



FINANCIAL SERVICES LITIGATION BULLETIN

September 2011

Schayes Shows the Way: Federal District Court for the District of Arizona Holds That Notice of Trustee's Sales and Substitutions of Trustees are Not Actionable Under A.R.S. § 33-420.

By Rick Herold and Mike Coccaro

Defaulting homeowners continue to flood Arizona courts (federal and state) with foreclosure-delay lawsuits alleging a variety of legal theories while admitting their default on their promissory note(s). Plaintiffs have shown great versatility and alleged claims running the gamut from ancient claims – such as claims of champerty and barratry – to new claims such as seeking to establish a private-right of action under the Home Affordable Mortgage Program. Plaintiffs have sought to avoid foreclosure by alleging the "vapor money theory" – the claim that financial institutions do not loan "real money" – and the thoroughly debunked "show me the note" claim whereby plaintiffs contend that a trustee's sale may not proceed absent production of the "original, wet-ink signature" on the promissory note and deed of trust. Financial institutions' well-articulated defenses to these claims have allowed the courts to see such claims as frivolous.

Undeterred, plaintiffs have adapted and recently began filing foreclosure-delay lawsuits alleging that the recordation of the (1) assignment of the beneficial interest in a deed of trust, (2) notice of substitution of trustee, and/or (3) notice of trustee's



Joel P. Hoxie
602.382.6264
jhoxie@swlaw.com



Barbara J. Dawson
602.382.6235
bdawson@swlaw.com



Jennifer H. Dioguardi
602.382.6371
jdioguardi@swlaw.com



Gregory J. Marshall
602.382.6514
gmarshall@swlaw.com



Cynthia L. Alexander
702.784.5234
calexander@swlaw.com



Richard H. Herold
602.382.6223
rherold@swlaw.com



Michael J. Coccaro
602.382.6444
mcoccaro@swlaw.com

sale itself violates A.R.S. § 33-420, Arizona's false recording statute. Frequently, plaintiffs attempt to find some typographical error in these documents and use it to claim that it is a "false" document subject to liability under A.R.S. § 33-420.

In a recent opinion dismissing a case from Federal District Court, Judge Neil Wake demonstrates that a strong defense to these claims is that none of the documents "assert" or "create" a "claim" of "interest in, or lien or encumbrance against, real property" as required by A.R.S. § 33-420 and, therefore, the allegations fail to state a claim upon which relief can be granted. *See Schayes v. Orion Financial Group*, Case No. CV-10-2658-PHX-NVW, 2011 U.S. Dist. LEXIS 82402 (D. Ariz. July 27, 2011).

In *Schayes*, the plaintiffs brought a claim under A.R.S. § 33-420, which imposes liability for recording false or forged documents or failing to remove them from the public records. A.R.S. § 33-420(A) provides:

A person purporting to **claim an interest in, or a lien or encumbrance against, real property**, who causes a document asserting such claim to be recorded in the office of the county recorder, knowing or having reason to know that the document is forged, groundless, contains a material misstatement or false claim or is otherwise invalid is liable to the owner or beneficial title holder of the real property for the sum of not less than five thousand dollars, or for treble the actual damages caused by the recording, whichever is greater, and reasonable attorney fees and costs of the action.

(emphasis added).

In *Schayes*, the plaintiffs argued that Mortgage Electronic Registration System, Inc. (MERS) and a non-party violated A.R.S. § 33-420 by causing the recordation of two substitution of trustee documents and two notices of trustee's sales. *Schayes* at *15-16. The plaintiffs argued that these notices were "false" under the guise of A.R.S. § 33-420 because MERS identified itself as the beneficiary under the Deed of Trust. MERS moved to dismiss for failure to

state a claim. *Id.* at *16.

Schayes reasoned that, assuming MERS did make a false statement – which was not clear given that MERS was the nominee for the beneficiary – "there is no liability under the statute because assignments of mortgages and notices of trustee's sales are not 'document[s] asserting a 'claim [of] interest, in, or lien or encumbrance against[] real property.'" *Id.* at *16. This requirement, that the document in question asserts a claim or interest in real property, is consistent with the legislative history of A.R.S. § 33-420 providing the purpose of the statute is to "establish liability for filing any document purporting to create a lien against real property, which is forged, groundless, contains a material misstatement or false claim or is otherwise invalid" and to impose damages, attorneys' fees and costs against one "who purportedly has an interest in property which attaches as a result of the lien and who willfully refuses to release the lien document of record on request of the owner of the real property affected." See April 8-9, 1981 Minutes of the Committee on Commerce & Labor, Arizona State Senate Thirty Fifth Legislature First Regular Session); *accord*, *Richey v. Western Pac. Dev. Corp.*, 140 Ariz. 597, 600, 684 P.2d 169, 172 (App. 1984) ("Liability under A.R.S. § 33-420 attaches when a groundless document purporting to claim an interest in real property is filed in the county recorder's office").

Schayes, citing four different Arizona opinions, explained that "the allegedly offending recordation is *always* some sort of document purporting to *create* an interest, lien, or encumbrance, such as a *lis pendens*, mechanic's lien, or the deed of trust itself." *Schayes* at *16-17 (emphasis added). *Schayes* noted the notice of trustee sale and substitution of trustee are not documents "asserting" an "interest in" or "lien or encumbrance against real property." *Schayes* noted that it could "locate no authority applying [A.R.S. § 33-420] to assignments of mortgages and notices of trustee's sale" and therefore dismissed the claim. *Id.* at * 17.

Financial institutions facing claims for alleged violations of A.R.S. § 33-420 should look to *Schayes* to determine if the documents which allegedly support the claim assert an interest in, or a lien or against, real property or, if like the documents in *Schayes*, they do not and are subject to a viable

motion to dismiss.



[Tweet](#)

Past Issues
Commercial Litigation Group
Snell & Wilmer

©2011 All rights reserved. The purpose of this newsletter is to provide 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.
