Trustee Times

Arizona Trustee Association

Summer 2001

Is There More Than One Power of Sale?

By Chris McNichol

Most trustee's sales involve a deed of trust which encumbers only one defined piece of real property. However, deeds of trust occasionally encumber multiple parcels, perhaps even in different Arizona counties.

In those circumstances, can the beneficiary foreclose on less than all of the trust properties at one time and still preserve a power of sale under the deed of trust for use later with the remaining properties?

The trustee's sale statutes are not crystal clear on the point. Language in the post-trustee's sale deficiency provisions recognizes, at least implicitly, the possibility of multiple sales under one deed of trust:

If a trustee's sale is a sale of less than all of the trust property or is a sale pursuant to one of two or more trust deeds securing the same obligation, the ninety day time limitations of subsection A of this section shall begin on either the date of the trustee's sale of the last of the trust property to be sold or the date of sale under the last trust deed securing the obligation, whichever occurs last.

A.R.S. § 33-814(B) (Emphasis Added). This provision suggests that different parcels secured by the same deed of trust may be foreclosed at different times, presumably by way of multiple trustee's sales.

However, other provisions in the trustee's sale statutes could be interpreted to the contrary. In particular, A.R.S. § 33-810(A) provides for the trustee to conditionally sell the trust property in known divisions of the trust property and, in addition, to conditionally sell the trust property "as a whole". The implication is that the entirety of the trust property secured by the deed of trust must be offered at the trustee's sale, although this could as well be interpreted as meaning only the property described in the notice of trustee's sale itself.

Of course, even if multiple sales would be allowed, the trustee's sales can only occur so long as there is still an outstanding obligation secured by the deed of trust. Thus, for instance, the anti-deficiency statute may come into play if one of the properties secured by the deed of trust is a residence. Equitable concepts such as marshalling of assets may also affect a foreclosure process involving multiple pieces of collateral.

As with many issues under the trustee's sale statutes, the prudent course is to communicate with the relevant title company prior to initiating a course of action in enforcing a deed of trust which requires multiple trustee's sales.

In this edition

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The ATA is a non-profit corporation devoted to serving the needs of Trustees and related industries. For membership information contact Paul Rhodes at (602) 414-0017.

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President's Message

by Earl Berg

First of all, I want to thank everyone for your confidence in me by electing me to serve this first year of the new millennium. I hope I measure up to the standards established by my predecessors, Chris, Brenda, Dave, Steve, Pam and all of the others who served before me. I will certainly do my best.

There are several things I hope we can accomplish this year. Number one on the list is to reemphasize the "Trustee" in the Arizona Trustee Association. In other words, focus on the purposes for which the ATA was founded. To do that, the Board of Directors hopes to appoint a committee of volunteers to do a detailed review and analysis of our By Laws to determine what, if any, changes need to be made to enhance the functioning of the ATA. Anyone interested in serving on this committee please contact me as soon as possible. Don't worry, we're not going to make changes just for the sake of change because I definitely subscribe to the adage of "if it ain't broke, don't fix it!"

We also need to tweak the Deed of Trust statutes a bit to clarify and correct portions of them. The Legislative Committee will begin work soon on drafting a bill to do that for introduction during the 2002 session of the Legislature. The changes contemplated will be relatively minor and focus on clarifying some of the ambiguities contained in the current statutes..

As many of you already know, the first Convention of the new millennium will be in Tucson. Joe Tajc has volunteered to chair the Convention Committee. Mary Wendel has graciously agreed to lend Joe the benefit of her expertise and assist him over the rough spots. They will welcome all the help they can get, so please contact Joe or Mary and volunteer to serve on the Convention Committee. In conjunction with that, Star McGowan is contributing her time and talents to chair the Education Committee. Star has lots of good ideas for speakers for the luncheons and the Convention but she would also appreciate all the help and ideas you can give her so please call her. Both of these Committees are the backbone of the ATA, so let's all support them as much as we can.

All in all, 2001 looks to be a good year for the ATA with lots of work to be done.

