating the tenancy of the perpetrator without terminating the tenancy of the other tenants and without awarding possession to the landlord.

2. <u>Mortgages, Trust Deeds, Land Sale Contracts and Their Foreclosure</u>.

Mortgages. ORS 86.010 to 86.275 generally address the rights and duties of lenders and borrowers owning land secured by a mortgage. The process of foreclosing a mortgage is set forth in ORS Chapter 88. The process of executing on a residential property is controlled by ORS 18.901 – 18.982. Under these statutes, the main features of a residential mortgage and a residential mortgage foreclosure are the following:

- *Parties* – There are two parties to a mortgage:
  - Mortgagee, who is the lender;
  - Mortgagor, who is the borrower.
- *Mortgagor's right to cure* – Upon acceleration of the remaining indebtedness under a promissory note, it becomes immediately due and owing. There is no statutory right to cure by tendering the amount then in default.

- *Right of redemption* – Following the sheriff's sale, there is a statutory 180-day period within which the mortgagor has a right to redeem the property by paying the amount paid at the sale, plus interest, taxes and certain other costs.
- *Timing of judicial foreclosure* – The recording on the public record of a Lis Pendens under ORS 93.740 and filing and service of the summons and complaint, commence the mortgage foreclosure process. Since timing is controlled by the speed and efficiency of the attorney handling the foreclosure suit and the court processing it, the procedure can be very slow – much slower than the non-judicial foreclosure of a trust deed discussed below.
- *Deficiency liability* – Subject to the following exception, upon completion of the judicial foreclosure of real property, there is a right to pursue the mortgagor for a deficiency. The foreclosure process is entirely judicial, and is conducted in much the same manner as a suit for collection of any other debt. The mortgagee has no claim against the mortgagor for any remaining deficiency under the promissory note if the property foreclosed is a primary residence. (See, ORS 86.770(2))

Trust Deeds. Virtually all voluntary liens secured by Oregon real estate are trust deeds and are therefore governed by the Oregon Trust Deed Act, ORS 86.705 – 86.795, which has been in existence since 1959. The main features of the Act are the following:

- *Parties* – There are three parties to a trust deed:
  - Beneficiary, who is the lender;
  - Trustor or Grantor, who is the borrower;
  - Trustee, who has two primary functions:
    - Upon payment in full of the promissory note, the Trustee, at the Beneficiary's instruction, issues a Deed of Reconveyance for recording, thus removing the trust deed as a lien on the real property; or
    - Upon notification by the Beneficiary that the Grantor is in breach of the note or trust deed, the Trustee is authorized to commence a non-judicial foreclosure and sell the property at a public sale.

- *Grantor's right to cure* – Notwithstanding that the promissory note contains an acceleration clause, the Act permits the Grantor to cure the existing default up to five days before the scheduled sale date. The right to cure also includes the payment of statutory costs and fees.
- *Right of redemption* – Following the Trustee's sale, there is no right of redemption to the Grantor.
- *Timing and non-judicial nature of foreclosure* – The recording of a Notice of Default triggers the trust deed foreclosure process; a Notice of Sale is sent to the Grantor. Both documents contain the sale date, which can be no sooner than 120 days before the Notice of Sale. At the time of default, the Beneficiary usually substitutes the current Trustee, who is normally a title insurance company, transferring the foreclosure process to a trustee foreclosure service qualified under ORS 86.790.
- *Deficiency liability* – Following the completion of the non-judicial foreclosure of a property, the Beneficiary has no claim against the Grantor for any remaining deficiency under the promissory note. However, the completion of a non-judicial sale does not extinguish the liability of any guarantor of the debt. (See, ORS 86.770(2))

Beneficiaries may elect to foreclose a trust deed judicially, as if it were a mortgage. In doing so, the mortgage foreclosure process must be followed, which means the process occurs in court and there is a 180-day right of redemption. However, there is no right to obtain a deficiency against the borrower if the property was a residential trust deed, as defined by ORS 86.705(5).

