I. Introduction

The United States housing bubble began to deflate in late 2006 and early 2007, and finally burst in 2008, laying bare the inadequacies of our nation's mortgage system. Arizona was particularly hard hit by the implosion. After years of housing industry growth, propelled by a lucrative construction sector and sky-rocketing home values, Arizona experienced the economic pangs of the very industry that had propelled the state to prosperity. As of September 2009, 17,807 Arizona households were in foreclosure, exposing one in every 150 Arizona homeowners to the immediate loss of their homes. In addition to rising foreclosure rates, home prices plummeted, and the difference between a homeowner's outstanding loan and home resale value drastically widened. In the current Arizona housing market, home prices are down by 45% and the difference owing after foreclosure generally exceeds $100,000. Thus, in the wake of an economic recession viewed by many as the “worst recession since the Great Depression,” homeowners stand to lose more than the roofs over their heads. Homeowners also confront the possibility of losing the remainder of their assets in a liability suit for any deficiency owing following foreclosure.

However, in Arizona, anti-deficiency statutes preclude lenders from seeking deficiency judgments against struggling homeowners, subject to certain qualifying conditions. Arizona enacted anti-deficiency legislation in the early 1970s in the midst of a larger movement to ensure consumer protection. Like other states that had successfully incorporated anti-deficiency protection into their mortgage law, Arizona sought to prevent artificial deficiencies and eliminate the added hardship of personal liability on homeowners. Yet, over the nearly forty years since enactment, Arizona's anti-deficiency statutes have financially shielded more than the individual homeowner. Speculative builders and commercial investors have used Arizona's anti-deficiency protection to divert the risk of loss of their real estate investments to lenders. The current housing crisis brought the problem to the forefront.

Thus, in 2009, the Arizona Legislature (the “Legislature”) attempted to preclude speculative builders and commercial investors from riding on the coattails of Arizona's anti-deficiency statutes by passing an amendment. Yet, the amendment was ambiguous, impractical, and questionably unconstitutional. Most importantly, the amendment threatened to harm the same individual homeowners the anti-deficiency statutes were designed to protect. As a result, the amendment was repealed soon after its passage. Nonetheless, the dilemma involving speculative builders and commercial investors did not disappear with repeal of the amendment, and the problem remains ripe for new legislation. Ensuring consumer protection as the Legislature originally intended by precluding deficiency judgments against individual homeowners is essential. However, Arizona's anti-deficiency statutes should be amended to achieve the Legislature's objective of barring speculative builders and commercial investors from profiting from the anti-deficiency statutes while simultaneously continuing to protect individual homeowners.
By learning from the flaws of the repealed amendment, and by incorporating language from other anti-deficiency statutes, the Legislature can achieve its objectives without risking the adverse effects of the repealed amendment. Part II examines the policy rationales underlying anti-deficiency protection and enumerates the benefits produced by anti-deficiency legislation. Part III canvases a variety of states' anti-deficiency statutes, explores the Uniform Land Security Interest Act's anti-deficiency provision, and provides an in-depth analysis of Arizona's anti-deficiency laws. Finally, Part IV critiques the repealed amendment and proposes a new amendment to accomplish the Legislature's goal of precluding speculative builders and commercial investors from profiting from Arizona's anti-deficiency protection without harming individual homeowners in the process.

*1022 II. Policy Rationales for Anti-Deficiency Protection

A mortgage financially secures a contract between a lender and a borrower, whereby the borrower makes an absolute promise to repay the mortgage debt, regardless of the borrower's personal circumstances. Anti-deficiency protection does not function to erase this contractual obligation: the lender retains its security interest in the home, and accordingly the right to foreclose in satisfaction of its outstanding debt. Instead, anti-deficiency protection functions to alleviate a heavy burden on the homeowner at a minimal expense to the lender under certain circumstances. The traditional mortgage contract is altered to a degree by precluding the lender from pursuing any deficiency remaining after foreclosure if the home sells for less than the debt owed under the loan. Thus, while anti-deficiency protection does slightly alter the original contractual obligation, as will be illustrated, the substantial benefits to the homeowner and the economy at large justifies such contractual alteration.

A. The Severity of the Economic Hardship on Homeowners Outweighs the Minimal Loss to Lenders

When a homeowner loses his home to foreclosure, such an event generally indicates that the homeowner has fallen upon rough times. A home is typically an individual's largest and most expensive asset, an investment an individual has made in his financial future. Generally, a homeowner does not rationally succumb to foreclosure unless facing extreme financial hardship more severe than the inability to make mortgage payments. Based on the importance of home ownership to an individual, it remains difficult to morally justify and rationalize the added imposition of personal liability on a homeowner above and beyond the loss of his home.