Ask The Titleman Q&A

by John T. Lotardo, Attorney-at-Law

***Q.** I am trying to sell property for the second time. The first time, I sold the property to a buyer for whom I carried back a deed of trust. He did not even make the first payment. Rather than go through a foreclosure, I allowed him to deed the property back to me. Now that I am selling the property a second time, the title company is requesting that I obtain an affidavit signed by the first buyer, which is called an "estoppel affidavit". Since I know where the buyer works, it is easy enough to locate him. But what is an estoppel affidavit and why do I need to get one when the first buyer already deeded the property back to me?*

A. An estoppel affidavit is an affidavit signed by a party affirming certain facts or circumstances. In your instance, the affidavit is most likely being used to confirm the circumstances of the transfer of the property back to you from the buyer. The affidavit will have the buyer affirm that he was not coerced or forced to deed the property against his will and that their was appropriate "consideration' given to the buyer in exchange for him to deed the property back to you. That "consideration" refers usually to the possible equity the buyer may have in the property. This type of affidavit is used to prevent the buyer from later saying he was tricked or forced into deeding the property back. The buyer would be "stopped" from asserting such claim because he had made the statements in the affidavit.

It may seem redundant to you that the title company is requiring you to go back to the original buyer for an additional document to be signed. I know that getting your first buyer to execute something additional is awkward. However, you are fortunate enough to be able to locate him without a great deal of effort. Many times the previous buyer is never to be found again after they sign the deed returning the property back to the original owner.

In addition, you should be cautious when accepting property back from a delinquent buyer. Why? Once you receive the property by way of a deed rather than foreclosing under your deed of trust, you accept the condition of title as it is. That means that if there are any other mortgages, liens, judgements, etc. recorded, the property remains encumbered by them. If the buyer had a judgment recorded against him or if he encumbered the property with another deed of trust, your claim to the title would be subject to those items. That is why it is important to know the condition of the chain of title before you accept the property back by way of deed.

***Q.** I am furious! Once again, I received nothing for a judgment I had against a client who refused to pay my commission. Without going into the latest story, I sued an ex-client for commissions owed. I won the lawsuit and got a judgement. When tried to collect on it, she filed bankruptcy claiming destitution. I even recorded the judgement in the County records, but I have been told that I can't get anything from that either. My attorney says that there is nothing I can do. Is that true?*

A. Unfortunately, you are probably out of luck. Most judgements are wiped or "discharged" in the typical Chapter 7 bankruptcy. Some judgements which are not wiped out (nondischarged) are judgments which are based upon fraud. Therefore, unless your judgment was based on fraud, or some other nondischargable debt, the judgment would be wiped out. Recording your judgment was a smart move because it turned your judgment into a judgment lien on all real property that the debtor owns in the County. However, the debtors homestead is generally protected from judgment liens.

This dilemma regarding the onslaught of bankruptcy filing is being addressed by the Legislation. The U.S. Congress is attempting to revamp the rules regarding bankruptcy. If completed, it would be the most complete revision in twenty years. It will make it harder for people just to file a liquidation bankruptcy. There is a

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EXCESS PROCEEDS CIVIL ACTIONS

Do the statutory procedures still work?

By Chris Perry

The excess proceeds statute, ARS §33-812, was amended in 1996 to clarify the procedures used in civil actions filed in the superior court after a trustee elected to deposit the funds with the county treasurer. In 1996, excess proceeds cases were a relative rarity. When excess proceeds were generated, the average amount of the excess was small. The procedure, which is analogous to a motion practice, only requires mailing to the same parties and at the same addresses used by the trustee for mailing the Notice of Trustee's Sale. Requiring service of process, private investigator or skip trace specialists and alternative service by publication would be too costly and time consuming for the amount of money involved.

Real estate values have increased significantly the last few years, making excess proceeds cases more common. Further, the average amount of excess proceeds has risen. Excess sale proceeds of twenty, thirty or forty thousand dollars are not uncommon. In Maricopa County, a single person in the Treasurer's office is responsible for handling the deposits. It has almost become a full time job. A specific attorney in the Maricopa County Attorney's Office was also assigned to represent the Treasurer in these cases, and that attorney has similarly been overwhelmed.

The large amount of money at stake has created an industry of individuals who offer to obtain the excess proceeds for the party entitled to the proceeds, usually for a fixed percentage. Such contingency "finder fees" can be as high as 60%. Finder fees are specifically provided for in certain sections of the Arizona Revised Statutes. For example, the probate code allows for a finders fee when someone locates a lost heir in a probate case. Unfortunately, an examination of the status of title does not indicate whether a lien or interest is valid, still enforceable or against the foreclosed property at all. As a result, finders have offered to assist parties whose interest may not be valid, or whose priority is

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Ask The Titleman Q&A

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possibility that a need-based test or an ability-to-pay test would be used whereby a debtor who could pay a portion of his or her debts would be required to do so. We'll see what happens in the coming months.