Practice Tip: *Practitioners should be aware of ORS 86.157, which provides that following a short sale, if the "…lender reports to the Internal Revenue Service that as a consequence of or in conjunction with a short sale of residential property the lender has canceled all or a portion of a borrower's debt under a real estate loan agreement and the lender provides to the borrower written evidence of the lender's report to the Internal Revenue Service, the lender or an assignee of the lender may not bring an action or otherwise seek payment for the residual debt following the short sale." Of course, it is always best to obtain written confirmation from the lender at the time of the short sale closing that it will waive, forgive or cancel the deficiency.*

Land Sale Contracts. With only a few exceptions, land sale contracts are not governed by Oregon statutory law. The major exceptions are as follows:

- In addition to the seller's judicial and non-judicial remedies described in the contract, ORS 93.905 – 93.940 provides a means of statutorily declaring a "forfeiture" through a non-judicial foreclosure process. However, the statutory process should be expressly described in the contract as one of the seller's available remedies.
- The rules of execution on a judgment of foreclosure of residential property set forth in ORS 18.901 – 18.999 apply to land sale contracts, including the right of redemption.

A land sale contract presupposes that the title is retained by the seller pending full payment. Upon that event, the seller will convey a "Fulfillment Deed" to the buyer, which then is recorded and removes the lien of the land sale contract from the property.

3. Oregon's Mandatory Resolution Conference Law.

The 2013 Oregon Legislature passed Senate Bill 558 which requires that lenders of a certain size that file judicial or non-judicial foreclosures must participate in a Resolution Conference with their borrower if requested to do so. Here are the highlights:

- The purpose of the conference is to give the borrower an opportunity to negotiate a foreclosure avoidance solution, such as a short sale, loan modification, deed-in-lieu, forbearance, or some other alternative.
- It specifies the documents the lender and borrower must provide each other.
- It requires that the lender obtain a Certificate of Compliance following completion of the Resolution Conference in order to foreclose a residential trust deed, and specifies the conditions under which the lender may obtain the Certificate.
- It requires the lender to send a notice to the borrower if it determines that: (a) the borrower is not eligible for a Foreclosure Avoidance Measure; or (b) has not complied with terms of an agreed-upon Foreclosure Avoidance Measure.
- It becomes effective 91 days after the Governor's June 4, 2013 signing.

4. State Environmental and Health Laws.

Carbon Monoxide Alarms.

Residential Landlord-Tenant

- ORS 90.316 Carbon monoxide alarm defined;
- ORS 90.317 Repair or replacement of carbon monoxide alarms;
- ORS 90.320 Landlord's habitability obligations include a functioning carbon monoxide alarm if the premises includes a carbon monoxide source;
- ORS 90.325 Requires tenant to replace batteries as need; prohibits tampering.

Residential Sales

- ORS 105.464 requires disclosure in the seller's property disclosure statement whether there is a working carbon monoxide alarm in the home.
- ORS 105.836 defines "carbon monoxide alarm"; mandates functions; requires conformance to State Fire Marshall rules. (See, http://www.oregon.gov/OSP/SFM/Pages/index.aspx)
- ORS 105.838 provides that "A person may not convey fee title to a one and two family dwelling or multifamily housing that contains a carbon monoxide source, or transfer possession under a land sale contract of a one and two family dwelling or multifamily housing that contains a carbon monoxide source, unless one or more properly functioning carbon monoxide alarms are installed in the dwelling or housing at locations that provide carbon monoxide detection for all sleeping areas of the dwelling or housing."
- ORS 105.840 provides that "(a) purchaser or transferee of a one and two family dwelling or multifamily housing who is aggrieved by a violation of ORS 105.838 or of a rule adopted under ORS 476.725 may bring an individual action in an appropriate court to recover the greater of actual damages or $250 per residential unit. In any action brought under this section, the court may award to a prevailing party, in addition to the relief provided in this section, reasonable attorney fees at trial and on appeal, and costs." Actions brought under this section must be commenced within one year after the date of sale or transfer.

- ORS 105.842 Prohibits tampering with carbon monoxide alarm in one and two family dwellings and multifamily housing.

