

Arizona Court of Appeals Rejects The “Show Me The Note” Claim

A common litigation tactic used by Arizona borrowers is to claim that their original mortgage note must be produced before foreclosure proceedings are commenced on their property. Until recently, only the federal courts in the District of Arizona had issued opinions on this “show me the note” defense. The Arizona state Court of Appeals recently published its own decision rejecting the “show me the note” defense holding that the original note is not required to be produced before non-judicial foreclosure proceedings are commenced in Arizona.

In *Hogan v. Washington Mutual Bank*,¹ the borrower obtained a mortgage loan to purchase his property, which was secured by a deed of trust. After defaulting on the loan, the power of sale clause in the deed of trust was invoked and non-judicial foreclosure proceedings commenced. The borrower then filed a lawsuit against the originator and beneficiary of his mortgage loan claiming that the foreclosure proceedings could not proceed unless the original note was produced. The borrower argued that since the note is a “negotiable instrument” subject to the UCC, the beneficiary must prove that it is a “person entitled to enforce” the note by producing the original. A.R.S. § 47-3301.

In rejecting this theory, the Court explained that the foreclosure sale was not an action to enforce the note. Instead, the beneficiary was conducting the sale pursuant to the power of sale clause contained in the deed of trust. The Court noted that a deed of trust conveys “trust property to a trustee ... to secure the performance of a contract or contracts.” In contrast, a “negotiable instrument” under the UCC is an “unconditional promise or order to pay a fixed amount of money.” The Court concluded that the UCC does not apply to a deed of trust because a deed of trust is not an “unconditional promise” or an “order” to pay money. As a result, the Court held that presentation of the original note is not required to conduct a non-judicial foreclosure sale in Arizona.

The *Hogan* decision is significant as it is the first in Arizona to create binding state law precedent rejecting the “show me the note” defense.² In reaching its decision, the Arizona Court of Appeals cited to one of the leading Arizona District Court opinions concerning the “show me the note” defense, which was obtained by attorney Robert W. Norman, Jr., of Houser & Allison, APC. See, *Diessner v. Mortgage Elec. Registration Sys.*, 618 F. Supp. 2d 1184, 1185 (D. Ariz. 2009) *aff'd sub nom. Diessner v. Mortgage Elec. Registration Sys., Inc.*, 384 F. App'x. 609 (9th Cir. 2010). The attorneys of Houser & Allison, APC, are continually on the forefront of the legal issues facing the mortgage banking and loan servicing industry. If you need assistance in any litigation files addressing these issues, please contact Chris Blevins at cblevins@houser-law.com or Eric Houser ehouser@houser-law.com.

¹ *Hogan v. Washington Mutual Bank*, 1 CA-CV 10-0383, 2011 WL 3108343 (Ariz. Ct. App. July 26, 2011)

² The borrower has petitioned the Arizona Supreme Court for review of this decision; however, the Arizona Supreme Court has not yet granted or denied the petition.