John T. Lotardo is Vice-President and General Counsel for Stewart Title & Trust of Phoenix, Inc. and is a regularly featured columnist. In addition, he is a frequent speaker and presenter on all aspects of real estate- related topics. Have any questions for him? Send it to him at titleman@stewartaz.com. —

Arizona Court of Appeals Resolves Dispute Between Bankruptcy Court Decisions in Favor of Trustees and Servicers

by John D. Duncan and Michelle A. Mierzwa
Moss Pite & Duncan, LLP

In 1995, the Arizona Bankruptcy Court ruling in the case of In re Acosta shocked lenders, foreclosure trustees and bankruptcy attorneys doing business in Arizona. The Acosta court created an additional requirement for lenders and their foreclosure trustees to give actual notice of pending foreclosure sale dates to borrowers after their bankruptcy cases have been discharged or dismissed. The trustee sale of the property in Acosta was ordered rescinded by the court on the basis that the oral postponement announcements allowed by Arizona statutes deprived the bankruptcy debtors of their due process rights under the United States Constitution.

Michelle A. Mierzwa

The In re Acosta[1] ruling has been disputed by several subsequent Arizona bankruptcy cases and by the Ninth Circuit Bankruptcy Appellate Panel. Bankruptcy judges in the holdings of In re Stober[2], In re Andersen[3] and In re Nagel[4] have questioned the reasoning of the Acosta court in its creation of additional post-bankruptcy noticing requirements, not contained in the Arizona Revised Statutes governing non-judicial foreclosures, based on due process rights. At last, lenders and trustees defending Arizona state court wrongful foreclosure lawsuits can cite non-bankruptcy state court authority now that Kelly v. NationsBanc Mortgage Corporation (2000 Ariz. App. LEXIS 184) - has addressed the issue. The Kelly case is important to the foreclosure trustee industry in that it clarifies trustees' and lenders' notice obligations, and confirms that no additional notice of an existing or postponed foreclosure sale date must be given in Arizona to a borrower after a bankruptcy discharge or dismissal. Further, the Kelly case is important to lenders in that it states the borrower is not entitled to a full accounting of the loan prior to foreclosure, but only a statement under ARS 38-813(d) upon request.

John D. Ducan

The facts of the Kelly case are as follows. The Kellys defaulted on their monthly loan payments and their property tax and insurance premium payments beginning in 1995. Between 1995 and 1998, during the foreclosure process the Kellys filed three bankruptcies. While the bankruptcy stay was in effect, NationsBanc and its predecessors-in-interest postponed the scheduled sale date pursuant to ARS 33-810(B). When the Kellys' third bankruptcy was dismissed, the automatic stay was terminated, and NationsBanc conducted a trustee's sale of the subject property on the next scheduled sale date, September 28, 1998.

The Kellys filed a Complaint in Maricopa

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[1]181 B.R. 477 (Bankr. D. Ariz. 1995), [2]193 B.R. 5 (Bankr. D. Ariz 1996), [3]195 B.R. 87, 28 Bankr. Ct. Dec. 1279 (Bankr.App.Pan. Cir. 9 1996), [4]245 B.R. 675 (Bank. D. Ariz. 1999). -Michelle A. Mierzwa of Moss Pite & Duncan, LLP is admitted to the Bar in California, but successfully defended NationsBanc in the Kelly Appeal by appearance Pro Hac Vice upon approval of the Arizona Court of Appeal. Further, Moss Pite & Duncan, LLP employs Arizona counsel, Josephine Piranio in its El Cajon, California office.

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Superior Court alleging causes of action for Noncompliance with Statutory Requirements for Foreclosure Sale, Violation of Constitutional Rights in Foreclosure Sale and Request for an Accounting, mainly based on the statement of law in the In re Acosta case. NationsBanc brought a motion for summary judgment which was granted by the trial court. On appeal, the Kellys contended that the trial court erred in granting summary judgment because the facts showed they received no actual notice of the September 1998 foreclosure sale as required by In re Acosta, and that NationsBanc's partial accounting deprived the Kellys of their right to reinstate.