Practice Tip: *Actual damages could be catastrophic. Entire families have died from carbon monoxide poisoning. Practitioners representing landlords – especially those that do not have professional third-party management – should emphasize the importance of having functioning carbon monoxide alarms in the premises at all times.*

Smoke Detectors.

Residential Sales. - ORS 479.250 – 479.305 govern the installation, use, and anti-tampering laws for smoke detectors in residential housing.

Landlord-Tenant.

- ORS 479.255 Requires a smoke alarm or smoke detector in every dwelling unit covered by the Oregon Residential Landlord Tenant Law, ORS Chapter 90.
- ORS 90.320 Landlord's habitability obligations include a functioning smoke alarm or smoke detector
- ORS 90.325 Requires tenant to replace batteries as needed; prohibits tampering
- ORS 90.740 Requires landlord to install working smoke alarm
- ORS 90.680 (manufactured home and floating home facilities) Requires that if a space or slip tenant is selling their home, that they give notice to any lienholder, prospective purchaser or person licensed to sell dwellings or homes, and the location of all properly functioning smoke alarms

Fireplace Inserts. ORS 468A.460 – 468A.515 requires all sellers of "residential structures" to remove and destroy uncertified woodstoves or fireplace inserts prior to closing of the sale. A "residential structure" includes: (1) any structure that contains one or more dwelling units and is four stories or less above grade; (2) a condominium, rental residential unit or other residential dwelling unit that is part of a larger structure, if the property interest in the unit is separate from the property interest in the larger structure; (3) a modular home constructed off-site; (4) a manufactured dwelling; or (5) a floating home.

- Exclusions. The primary exclusions are pellet stoves, central wood fired furnaces, antique stoves, masonry fireplaces and masonry heaters.

- Removal and Destruction. This entails removal of the insert from the Property and destroying it. Woodstove retailers, chimney sweeps, or others may perform this task. Sellers removing an insert may take it directly to a metal scrap recycler or DEQ-approved landfill. Seller must obtain a receipt from the contractor or business certifying that the insert has been destroyed. DEQ has a disclosure form posted on its website that may be used to notify DEQ of the destruction of the insert. See, http://www.deq.state.or.us/aq/burning/woodstoves/heatSmart.htm
- Failure to remove or destroy the insert does not invalidate the sale. However, it may constitute a Class A misdemeanor and/or result in a civil fine. See, ORS 468A.990.
- Certification Label. A certified woodstove or fireplace insert is one that bears a certification label located on the back and issued by the Oregon DEQ or U.S. Environmental Protection Agency ("EPA") which means that it has met certain particulate emission standards. If the insert does not bear such a label, it is "uncertified," and must be removed and destroyed. Sellers who cannot access the back of their insert may look up the model number on the EPA's certified woodstove list or call the manufacturer of the insert.
- Responsibility. The seller is responsible for removal and destruction an uncertified insert located on the property. If the buyer accepts written responsibility for removal and destruction, the insert must be removed and destroyed by buyer within 30 days following the closing date of the sale.
- Additional Regulations. Sellers of residential structures located in some rural counties and cities may have regulations that require homeowners to remove non-certified solid fuel heating devices when a home is sold. Sellers and buyers in these areas should check with their local agency to determine if any other requirements might apply.
- More Information. See: DEQ Woodstove FAQs: http://www.deq.state.or.us/aq/burning/woodstoves/questions.htm; Contact DEQ – Heat Smart Program, 811 SW Sixth Ave., Portland, OR 97204; See ORS 468A.

Wells and Well Water. Pursuant to ORS 448.271(1), in any transaction for the sale or exchange of real estate that includes a well that supplies ground water for domestic purposes, the seller is required to have the well tested for arsenic, nitrates and total coliform bacteria. The seller is then required to submit the test results to Oregon's Drinking Water Services and to the buyer within 90 days of receiving the test results. The seller's failure to comply with this law will not invalidate the deed or contract executed in the transaction.

