



Joel P. Hoxie
602.382.6264
jhoxie@swlaw.com
vCard



Barbara J. Dawson
602.382.6235
bdawson@swlaw.com
vCard



Jennifer H. Dioguardi
602.382.6371
jdioguardi@swlaw.com
vCard



Gregory J. Marshall
602.382.6514
gmarshall@swlaw.com
vCard



Cynthia L. Alexander
702.784.5234
calexander@swlaw.com
vCard



Richard H. Herold
602.382.6223
rherold@swlaw.com
vCard

Snell & Wilmer



FINANCIAL SERVICES LITIGATION BULLETIN

March 2012

The Arizona Court of Appeals Expands Anti-Deficiency Protection for Borrowers

By Chris Bayley and Evans O'Brien

On December 27, 2011, the Arizona Court of Appeals issued a decision that, if upheld on appeal, will negatively impact a lender's ability to obtain a deficiency judgment under certain circumstances. See *M&I Marshall & Ilsley Bank v. Mueller*, 2011 Ariz. App. LEXIS 216 (Dec. 27, 2011). M&I Marshall and Ilsley Bank (M&I) recently appealed the Court of Appeals' decision in *M&I v. Mueller* to the Arizona Supreme Court. *M&I v. Mueller* is a significant decision that marks a departure from the case law interpreting Arizona's anti-deficiency statutes over the past 20 years. The purpose of this article is to alert you to the *M&I v. Mueller* decision and its potential impact, if affirmed on appeal.

In addition, the Arizona Rules of Civil Appellate Procedure permit *amicus curiae* briefs when a party has an interest in another case that might be affected by the decision on appeal. Therefore, because the ultimate decision in *M&I v. Mueller* could have a significant impact on current or future litigation you may be involved in, we also want to make you aware of the opportunity to file an *amicus curiae* brief on the issues presented in *M&I v. Mueller*.

What follows is a brief background on Arizona's deed of trust anti-deficiency statutes and a discussion of the Court of Appeals' decision in *M&I v. Mueller*.

Relevant Background of Arizona's Deed Of Trust Anti-Deficiency Laws

Arizona's deed of trust anti-deficiency statute provides:

If trust property of two and one-half acres or less *which is limited to and utilized for either a single one-family or a single two-family dwelling* is sold pursuant to the trustee's power of sale, no action may be maintained to recover any difference between the amount obtained by sale and the amount of the indebtedness and any interest, costs and expenses.



Michael B. Reynolds
714.427.7027
mreynolds@swlaw.com
vCard



Andrew V. Hardenbrook
602.382.6229
ahardenbrook@swlaw.com
vCard



Holly Renee Shilliday
303.634.2087
hshilliday@swlaw.com
vCard



Christopher H. Bayley
602.382.6214
cbayley@swlaw.com
vCard



A. Evans O'Brien
602.382.6360
eobrien@swlaw.com
vCard

Ariz. Rev. Stat. Ann. (A.R.S.) § 33-814(G) (emphasis added). The recognized legislative intent behind § 33-814(G) is “to protect certain homeowners from the financial disaster of losing their homes to foreclosure plus all of their nonexempt property on execution of a judgment for the balance of the purchase price.” *See Baker v. Gardner*, 160 Ariz. 98, 101, 770 P.2d 766, 769 (1988).

In 1991, the Arizona Supreme Court interpreted the scope of A.R.S. § 33-814(G) in *Mid Kansas Federal Savings and Loan Association of Wichita v. Dynamic Development Corp.*, 167 Ariz. 122, (1991) (*Mid Kansas*). There, a commercial homebuilder sought protection under A.R.S. § 33-814(G) after it defaulted on a construction loan. *Id.* at 124-25. Observing that “[t]here is a difference between property intended for eventual use as a dwelling and property utilized as a dwelling,” the Supreme Court held that, under A.R.S. § 33-814(G), trust property “is not utilized as a dwelling when it is unfinished, has never been lived in, and is being held for sale to its first occupant by an owner who has no intent to ever occupy the property.” *Id.* at 129. On that basis, the Supreme Court found that the subject property was not “limited to and utilized for” a dwelling because it had never been occupied. Consequently, the Court held that the lender could obtain a deficiency judgment against the homebuilder.