The Arizona Court of Appeals in Kelly thoroughly discussed In re Acosta and the subsequent bankruptcy cases addressing the Acosta holding. In In re Acosta, a trustee's sale noticed before the debtors' bankruptcy petition was orally continued pursuant to statute various times during the bankruptcy proceedings. The debtors' bankruptcy was dismissed and while a motion to reinstate the petition was pending, a trustee's sale of the debtors' residence was conducted. Although the Acosta court recognized that ARS 33-810(B) does not require direct or actual notice of a postponed sale to interested parties after the initial sale has been set, the court held that the Arizona statutory oral notice was insufficient to protect a debtor's rights in the property. Citing a high probability that the debtor would not realize a sale would be conducted so soon after discharge or dismissal, the court decided that the existing Arizona statutory provisions violate the due process requirements set forth in the United States Constitution, and the sale was voided.[5]

The Kelly court agreed with the decision in In re Stober, which heavily criticized Acosta:

In essence, Acosta judicially amends the Arizona statute to provide additional noticing requirements applcable only to debtors who had prevously filed a federal bankruptcy case. The Acosta opinion thus extends additional post-dismissal bankruptcy protection to former debtors, although the intent of 11 U.S.C. § 349 provides that the effect of a dismissal requires only a return to the status quo.[6]

Although based on slightly different facts, the Kelly court also cited the 1999 decision of the Bankruptcy Court in In re Nagel to support the proposition that the due process concerns in Acosta were unwarranted. The Kelly court stated that "once the initial notice of the trustee's sale is given in compliance with due process, the debtor is in a position to keep himself informed of the status of the matter." The Kelly court also adopted Nagel's holding that ARS 33-810(B) does not "involve the requisite nexus

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[5]*The same bankruptcy judge followed the Acosta ruling in In re Duncan, 211 B.R. 42 (Bank. D. Ariz. 1996).*

[6]*In re Stober at 10. See also the Ninth Circuit Bankruptcy Appellate Panel's reversal of the Acosta judge's order in a different case, which set aside a foreclosure sale that occurred on the date scheduled prepetition, but after the debtor's bankruptcy was dismissed. "Arizona law allows a foreclosure sale to be continued by public proclamation at the time and location of the previously scheduled sale. The statute requires no other notice, and makes no provision for notice upon the filing of an intervening bankruptcy." In re Anderson, 195 B.R. 87, 28 Bankr. Ct. Dec. 1279 (9th Cir. B.A. P. 1996).*

Gross Inadequacy of Sales Price Headed to Supreme Court

Written for the ATA by Dave Knapper

A case I have been handling for several months, In re Linda Lorraine Krohn, Case No. 00-10623-PHX-RTB, United States Bankruptcy Court, District of Arizona, Phoenix Division (which we discussed at our January, 2001 luncheon), is about to be certified to the Arizona Supreme Court.. Bankruptcy Judge Redfield T. Baum intends to ask the Supreme Court to decide whether or not he can set aside a trustee's sale for no other reason that the property at issue was sold for substantially less than its fair market value.

Yet, in Security Savings & Loan Association v. Fenton, 167 Ariz. 268, 269, 806 P.2d 362, 363 (App. 1991) review denied March 5, 1991, the Arizona Court of Appeals has already held that:

"The setting aside of a trustee sale for inadequacy of price has no basis in either Arizona case law or statue. Trustee sales are governed by A.R.S. 33-801 et seq., which statutory scheme is designed to provide expeditious foreclosure sales. LeDesma v. Pioneer National Title Insurance Co., 129 Ariz. 171, 629 P.2d 1007 (App. 1981).".

Hopefully, the Supreme Court will agree with the Court of Appeals. However, some contrary legal authority does exist. Specifically, relying upon Estate of Yates, 25 Cal.App. 4th 511, 32 Cal.Rptr. 53 (1994), and The Restatement (Third) of the Law of Property 8.3 (1997), the Debtor in the pending Chapter 13 is alleging that a trustee's sale may be declared invalid, if the price the property sold for was "grossly inadequate". In further support of her argument, the Debtor has also pointed out how sheriff's sales were set aside in Wiesel v. Ashcraft, 26 Ariz. App. 490, 549 P.2d 585, 588 (1976), Crossman v. Meek, 27 Ariz. App. 477, 556 P.2d 325 (1976), and Homecraft Corp. v. Finbres, Ariz. 299, 580 P.2d 760 (App. 1978), where property was sold at a price that shocked the conscience of the court.