Septic Systems. Oregon does not mandate that septic systems be tested before closing of a residential sale. Common sense dictates that it occur, however, since there are significant questions and issues that arise when a residence on septic is sold. For example: Is the system legal, i.e. was it permitted? How old is it? Is the system adequate for the number of occupants? The best resource on this issue is the DEQ website here: http://www.deq.state.or.us/wq/onsite/aboutseptic.htm

Residential Oil Tanks. ORS 466.878 requires certain action when a property owner discontinues the use of an underground heating oil tank. When the property is sold, the seller must ensure that the tank be emptied of oil and the seller shall provide to the buyer documentation showing that the tank has been emptied.

5. <u>Safety Laws Affecting Residential Sales; Sex Offenders</u>.

Megan's Law. Megan's Law was enacted in 1996 after seven-year-old Megan Kanka was raped and murdered by a sexual predator. It requires the registration of sex offenders, and public notification of private and personal information regarding registered sex offenders. In Oregon, the law is found at ORS 181.582 – 181.609. However, ORS 696.880 provides that an Oregon real estate licensee does not have a duty to disclose to a potential purchaser of residential property that a sex offender registered under Oregon' version of Megan's Law resides in the area.

Matters Deemed "Not Material" to Real Property Transactions. ORS 93.275 provides that the following incidents are not material facts to real property transactions:

- The fact or suspicion that the real property or a neighboring property was the site of a death by violent crime, by suicide or by any other manner;
- The fact or suspicion that the real property or a neighboring property was the site of a crime, political activity, religious activity or any other act or occurrence that does not adversely affect the physical condition of or title to real property;

- The fact or suspicion that an owner or occupant of the real property has or had human immunodeficiency virus or acquired immune deficiency syndrome;
- The fact or suspicion that a registered sex offender resides in the area; and
- The fact that a notice has been received that a neighboring property has been determined to be not fit for use under ORS 453.876 (e.g. because it was once used as an illegal drug manufacturing site).

Practice Tip: *This does not mean that, if asked, a sales agent or other seller representative is permitted to lie. However, buyers should be advised of the need to exercise their own due diligence on these issues.*

6. <u>Oregon Property and Income Tax Laws</u>.

Property Tax Deferrals. The state laws are governed by ORS Chapter 305 - 312. For most residential real estate practitioners, there are two major categories:

- Property tax deferrals based upon the age or disability of the taxpayer – Discussed at ORS 311.666 – 311.701 (Note: There have been legislative changes since the 2011 statutes. See, http://www.oregon.gov/dor/SCD/Pages/changes-impacting-deferral.aspx)
- Other property tax deferral programs:
  - Farm (EFU and non-EFU) – ORS 308A.050 to 308A.128
  - Farm and forest home sites – ORS 308A.250 to 308A.259
  - Historic property – ORS 358.475 to 358.690

Practice Tip: *Be aware that the loss of a deferral can result in the owner being required to recapture some of the deferred taxes. Buyers of property promoted as having a deferral should thoroughly verify that all conditions to entitlement of the deferral have been met.*

The process to appeal an assessment is well described at the Department of Revenue website here: http://www.oregon.gov/dor/ptd/Pages/ic_303_668.aspx See also, ORS Chapter 308.

Property Transfer Tax. The only tax on the transfer of Oregon real estate is in Washington County.* Subject to several exceptions, the rate is $1.00/$1,000 of the sale price. On November 6, 2012, the Oregon Real Estate Transfer Tax Amendment, Measure 79 (known as Initiative 5), was passed, changing the Oregon Constitution and prohibiting additional real estate transfer taxes unless approved by a vote of the citizens.

*See, Washington County website for more information:

http://www.co.washington.or.us/AssessmentTaxation/Recording/TransferTaxExemption/application-forms.cfm

State Tax Withholding For Nonresident Sellers of Oregon Real Property. Pursuant to ORS 314.258 and Oregon Administrative Rule 150-314-258, escrow companies are required to withhold a portion of a non-resident seller's net proceeds from the sale of Oregon real property for transmittal to the Oregon Department of Revenue. As a result, all sellers of Oregon property are asked to provide escrow with one of the following: (a) proof of residency in Oregon; (b) a completed Department of Revenue Form WC in which the seller certifies that they are exempt from Oregon's withholding law; or (c) other written assurance of Oregon residency.