The *M&I v. Mueller* Decision

Factual and Procedural Background:

The facts of *M&I v. Mueller* are fairly straightforward. In 2006, the Muellers borrowed \$440,000 from M&I to construct a single-family residence on a vacant lot they owned. *Id.* at *1-2. The loan was secured by a deed of trust on the property. *Id.* After construction began, the Muellers discovered that the contractor was behind schedule and that much of the construction that had been completed was defective. *Id.* at *2. The Muellers requested advances on the loan disbursements from M&I to cure the construction defects. However, M&I did not disburse the additional funds. *Id.* Construction on the residence was never completed. *Id.* In September 2009, M&I commenced a non-judicial foreclosure of the property. *Id.*

After foreclosing on the property, M&I filed an action against the Muellers to recover a deficiency judgment for the difference between the amount the Muellers owed and the appraised value of the property prior to the foreclosure sale. *Id.* The trial court found that, as a matter of law, the Muellers were entitled to anti-deficiency protection under A.R.S. § 33-814(G) and dismissed M&I’s deficiency claim.^[1] *Id.*

Holding and Rationale:

The Court of Appeals affirmed the trial court’s ruling that the Muellers were entitled to anti-deficiency protection under A.R.S. § 33-814(G). In reaching this conclusion, the Court rejected M&I’s argument that it was entitled to a deficiency judgment under *Mid Kansas* since the Muellers did not complete construction on, or ever occupy, the home on the property. *M&I v. Mueller*, 2011 Ariz. App. LEXIS at *3. Instead, the Court found that because the Muellers, unlike the commercial homebuilder in *Mid Kansas*, “intended to live in the single-family home upon its completion,” M&I could not obtain a deficiency judgment against the Muellers. *Id.* at *4 (emphasis added). Thus, for the Court of Appeals, the fact that the property was not utilized as a dwelling was not dispositive. Instead, under the rationale of *M&I v. Mueller*,

A.R.S. § 33-814(G) protects a borrower who intends to reside in the trust property even if no one ever actually does so (assuming the other requirements of § 33-814(G) are also met).

Conclusion

M&I v. Mueller marks a significant departure from *Mid Kansas*. In particular, the decision expands the anti-deficiency protection of A.R.S. § 33-814(G) to properties that are never actually “utilized for ... a dwelling,” as the plain language of the statute appears to require. If upheld by the Arizona Supreme Court, *M&I v. Mueller* could significantly affect a lender’s ability to obtain a deficiency judgment where an individual borrower merely “intends” to occupy the property that secures the obligation, but never does so.

M&I appealed the Court of Appeals’ decision in *M&I v. Mueller* to the Arizona Supreme Court on February 23, 2012. As a result, lenders who could be affected by the decision have an opportunity to file an *amicus curiae* brief on the issues involved in the appeal. The Muellers’ response to M&I’s petition for review by the Arizona Supreme Court is due by March 29, 2012. Any *amicus* briefs are due within 21 days of that response.

Notes:

[1] The exact procedural posture of the case at the time of the dismissal is not clear from the decision. However, based on a review of the trial court’s docket, it appears that the court denied M&I’s motion for summary judgment and dismissed the case four months later. [\[back\]](#)

[Tweet](#)

Past Issues

Snell & Wilmer

Financial Services Litigation Group

©2012 All rights reserved. The purpose of this newsletter is to provide our readers with information on current topics of general interest and nothing herein shall be construed to create, offer or memorialize the existence of an attorney-client relationship. The articles should not be considered legal advice or opinion, because their content may not apply to the specific facts of a particular matter. Please contact a Snell & Wilmer attorney with any questions.

Snell & Wilmer L.L.P. | One Arizona Center | 400 East Van Buren Street | Suite 1900 | Phoenix, Arizona 85004
All rights reserved. The material in this newsletter may not be reproduced, distributed, transmitted, cached or otherwise used, except with the written permission of Snell & Wilmer L.L.P.