But again, the Court of Appeals in Security Savings & Loan Association v. Fenton, has previously ruled that trustee's sales are to be treated differently than sheriff's sales.

It makes no difference whatsoever that this issue arises in the context of a Chapter 13. This is because State law determines the existence and extent of a debtor's property rights immediately preceding the filing of a bankruptcy. Butner v. United States, 440 U.S. 48, 55, 99 S.Ct. 914, 918, 59 L.Ed.2d 136 (1979), states:

"Property rights are created and defined by state law. Unless some Federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. Uniform treatment of property interests by both state and Federal courts within a state reduces uncertainty, discourages forum shopping, and prevents a party from receiving a windfall merely by… the happenstance of bankruptcy." (citation omitted).

Accord In re Harrell, 73 F.3d 28 (9th Cir. 1996). A debtor may not use the Bankruptcy Code to create an interest or right not existing under state law. See Moody v. AMOCO Oil Co., 734 F.2d 1200 (7th Cir. 1984); In re Redpath Computer Services, Inc., 181 B.R. 975, 979 (Bankr. D.

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Sales Price

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Ariz. 1995); 6A Norton Bankruptcy Law and Practice 2d 150:3; 9A Am. Jur. 2d Bankruptcy 1931.

The hammer fell at the auction sale, my client (the successful third-party bidder), tendered its bid amount, and the deed was executed. All these acts occurred prior to the initiation of the pending Chapter 13, and terminated the Debtor's interest in the real property. See A.R.S. 33-810(A). We therefore are arguing that Judge Baum can not resurrect the interest. The concept of property of the estate is not intended to enlarge a debtor's rights beyond those existing on the petition date. In re Dalton, 146 B.R. 460, 462 (Bankr. D. Ariz. 1992).

The Arizona Supreme Court is by no means obligated to follow Estate of Yates, because that is a California decision, and different States have different laws. Neither is the Supreme Court bound by The Restatement (Third) of the Law of Property because Arizona courts only follow the Restatement in the absence of Arizona law to the contrary. Jesik v. Maricopa County Com. College Dist., 125 Ariz. 543, 611 P.2d 547, 550 (1980); Martinez v. Woodmar IV Condominiums Homeowners Ass'n, Inc., 189 Ariz. 206, 208, 941 P.2d 218, 200 (1997).

Arizona courts have refused to read additional requirements into the deed of trust statutes. Kelly v. Nationsbanc Mortgage Corp., 337 Ariz. Adv. Rep. 42 (App. 2000) (filed December 26, 2000) (rejecting requirement of additional notice of trustee's sale held after dismissal of bankruptcy).

And, when our local bankruptcy courts have previously read additional requirements into the Arizona deed of trust statutes, such attempts to judicially amend those statutes have been held to be invalid. E.g., Kelly v. Nationsbanc Mortgage Corp., supra; In re Acosta, 181 B.R. 477 (Bankr. D. Ariz. 1995); In re Duncan, 211 B.R. 42 (Bankr. D. Ariz. 1997); In re Nagel, 245 B.R. 657 (D. Ariz. 1999); contra In re Stober, 193 B.R. 5 (Bankr. D. Ariz. 1996).

Unfortunately, neither is the Arizona Supreme Court bound by the Court of Appeals. The Supreme Court can uphold or overturn Security Savings & Loan Association v. Fenton as it pleases.

If the Arizona Supreme Court determines that trustee's sales may be set aside when properties are sold at a "grossly inadequate" price, then such will likely spawn a slew of lawsuits, and inject uncertainty in non-judicial foreclosures. It is therefore suggested that the ATA retain the services of legal counsel to file an amicus brief. The Supreme Court needs to know that much more is at stake here than just the subject property, the Debtor, and my client. —

Convention News

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As with every convention we hold, we are inviting attendees to provide sponsorships for various activities within the convention. These sponsorships go a long way towards defraying our costs and helping us provide you with the kind of convention you have come to anticipate. In exchange, we will announce your sponsorship at the convention and post an appropriate sign acknowledging it at or with the activity you sponsor. Your sponsorship will also be reflected in our program and on our main lobby welcoming sign. If you or your firm/company are interested in sponsoring an activity at this years ATA Convention in Tucson, please mark the activity on this flyer that you are interested in sponsoring and fax it to 520-795-9646 or reply to ataconvention@hotmail.com and we will call you with the details of your sponsorship and what you will be provided with.