If a seller is unable to establish that they live in Oregon full time, or they are not otherwise exempted, escrow is required to withhold the tax due. It is calculated based upon the least of the following three amounts: (a) 4 % of the sales price; (b) 8 % of the gain from the sale; or (c) the net proceeds distributed to the seller.

Escrow is not required to withhold for: (a) Sellers who are Oregon residents, or C corporations doing business in Oregon after the property sale; or (b) Pass-through entities such as certain partnerships, S-corporations, limited liability companies with more than one owner, limited liability partnerships, or certain trusts and estates. The statute contains several exemptions.

7. Condominiums and Planned Communities.

Residential Condominium Laws. Condominiums are a unique form of real property, since a unit owner does not have a direct interest in the surrounding land or structure. Rather, ownership consists of the interior airspace of the unit, its furnished interior surfaces, and the windows, doors and fixtures within the physical boundaries of the unit. The remaining portions of the structure, and all of the land that has been submitted to condominium ownership, are known as "*common elements,*" in which each unit owner has an undivided interest along with all of the other unit owners. Those common elements that are expressly reserved for use by the unit owner, such as the garage or patio, are called "*limited common elements*." The remaining common elements, such as the land, physical structure of the building, and all recreational facilities such as pools and tennis courts, are known as the "*general common elements*." See, ORS Chapter 100.

The creation and marketing of condominiums are regulated by the Oregon Real Estate Agency. Misleading, deceptive or fraudulent sales tactics can result in civil or criminal penalties.

The primary document creating the condominium form of ownership is the Declaration, which is a comprehensive summary of information describing all of the units in the project, their location, the limited and general common elements, and the percentage interests each owner will have in them. Before any condominium units may be sold to the public, the Declaration must be approved by the county tax assessor and the Oregon Real Estate Commissioner. Upon approval, the Declaration is recorded in the county where the condominiums are located. The signor of the Declaration is known as the "Declarant."

Practice Tip. *A critical due diligence issue when purchasing a condominium is the unit owners association. How does it function? Are the reserves adequate? Are there any impending large assessments scheduled? Are there any pending construction defect claims? Accordingly, close scrutiny must be given to the governance documents, e.g. the bylaws, minutes, budgets, reserve studies, etc. Another important issue is the Declaration. What does it say about in-home businesses? Pets? Parking?*

Planned Communities. A planned community is one that contains common area and a homeowners' association. The law is found at ORS 94.550 – 94.785. A planned community may consist of common wall structures or single family detached dwellings. The distinction between a planned community development and a condominium development can be blurry. The major difference is that the latter has been submitted to the provisions of ORS Chapter 100, and the former has not.

Practice Tip. *The due diligence duties in the purchase of a residence in a planned community are very much the same as in purchasing a condominium. How does the homeowner's association function? Are the reserves adequate? Are there any impending large assessments scheduled?*

8. <u>Seller Property Disclosure</u>. The governing statutes are ORS 105.462 to 105.490. ORS 105.464 sets forth a form of disclosure statement that, subject to limited exceptions, all sellers of residential property must complete. The statement consists of 50+ questions about the property. The representations are not warranties; they are based upon the seller's best knowledge. The buyer has five business days from seller's deliver of the disclosure statement to revoke the buyer's offer by delivering a signed written statement of revocation to the seller. Buyers may waive the right of revocation. Upon timely exercise of the right of revocation, the buyer has an absolute right to the return of the earnest money deposit.

Exceptions are for the following sellers/properties: (a) New construction that has never been occupied; (b) Sale by a financial institution (or by foreclosure or deed-in-lieu of foreclosure); (c) Sales/transfers by a governmental agency; or (d) Receivers, personal representatives, trustees, conservators, or guardians – if appointed by a court.

Practice Tip: *Practitioners should be very careful when advising clients how to exercise the right of revocation. It must be timely delivered to the seller. It should not say more than that the seller hereby exercises their right of revocation. (If the buyer gives a "reason," e.g. there is lead based paint in the home, it creates the impression that buyer is revoking under the professional inspection contingency for which the buyer has no right to demand that escrow release the deposit without seller's consent.) Out of an abundance of caution, the notice of revocation should also be timely delivered to the title company and the seller's real estate agent. When timely exercised, the title company is required to disburse the deposit back to the buyer, notwithstanding the seller's objections.*

9. State Regulators - Residential Housing.

Oregon Real Estate Agency.

