

New Arizona Court of Appeals Decision Adds Confusion to the Interpretation of the Anti-Deficiency Statutes

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In a new decision issued on December 27, 2011, the Arizona Court of Appeals held that Arizona's anti-deficiency statute applies to debtors who purchase vacant land **with the intent** to reside on the property upon completion of construction of a home even if they do not complete construction or actually occupy the property.

In *M&I Marshall & Ilsley Bank v. Mueller*, 1 CA-CV 10-0804, <http://azcourts.gov/Portals/89/opinionfiles/CV/CV100804.pdf> the debtors purchased a vacant lot on which they intended to construct a single-family home. The debtors borrowed approximately \$440,000 from M&I Bank to finance the construction. Many months into the construction the debtors experienced construction delays. The debtors defaulted on the note and M&I conducted a non-judicial [foreclosure](#) on the property. After foreclosure, M&I sued the debtors for the resulting deficiency. The trial court held that the debtors were entitled to protection under Arizona's anti-deficiency statute.

This seemingly is a change in Arizona law. The Arizona Court of Appeals distinguished its ruling from the twenty year old Arizona Supreme Court holding in *Mid Kansas Federal Savings & Loan Association of Wichita v. Dynamic Development Corp.*, 167 Ariz. 122, 129, 804 P.2d 1310, 1317 (1991). In the *Mid-Kansas* case, a commercial builder sought protection under the anti-deficiency statute after defaulting on a loan on partially constructed homes. The Arizona Supreme Court held that the anti-deficiency statute did not protect the debtor in *Mid Kansas*. The court specifically stated that debtors are not entitled to the protections of the anti-deficiency statute where property cannot be utilized as a dwelling, is unfinished, has never been lived in, and the owner has no intent to ever occupy the property.

In citing the *Mid-Kansas* decision, M&I argued that the debtors were not entitled to the protections of the anti-deficiency statute because the residence was never constructed and therefore never utilized as a single family home. The Court of Appeals distinguished the *Mid Kansas* decision finding that when a lot is purchased by a debtor who intends to personally occupy the property, the anti-deficiency statute applies. The issue of the debtors' intent trumped that construction of the residence was not complete and the debtors never occupied the property.

While we anticipate that this case will be eventually heard by the Arizona Supreme Court, in the interim we surmise that this will be raised as a defense to anti-deficiency actions by debtors that have construction loans which have been foreclosed on. At issue will be the debtor's intent. We will provide updates to you.

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