Your support, as always, is greatly appreciated and contributes significantly to the overall success of our convention.

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Wednesday Party & Mixer	1,000	_____
Silent Auction	300	First American Lenders Advantage
Thursday Breakfast Buffet	250	_____
Thursday Luncheon	300	(paid) Title Guaranty Agency _____
Thursday Dessert Cart/Display	200	_____
Thursday Entertainment (Music)	600	Stewart Title of Tucson _____
Friday Breakfast Buffet	250	_____
Friday Luncheon	300	_____

Additionally, we will be holding a Vendor Fair all day on Thursday, September 13th. If you will be interested in setting up an exhibit and displaying your product, please let us know.
ATA Members - $100.00 Non-members - $150.00
Vendor Booths (as of 5/11/01)

Arizona Capitol Times
Title Guaranty Agecy

Notaries Should Review Their Procedures

By Barbara McDugald - Vice president and counsel Security Title Agency

This volume of (***Jane — insert name of your newsletter***) revisits the notarization process to refresh the memories of Notaries Public and those who use the services of Notaries Public. In the four-year interim between the grant of a notary commission and the renewal of a commission, a Notary may lose sight of the laws governing this office and the importance of strict adherence to the statutes and rules which are designed to protect both the Notary and the public.

The laws covering Notaries Public are found in ARS § 41-311 through 369. Sections
§ 41-351 through 369 cover electronic notarization and we will leave that discussion for another time. Instead, I will review the procedures that every Notary must consistently follow.

Protective words to remember *are reasonable precaution, ordinary prudence and intelligence*. Put them together in this question to yourself: "Did I use every reasonable precaution that a person of ordinary prudence and intelligence would use in making this decision?" If you can respond with a convincing "yes", you have shielded yourself. Use this question as a protective key, particularly when you are confronted with an unfamiliar situation. It will become a balm to your conscience.

Revisiting the Basics

Notaries Public perform the following notarial acts upon request:

- Take acknowledgments and give certificates of the acknowledgments endorsed on or attached to the instrument,
- Administer oaths and affirmations,
- Perform jurats (voluntary signature, in Notary's presence, taken under oath or affirmation of the truthfulness of the signed document),
- Perform copy certification.

Items one through eight below are not an exhaustive list of laws, but a few of the important musts.

1. See the signer face to face at the time of notarization. As Notary you are assessing the signer's identity, willingness and competence. A telephone call, no matter how convincing, will not suffice. In fact, an attempt to persuade you to act contrary to the face-to-face rule is a criminal act. Obvious as this seems, Notaries do find themselves in conflicting positions from time to time when a manager, friend or family member, for the sake of expediency, requests the notary stamp prior to the signature later on. Never do it. The risk far outweighs any personal consequences.

2. Identify the document signer with at least one current form of picture identification issued by a federal, state or tribal government. In addition to a photograph, the ID must have a signature and a physical description of the individual (including height, weight, and color of hair and eyes). "It's okay. She's my wife; I can vouch for it," is unacceptable identification. It is a stretch of the Statute you do not want to defend. And beyond that, you know better.

Certain identification variations are acceptable, however. If you, the Notary: (a) personally know the signer; (b) know a credible person who also knows the signer and that credible person provides an oath or

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Notaries

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affirmation of the signer's identity; or (c) have a credible person with proper identification who provides an oath or affirmation that he or she knows the signer, then you can accept the identification of the signer. But be thoughtful. This gets tricky if you are not clear on these variations. Visualize each situation in advance so that you are not questioning yourself when an actual identification anomaly arises.

Look carefully at the identification -- not a magnifying glass, of course; that is not expected but, be aware of the document presented. If it looks altered in any way, such as, the picture looks pasted on, the signature looks suspicious or information looks tampered with, hold out for another form of identification. Ask for a driver's license first. It is the most acceptable form of picture identification. Yes, it could be forged but, if it would be undetectable to a person of ordinary prudence and intelligence, you are shielded from liability.