1. Personal Value of a Home

Home ownership serves a deeply personal purpose aside from economics. A home is more than a place where an individual resides: an individual forms roots in a home and derives a sense of self-worth and stability from home ownership. Accordingly, because “property rights in one's home are so inextricably intertwined with the individual's sense of self and well-being[,] . . . they are deserving of special protection.” Margaret Jane Radin defines a person's interest in his home as akin to personal property. Like personal property, a home is a non-fungible, irreplaceable good, the loss of which causes its owner “pain that cannot be relieved by the object's replacement.” As such, a home is more highly valued by the homeowner than its monetary worth is valued by lenders and cannot easily be replaced by another piece of property. Given that value is highly skewed in the homeowner's favor, special safeguards should be in place to ensure that a homeowner does not easily lose his home to repay a lender. Although anti-deficiency protection only applies post-foreclosure and does not prevent the forced sale of an individual's home, it is in line with the notion that owning a home is not a purely economic undertaking, but also encompasses human dignity and the basic right to decent housing. Additionally, the personal significance of home ownership weakens the argument that homeowners easily walk away from their homes when their mortgage debt exceeds the value of their homes. Homeowners who acquire a sense of self-worth from home ownership and feel deeply rooted to their homes are disinclined to leave, regardless of the amount of debt owing.

2. Unequal Bargaining Power, Lack of Borrower Expertise, and Non-Negotiable Loans
While no party wants to bear the burden of an economic crisis, lenders are much better equipped than individual homeowners to shoulder the risk of market decline. Nonetheless, the consumer-driven, free-market perspective takes the opposite approach. According to this perspective, homeowners stand as the more appropriate party to bear the risk of market decline because they are the party positioned to gain substantially from housing market growth. Under this perspective, shifting market risk to the lender would encourage homeowners to default when “times are hard” and would “make home mortgages less desirable investments, raise lending (and borrowing) costs, and cause secondary market purchasers to boycott mortgages originated in [states affording anti-deficiency protection].”

Yet, the consumer-driven, free-market perspective fails to take account of the realities of the mortgage lending system. First, lenders exert unequal bargaining power over borrowers. Most mortgages include set transactional terms, precluding borrowers from negotiating conditions, including the scope of deficiency liability. The mortgage lending industry as a whole sets these strict mortgage terms to facilitate the purchase of mortgages on the secondary market. As a result, there is a lack of meaningful competition among different mortgage lenders, and borrowers are faced with the same mortgage terms no matter where they go to obtain a loan. The mortgage lending industry is able to prevent negotiation and assign all of the risk to borrowers because the borrower as an individual has “no bargaining power, lack[s] expertise,” and has failed to “organize to negotiate mortgage terms effectively.”

Even if borrowers were in a position to negotiate, many borrowers are unsophisticated and unaware of the potential for liability following foreclosure. Borrowers may assume that losing their home by foreclosure ends their obligation under the loan. Yet, even sophisticated borrowers who understand the terms of their loan and the potential for liability are nonetheless at a disadvantage. “Homeowners have little ability to assess the present or future value of their purchases and no power to influence the regional market conditions.” Additionally, critics of anti-deficiency protection rest their argument on the premise that a borrower will automatically walk away from a home worth less than the amount owing. Just as many unsophisticated borrowers are unknowledgeable about deficiency liability in general, many other borrowers are unaware that several states provide some form of anti-deficiency protection. Of the borrowers who are apprised of protective anti-deficiency statutes, there still remains a disincentive to walk away: default and foreclosure blot a borrower's credit rating, posing serious consequences for the many borrowers who depend on consumer credit.

### 3. Lender Sophistication, Aid, and Access to Information

On the other hand, lenders, as the more powerful and sophisticated party to the mortgage transaction, can better ride out the consequences of market decline. Lenders have the tools to anticipate market conditions. For example, lenders have far greater access to market information, including the “short-term and long-term value of property in the local market.” Additionally, lenders have the protection of mortgage insurance. Many lenders require low-equity borrowers to purchase mortgage insurance policies. Unbeknownst to many borrowers, these insurance policies do not benefit the borrower in the event of foreclosure, but rather solely protect the lender. If lenders are truly concerned about the impact of anti-deficiency legislation, they can increase the role of mortgage insurance in the lending process.

Additionally, unlike individuals, large lending institutions are apt to receive government bailouts. The federal government's bailout of corporations deemed “too big to fail,” including the nation's largest mortgage institutions Freddie Mac and Fannie Mae, illustrates the government's proclivity to aid the lending industry.