The Oregon Real Estate Agency regulates real estate licensees and escrows companies. The statutes governing the former are found at ORS 696.007 to 696.320, and those governing the latter are found at ORS 696.505 to 696.590. The Agency is also in charge of approving all applications to submit property to condominium ownership, and monitoring their activities thereafter for regulatory compliance. The regulations affecting the Agency are found at Chapter 863 of the Oregon Administrative Rules. Its website is located at: http://www.oregon.gov/rea/Pages/index.aspx.

Oregon Construction Contractors Board.

The Oregon Construction Contractors Board ("CCB") is a consumer oriented agency charged with protecting the public's interest in matters relating to the improvement of real property. It regulates construction contractors through licensing and bonding requirements, education, dispute resolution and enforcement. The CCB and construction contractors are governed by ORS Chapter 701. The regulations affecting the CCB are found at Chapter 812 of the Oregon Administrative Rules. Its website is located at: http://www.oregon.gov/ccb/Pages/index.aspx.

Practice Tip: *Practitioners should always encourage their clients that before hiring an Oregon residential contractor, they do a thorough background search on the CCB. While it is not foolproof, it generally provides useful licensing history on the person and company they are considering hiring.*

10. Homeowner Protection Act ("HPA").

In Oregon, claims of lien for certain types of labor, material or services that are provided by licensed contractors to real property can be created and exist for a period of time *before* they have to be recorded in the public records. This period can generally last up to 75 days after the contractor has provided the labor or material, or 75 days after completion of the residential construction, whichever is earlier. As a result of this 75-day period, occasionally lien claims are recorded on property *after* it has been sold to the new owner, even though the debt upon which the lien is based belongs to the prior owner. If the prior owner is unable or unwilling to pay the debt, the new owner may be compelled to do so in order to avoid a lien foreclosure on their home. Additionally, there have been instances in which the home seller pays the general contractor, but the general contractor does not pay his subcontractors, who then file lien claims on the home. It is these types of risks that the Homebuyer Protection Act ("HPA") seeks to address.

The HPA provides that for certain residential sales transactions, sellers are required to take one of the following actions to protect new buyers from construction liens that are not yet recorded as of the date of closing of the sale:

- The seller may purchase or provide title insurance with extended coverage to help cover any construction liens that are recorded after the buyer has completed the purchase of the residence.
- Escrow may be instructed to retain an amount of funds that is not less than 25% of the sale price of the property until the status of all construction liens is resolved after closing. The seller may maintain a bond or letter of credit in an amount that is not less than 25% of the sale price of the property, until the status of all construction liens is resolved after closing.
- The parties may simply delay closing the purchase of the residence until 75 days after the completion of construction.

The HPA applies to the following sales of residential property: (a) A new single family residence; (b) A single family residence where the sale price for original construction or contract price for improvements completed within three months prior to the date of sale of the property is $50,000 or more; (c) A new residential condominium unit; (d) A residential condominium unit where the sales price for original construction or contract price for improvements completed within three months prior to the date of the sale of the property is $50,000 or more; (d) A new residential building (up to four units and used for residential purposes only); (e) A residential building where the sales price for original construction or contract price for improvements completed within three months prior to the date of the sale of the property is $50,000 or more. More details can be found in the statute, ORS 87.007.

11. <u>Conveyancing, Recording, and Co-Ownership</u>.