The bottom line is, if the signer cannot provide a suitable piece of identification, do not notarize the document.

3. Access your signer's competence or capacity. If you are suspicious that the signer may not know what he or she is signing, ask the person if he or she understands the document and can explain its purpose. If you are not convinced by the explanation, do not accept the signature. Your responsibility is to uphold the terms of your oath; the signer's responsibility is to understand the purpose of notarization and comply with the regulations.

A foreign signer could be a problem. If the signer does not speak your language, and you do not speak the signer's language, it is impossible for you to be certain… of anything. And you NEED to be certain. An interpreter could be well meaning or not. Simply put, if you face this situation do not even attempt to go forward with it. Bow out politely with a simple explanation that the dialogue between you and the signer must be direct and comprehensible in a language you both understand.

4. Compare the ID signature against those by the same signer on other documents.

5. Ask the signer to write "NA" or ink-line through any spaces that do not apply, or could be used to add fraudulent information on the document being notarized, and then initial any such changes.

6. Count the pages, note the document title and the date of the notarial act, and for jurats (the "subscribed and sworn to" statement) assure that the document is signed in your presence immediately prior to notarization. Only with an acknowledgment can a signer affirm, in the presence of the Notary, that a previously signed document bears their signature.

7. Complete the journal entry before executing the certificate. Every notarial act must be recorded in the Notary's journal with :

- The date,
- A description of the document or type of notarial act,
- The printed full name, signature and address of each person for whom a notarial act is
- performed,
- The type of identity evidence presented to the notary,
- A description of the identification document, including its serial or identification number and its date of issuance or expiration,

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between the state and the [foreclosure] trustee as to constitute state action" to trigger the due process inquiry, as "a private deed of trust sale… does not constitute state action." Accordingly, the Arizona State Court of Appeals in Kelly declined to follow the errant holding in Acosta and upheld the trial court's granting of NationsBanc's summary judgment motion, despite the Kellys' challenges to the propriety and constitutionality of the notice of the trustee's sale.

The other issue on appeal in Kelly was whether the trial court erred in granting summary judgment as to the Kellys' cause of action requesting an accounting. In the trial court proceedings, NationsBanc alleged and provided evidence that it provided reinstatement figures pursuant to ARS 33-813(D)[7] and provided a three-year accounting of the payment applications and escrow disbursements on the loan after the Kellys' lawsuit was filed. The Court of Appeals agreed with NationsBanc that no statute requires that a full accounting be provided before a foreclosure sale as long as the lender complies with ARS §33-813(D). The Kelly decision is well reasoned and provides state appellate court authority to help trustees defend against many wrongful foreclosure lawsuits.

Bankruptcy Filing Facts

The number of individuals and business filing for bankruptcy fell for the second year in a row in 2000, according to data provided by the Administrative Office of the U.S. Courts. The total number of bankruptcies filed during 2000 was 1.25 million, down five percent from the 1.32 million filed in 1999, and down over 13 percent from the record high of 1.44 million on 1998. Filings in the fourth quarter of 2000 totaled 310,169, down three percent from the same period in 1999, though up slightly from 308,718 in the third quarter of 2000. However, many researchers have stated that they expect bankruptcy filings to increase by over 10 percent in 2001, and by over 20 percent in 2002.

Pending Chapter 11 Cases of Interest

The U.S. Bankruptcy Court ruled that class-action proofs of claim in the First Alliance Mortgage Company case filed on behalf of certain borrowers would be disallowed. The court's ruling was based on the failure of the class-action claimants to satisfy standards applicable to class certification, in addition to the unfairness to those borrowers who already had filed timely proofs of claim. First Alliance has been operating under Chapter 11 protection since March 23, 2000.

Bankruptcy Legislation

The House Judiciary Committee approved the "Bankruptcy Abuse Prevention and Consumer Protection Act" (H.R. 333) on February 14, 2001. The bill is virtually identical to the measure that was vetoed by President Clinton after Congress adjourned in December. Indications are that the Bush administration will sign the bill if presented in its current form.

The same bill is in the Senate as S.220 and is awaiting mark-up by the Senate Judiciary Committee. The committee is also expected to approve the bill. The new law will become effective 180 days after the date of enactment. It will not apply retroactively or to pending cases.

