

D.C. Circuit Vacates FCC's (Federal Communications Commission) Net Neutrality Rules

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In a recent opinion, the Arizona Court of Appeals held that borrowers who obtained a **loan secured** by a vacant, unimproved residential lot are not protected from a deficiency judgment following a non-judicial trustee's sale of the property, when no construction activity of any kind has occurred before the trustee's sale. This decision provides additional guidance on the scope of the anti-deficiency statute. It also illustrates the uncertainty that lenders and borrowers continue to face in determining whether the anti-deficiency statute applies.

Background

A.R.S. § 33-814(G) protects certain borrowers from a **deficiency judgment** in the event the proceeds of a foreclosure sale are lower than the loan balance. The protection extends only to a property of two-and-a-half acres or less "which is limited to and utilized for either a single one-family or a single two-family dwelling." A finished property being used as a dwelling falls within the "limited to and utilized for" language, even if the property is used primarily for investment purposes. See, e.g., *N. Ariz. Properties v. Pinetop Properties Group*, 151 Ariz. 9, 12, 725 P.2d 501, 504 (App. 1986) More recently, the Arizona Court of Appeals held that borrowers whose residence was under construction at the time of foreclosure and who intended to occupy it upon its completion could not be subject to a deficiency judgment. See *M & I Marshall & Ilsley Bank v. Mueller*, 228 Ariz. 478, 268 P.3d 1135 (App. 2011).

The Arizona Court of Appeals Holds That Owners of Unimproved Residential Lots Can Be Subject to Deficiency Judgments

The Arizona Court of Appeals recently revisited the anti-deficiency statute in *BMO Harris Bank N.A. v. Wildwood Creek Ranch, LLC*, No. 1 CA-CV 12-0728, 2014 WL 177540 (Ariz. App. Jan. 16, 2014). In that case, the borrowers obtained a refinancing loan that was secured by a deed of trust on an unimproved, vacant residential lot. Following the borrowers' default and a trustee's sale, the lender sought a deficiency judgment. No construction had ever taken place on the lot, and it remained

vacant and unimproved at the time of the trustee's sale.

The borrowers put forward evidence that they intended to build a single-family dwelling on the property. Citing *Mueller*, the borrowers argued that their intention to build and occupy a qualifying residence on the property brought it within the scope of the anti-deficiency statute. The superior court agreed and granted summary judgment in favor of the borrowers.

The court of appeals reversed, holding that the plain language of the statute precluded its application to vacant, unimproved lots. The court relied on the “plain and unambiguous” meaning of the word “dwelling” to mean “a shelter . . . in which people live.” A vacant lot could not, in the court's view, be properly characterized as a dwelling. The court distinguished *Mueller*, noting that construction of a dwelling had actually begun in *Mueller*, but there was no improvement to the land in this case. Therefore, because the property was not “utilized for” a “dwelling” under the statute, the borrowers did not receive anti-deficiency protection.

Conclusion

Recent appellate decisions have supported a broad reading of the “limited to and utilized for” language in A.R.S. § 33-814(G). *Wildwood Creek Ranch* provides additional guidance on the scope of that language when there has been no improvement to the land at issue. However, as Judge Kessler noted in his special concurrence, there remains uncertainty in the law when improvements have begun but are incomplete—namely, how much of the dwelling must be constructed before a creditor is precluded from obtaining a deficiency.

Judge Kessler suggests a “totality of the circumstances [approach] to see if the debtor intended the structure under construction to be utilized as his or her dwelling,” suggesting a fact-intensive inquiry. Although Judge Kessler's concurrence is not binding, trial courts may follow his approach. If they do, they may look to factors like: (1) the extent of construction undertaken before the foreclosure; (2) whether the borrower stated in loan documents that the property was to be used as a residence; and (3) whether the borrower purchased a single parcel, or more than one. Based on the facts of individual cases, other factors may also be relevant. For example, *Wildwood Creek Ranch* also leaves open the question whether anti-deficiency protection applies if construction has not begun but the subject loan is a construction loan obtained for the purpose of building a single-family dwelling.

Notably, in an unpublished decision issued last year, a different panel of the Arizona Court of Appeals held that, although the borrower had not yet begun construction on the dwelling, the anti-deficiency statute applied based on evidence that the borrowers intended to use the to-be-constructed home as their residence upon completion. See *Whitmor Capital Management v. Park*, No. 1-CA-CV 12-0719, 2013 WL 3516175 (Ariz. App. July 9, 2013).

Lenders and borrowers should consider how this recent decision affects their existing and prospective lending relationships and collection activities.

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