Snell & Wilmer

FINANCIAL SERVICES LITIGATION BULLETIN

December 2011

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

Lenders Not Required to Record Trust Deed Assignments, says the Arizona Supreme Court

By Greg J. Marshall and Andrew V. Hardenbrook

With lawsuits challenging trustee's sales continuing to flood Arizona courts, the Arizona Supreme Court accepted a rare request by the Bankruptcy Court to consider whether lenders must record deed of trust assignments prior to noticing a trustee's sale. After considering several *amici curiae*, including one filed by the Arizona Attorney General, the Arizona Supreme Court answered unanimously in *Vasquez v. Saxon Mortgage Inc.*, No. CV-11-0091-CQ (Ariz. Nov. 18, 2011), that lenders are not required to record assignments prior to noticing a trustee's sale.

The Case Below

Vasquez executed a note in September 2005 in favor of Saxon Mortgage secured by a deed of trust naming Saxon as the beneficiary. Thereafter, Saxon assigned the note by endorsing it in blank to Deutsche Bank National Trust Co., as trustee for a securitization, but the assignment was not recorded in the local, public land records. Vasquez subsequently defaulted under the note and Deutsche noticed a trustee's sale of the


Cynthia L. Alexander
702.784.5234
calexander@swlaw.com


Richard H. Herold
602.382.6223
rherold@swlaw.com


Michael B. Reynolds
714.427.7027
mreynolds@swlaw.com


Andrew V. Hardenbrook
602.382.6229
ahardenbrook@swlaw.com

property securing it. More than a month later, Saxon executed an assignment of the deed of trust in favor of Deutsche, which purported to be retroactive from before the notice of trustee's sale notice was signed.

Before the trustee's sale, Vasquez filed for bankruptcy protection. Deutsche moved for stay relief, so it could proceed with the trustee's sale. Vasquez opposed stay relief arguing, among other things, that Deutsche was not the named beneficiary under the deed of trust when the trustee's sale was initiated. The Bankruptcy Court then certified two questions to the Arizona Supreme Court:

> (1) Is the recording of a deed of trust assignment required before noticing a trustee's sale? and
>
> (2) Must the deed of trust beneficiary have the right to enforce the note?

The Court was not asked to consider whether the recorded assignment could be given retroactive effect, an increasingly common practice and a question at least one Arizona District Court has answered in the affirmative. *Nichols v. Bosco, et al.*, CV-10-01872-PHX-FJM, 2011 U.S. Dist. LEXIS 22564, at * 13 (D. Ariz. Mar. 3, 2011) (noting that "other courts have rejected claims for wrongful foreclosure on the basis of backdating, and instead have utilized the effective date of assignment") (citations omitted).

The Decision

While recognizing the "human costs attendant to home foreclosures," the Court recognized its duty was one of statutory construction as Arizona's nonjudicial foreclosure scheme is a "creature of statute."

The Court examined the statute governing trustee's sales, A.R.S. § 33-808, and noted that it does not impose any requirement to record an assignment before the trustee's sale is noticed. The absence of such a requirement is not surprising, as the purpose

of Arizona's recording statutes is to protect property interests against claims of subsequent purchasers for value without notice, not to "shield the original obligor on a deed of trust from a trustee's sale." Indeed, finding such a requirement would be inconsistent with the law that "[u]nrecorded instruments, as between the parties and their heirs … shall be valid and binding," irrespective of whether assignments are recorded. *See* A.R.S. § 33-412(B). Arizona law also provides that the transfer of a note operates to transfer automatically the deed of trust securing its performance, *see* A.R.S. § 33-817, and so Arizona law requires no separate documentation of the assignment at all, much less a recorded assignment.

Nonetheless, the Arizona Attorney General, appearing *amicus curiae*, argued that recording an assignment is necessary to give effect to the recently enacted A.R.S. § 33-807.01, which generally requires lenders to "explore options" with borrowers before noticing a trustee's sale. Without such a requirement, argued the Attorney General, borrowers would not know with whom to "explore options." The Court observed, however, that Section 33-807.01 requires lenders to contact borrowers, not the other way around. Regardless, the 2009 amendments to the Truth in Lending Act requiring notice of note transfers to borrowers would make such a requirement duplicitous of what federal law already requires of lenders. *See* 15 U.S.C. § 1641 (g).

While a second question was certified – whether the deed of trust beneficiary must also have the right to enforce the note? – the Court declined to answer it. The facts presented established that Deutsche was the note's assignee, so answering the second question would not be case determinative.

Looking Forward

While the Arizona Supreme Court's decision provides finality to a narrow legal issue, it will probably have little effect stemming the tide of mortgage default-

fueled litigation. Attempting to block or unwind trustee's sales, borrowers often point to defects in the notice of assignment itself, or perceived inconsistencies between assignment notices and the notice of substitution of trustee and notice of sale, as they attempt to secure judicial scrutiny over what was intended to be an inexpensive and expeditious nonjudicial process. In addition to endorsing a strict statutory construction analysis, perhaps the import of *Vasquez* will be that lenders and their trustees will cease the practice of recording assignments, thus depriving borrowers the opportunity to use these perceived discrepancies as a basis to block or unwind valid and lawful trustee sales.

Past Issues
Financial Services Litigation Group
Snell & Wilmer