The House Judiciary Committee approved on February 14, 2901, a bill (H.R. 256) that would temporarily extend Chapter 12 bankruptcy protection to family farmers. The broader bill (H.R. 333) permanently extends Chapter 12, and will serve as the vehicle for the re-enactment of Chapter 12. It is expected to pass both houses in the near future. —

[7]ARS §33-813(D) allows a trustor to request "a good faith estimate of sums which appear necessary to reinstate the trust deed separately specifying costs, fees, accrued interest, unpaid principal balance and any other amounts which are required to be paid as a condition to reinstatement of the trust deed.

CIVIL ACTIONS

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too low to entitle them to any of the proceeds.

The greatest problem with the current procedure is that the mailing addresses used by the trustee may no longer be good. This would not be a significant problem, if only the proper party applied for the funds. The statute enables a judge to enter an order to any applicant if no other interested party files a timely response claiming a superior right to the funds. As a result, questionable applications are filed knowing there is a chance no one will respond. Further, multiple civil actions have been filed, each assigned to a separate judge, resulting in multiple orders. The Maricopa County Treasurer will only pay on the first order entered and presented to them. The Maricopa County Attorney does not currently track the case numbers with the deposits, so the various cases are usually not consolidated so a proper decision can be made.

There probably will not be a simple solution to what has obviously become a problem. Legislative changes are expensive. The problems seem to exist primarily in Maricopa County. A task force of judges and lawyers is being formed to determine if a local regulation for handling these cases can be created. —

Notaries

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• The fee, if charged.

If the Notary has personal knowledge of the signer, the Notary may retain a

paper copy of the notarized document in lieu of the above journal entries.

If an identified signer appears before the same Notary repeatedly within a

six-month period, that signer does not have to sign the journal subsequent times within that six-month period.

If you (or someone related to you by marriage or adoption) need notary services, use an unrelated notary — not yourself.

Remembering The Details

Keep your journal current. Keep only one journal at a time. Record notarial acts in chronological order. Include details beyond the required details if they seem pertinent. The notary journal is a mandatory requirement in Arizona. It is potential evidence in the future for the Notary and notarized parties. Your journal could be requested as evidence at any time.

Keep your journal for at least five years after the date of the final entry. In the event of the death of the Notary, resignation, failure to renew, or revocation of notary commission, all journals must be sent by certified mail to the county recorder in the Notary's county of residence.

Notify the Secretary of State, by certified mail with a personally signed letter, if you experience a loss or theft of your journal or seal. This must be done within 10 days of the event. If theft, notify law enforcement as well. Also notify the Secretary of State by certified mail if you have a change of address. Do this within 30 days of the change.

Use the required-by-law dark-ink, rubber stamp as your official seal. Though some states require an embosser, Arizona does not. Using one is an optional extra. If you notarize a document that will be sent to a state that requires embossers, you still do not need to use an embosser. You are required to follow only the laws of your own state. Our Constitution requires that states honor the official acts of every other state.

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2001

Committee Chairpersons

For information pertaining to any committee, please contact the person listed.

Convention Committee: Joe Taje 520-327-7373

Education Committee: Star McGowan 602-285-0250

Legislative Committee: Chris Perry 602-264-2261

Membership Committee / PR: Paul Rhodes 602-414-0017

Newsletter Committee: Jane Myrick 602-266-0275

Board Meetings: Earl Berg 602-224-5900
Meetings are held monthly and all members are invited to attend the board meetings.

Luncheons: Kathy Meyers 602-224-8537 The luncheon dates are provided in this newsletter.

Officers

President	Earl Berg	602-224-5900
Vice President	Terri Kaufman	602-279-9663
Secretary	Kathy Meyers	602-224-8537
Treasurer	Star McGowan	602-285-0250
Director	Chris Perry	602-264-2261
Director	Mary Wendel	602-434-5560
Director	Linda Rhodes	602-414-9928
Director	Brenda Melroy	602-667-1039

Notaries

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8. Assure that the proper language is used. Notarization language is legal and binding, therefore not flexible.

Remember that whatever notarial act you execute, "reasonable" care is your best defense. Know and obey every law. Be alert and cautious, keep a detailed journal, and enjoy your interesting commission. —

It is prudent to live above the law rather than at the level of the law.