Deed Forms. Sellers and buyers of residential property are frequently confused over what type of deed they should use in making a conveyance as a grantor, or accepting a conveyance as a grantee. Each statutorily recognized deed is different based upon the degree of protection it affords the grantee, and the degree of exposure it creates for the grantor. In descending order of protection to the grantee they are as follows:

- General Warranty Deed - See, ORS 93.850
- Special Warranty Deed - See, ORS 93.855
- Bargain & Sale Deed - See, ORS 93.860

• Quitclaim Deed - See, ORS 93.865

The greatest protection to the grantee is the General Warranty Deed, which contains all of the major covenants if title. The Special Warranty Deed limits the covenants to the period of time the grantor held the property – not before. The Bargain and Sale Deed and the Quitclaim Deed make no warranties, and are alike but not the same. Any interest that can be conveyed by a Bargain and Sale Deed can be conveyed by a Quitclaim Deed. (ORS 93.110) The former conveys what title officers call "after-acquired title", while the latter does not. Most grantees should prefer to receive a Bargain and Sale Deed over a Quitclaim Deed, and most title companies would prefer to insure a conveyance using the former deed rather than the latter.

Approved Uses. ORS 93.040(1) and (2) set forth mandatory statements for real estate sale agreements (also known as earnest money agreement) as well as contracts and deeds agreeing to convey or conveying fee title to real property. Recorders can refuse to record a document if it fails to include the required language.

Practice Tip: *Although these statutory statements are routinely included in all required documents, their significance in litigation can be overlooked. They are useful in defending against claims raised by buyers that the zoning or other land use condition of the property was not as represented. They are also helpful in meeting the "known or should have known" standard for purposes of triggering the applicable statute of limitations.*

Risk of Loss. ORS 93.290 provides that after an agreement to sell real estate has been executed: (a) If neither the legal title nor possession has been transferred, all or a material part is destroyed without fault of the purchaser, the seller may not enforce the contract, and the purchaser is entitled to recover any portion of the price paid; and (b) If either legal title or possession has been transferred, all or any part is destroyed without fault of the seller, the purchaser is not relieved from a duty to pay the price, nor is the purchaser entitled to recover any portion paid to the seller.

Practice Tip: *This is why it is imperative that sellers carry casualty insurance all the way to and including the date of closing, and buyers make sure they are fully insured from and after the day of closing. In other words, out of an abundance of caution, both seller and buyer should have casualty insurance in place on the day of closing.*

Co-Ownership.

Buyers of residential property are occasionally confused as to how they should hold title. The confusion is natural, since the different forms of co-ownership carry names developed during feudal times, and do not give any hint to their use or meaning. A description of all forms of co-ownership is beyond the scope of this chapter. ORS 93.180 is an important statute for practitioners to become familiar with. It provides that a conveyance or devise of an interest in real property to two or more persons:

- Creates a tenancy in common unless the conveyance or devise clearly and expressly declares that the grantees or devisees take the real property with right of survivorship;
- Creates a tenancy by the entirety if the conveyance or devise is to a husband and wife unless the conveyance or devise clearly and expressly declares otherwise;
- Creates a joint tenancy as described in ORS 93.190 if the conveyance or devise is to a trustee or personal representative;

It also provides that a declaration of a right to survivorship creates a tenancy in common in the life estate with cross-contingent remainders in the fee simple. Except as provided in ORS 93.190, joint tenancy interests in real property are abolished and "…the use in a conveyance or devise of the words "joint tenants" or similar words without any other indication of an intent to create a right of survivorship creates a tenancy in common."

12. Statutory Adverse Possession in Oregon. In 1989, Oregon codified the Common Law elements of adverse possession. They are now found in ORS 105.620. Most of the statutory law of adverse possession follows the Common Law elements. However, a significant new element was introduced under the statute – the requirement that one must have an "honest belief" in their ownership. In other words, the person claiming title by adverse possession must have had a good faith belief they are the true owner.

Today, a person may acquire fee simple title to real property by adverse possession only if:

- The person (and their predecessors in interest) has/have maintained actual, open, notorious, exclusive, hostile and continuous possession of the property for a period of 10 years;

- At the time the person claiming by adverse possession (or their predecessors in interest), first entered into possession of the property they claim title to by adverse possession, they had an honest belief that they were the actual owner of the property, and that belief:
    - Continued throughout the 10-year vesting period;
    - Had an objective basis; and
    - Was reasonable under the particular circumstances; and
    - The person proves each of the elements set out in this section by clear and convincing evidence.