

SOMETHING NEW ON THE ARIZONA ANTI-DEFICIENCY FRONT FOR CONSTRUCTION LOAN FORECLOSURES

By: [Valerie Marciano](#)

A recent Arizona Court of Appeals case has clarified residential construction loan deficiencies by including certain residential construction loans under the Arizona anti-deficiency statute protection. Arizona homeowners, for the most part, are protected from their home mortgage lenders attaching other assets such as the cash in the bank, vehicles and jewelry following a foreclosure or trustee sale of their home. The lender is left to recover the residence and that is all. Aside from very certain circumstances such as when the homeowner damages the residence, the "anti-deficiency protections" have safeguarded Arizona homeowners for more than 25 years. One of the key requirements of Arizona's law is that the residence must be located on 2 1/2 acres or less and be limited to and utilized for a single one-family or two-family dwelling.

From 2004 to 2006, lenient lending requirements made it possible for many people to purchase a residence or to obtain funding for the construction of a residence. Some of those loans were obtained under false pretenses for the purpose of using the residence as an investment to rent to a third-party or to resell the residence to an end-user, commonly known as flipping. Such loans were not obtained for the purpose of buying or building the residence for the borrower to actually live in as the borrower's primary residence.

However, many borrowers obtained a loan to build a residence with the intended purpose of using the to-be-constructed residence as the borrower's primary residence. Frequently, the homeowner would continue living in their existing residence while the new residence was under construction. With the housing crash at the end of 2006, many of those borrowers were either unable or chose not to continue paying the construction loan for the residence that was still being built. Many of the construction projects stalled, uncompleted. Lawsuits most certainly followed. These borrowers faced the possibility that they would be found liable for the balance of the construction loan as the loans did not clearly fall under Arizona's anti-deficiency protection.

A recent Arizona Court of Appeals case, *M&I Marshall & Ilsley Bank v. Mueller*, has changed the landscape for both home construction lenders and their borrowers, at least when it comes to partially constructed residences **in which the borrowers had the intent to live**. The Arizona Court of Appeals agreed with the lower trial court and found that the borrowers, the Muellers, are protected by the "anti-deficiency laws" even though the residence was only partially constructed and had never been lived in by the Muellers. The Muellers had purchased the property with the intent of occupying the dwelling upon completion. It is unknown whether the bank will appeal the decision to the Arizona Supreme Court. If an appeal is taken, then the Arizona Supreme Court will have the final say on the issue.

If you are facing foreclosure on a construction loan, we recommend that you seek legal counsel as you may have protection under Arizona's anti-deficiency statutes.

About the author: [Valerie L. Marciano](#) is an attorney at the Phoenix law firm of [Jaburg Wilk](#). She assists clients with [real estate](#), [foreclosure](#), [bankruptcy](#) and [litigation](#) issues. Val frequently writes on Arizona's foreclosure and anti-deficiency statutes and is a board member of AZCREW - Arizona's premier commercial real estate professional association for women. Val can be reached at 602-248-1025 or vlm@jaburgwilk.com.

This article is not intended to provide legal advice and only relates to Arizona law. It does not consider the scope of laws in states other than Arizona. Always consult an attorney for legal advice for your particular situation. This policy is written based on Arizona law for Arizona employers.