### 4. Pressuring Responsible Lending

Moreover, shifting the risk of market decline to the lender by providing anti-deficiency protection for the borrower creates a more stable and responsible mortgage lending system. Applying pressure on lenders to limit loans to reflect actual home values...
and borrowers' financial capabilities produces more benefits than one. Lenders collect the full amount of the loan in the event of foreclosure when the sale itself fully covers the amount of debt owing. Moreover, when the borrower's loan is commensurate with his income and other financial obligations the borrower maintains the ability to make payments even when experiencing rough financial patches. Even if a borrower can no longer maintain mortgage payments, he can voluntarily sell the property, prevent foreclosure, and pay off the mortgage in full.

*1027 Recently, lenders have pursued overly aggressive marketing schemes, issuing loans to borrowers who are not financially positioned to take on the high level of debt placed at their disposal. Unfortunately, requiring larger down payments and more conservative lending practices may preclude these potential borrowers from obtaining mortgages and purchasing homes. However, the recent foreclosure crisis clearly illustrates the dangers of irresponsible, risky lending to ill-equipped borrowers. Sounder lending practices are necessary to ensure the integrity of the mortgage system. Curbing such lending behavior by providing borrowers with anti-deficiency protection in fact benefits lenders and the financial institution over the long-run by creating a more reliable and stable mortgage system.

B. Minimal Benefit to Lenders

Whether lenders even realize much from deficiency judgments to justify the effort and expense involved remains unknown. During the 1980's, lenders rarely expended the time and cost necessary to collect deficiencies. However, given the present housing crisis and the recent censure of lenders for irresponsible lending practices, deficiency judgments are likely to rise. Yet, it remains to be seen whether such action will be worth the cost and effort expended. Even if a deficiency judgment does produce a minimal monetary benefit to the lender, the benefit may not be worth the large expense and hardship to the individual homeowner.

C. Bolstering Regional Economic Recovery

During a recession, deficiency collection hampers regional economic recovery. A recession alone makes it less likely that consumers will make purchases and pump money back into the local economy. Adding deficiency liability to the equation amplifies the problem by further decreasing consumer spending and investment activity. Additionally, the secondary market now holds the majority of mortgages, deterring regional recovery. When deficiencies are indeed collected, they do not return to the hands of local lending institutions and creditors, but rather go straight to the investors holding the mortgages on Wall Street. With the loss of this infusion of capital, local lending institutions and creditors cannot resume lending activity, and the prospect of local economic recovery dwindles.

D. Preventing the Hazards of Bankruptcy

A struggling homeowner who has just lost his home to foreclosure and faces deficiency liability may have no other alternative but to file for bankruptcy. Bankruptcy is not only traumatic for debtors, but also hurts creditors and reduces the availability of credit. When bankruptcy filings rise, creditors raise interest rates for all consumers and lend more discriminately to borrowers. The recent economic crisis has created a flood of bankruptcy filings. In the first nine months of 2009, over one million debtors filed for consumer bankruptcy. This is the highest nine-month figure for consumer bankruptcies since 2005 when the Bankruptcy Code was amended, resulting in a rush of bankruptcy filings before the new amendment went into effect. As described in Part II.C, when credit becomes harder to obtain, spending activity and business growth slows, and the regional economy cannot rebound.

Whether a debtor files for Chapter 7 liquidation or Chapter 13 reorganization, unsecured creditors receive only limited, if any, repayment on their loans. Most Chapter 7 filings are no-asset cases, meaning the debtor has little or no assets to distribute to his unsecured creditors. Similarly, most Chapter 13 plans only repay a small fraction of the debts owing to unsecured
creditors. As a result, unsecured creditors gain little from the debtor's bankruptcy. Thus, pursuing a deficiency judgment at the expense of spurring the debtor to bankruptcy works to the detriment of these creditors.

*1029 On the other hand, secured creditors hold a security interest in the debtor's home and retain their lien despite bankruptcy. While a secured creditor is generally precluded from foreclosing until the automatic stay lifts and the debtor receives his bankruptcy discharge, the secured creditor can eventually foreclose on the home. Yet, there are instances where even a secured creditor can lose out. For instance, in a Chapter 13 bankruptcy, a debtor may “strip off” a wholly undersecured lien on the debtor's home. Essentially, if there is no equity in the home to cover even a portion of the secured creditor's lien, the debtor may seek to modify the undersecured lien and demote it to unsecured status.

Whether or not the lender stands to lose from the debtor's bankruptcy, bankruptcy should not be viewed as an easy way out for struggling homeowners. Bankruptcy is a demoralizing process for debtors who are reneging on their contractual promise to pay back their debts. Additionally, debtors should feel morally compelled to avoid bankruptcy, for “our credit-based economy cannot function if it becomes widely acceptable to use bankruptcy as ‘just another tool of financial management.’” Prohibiting deficiency collection in order to prevent consumer bankruptcies is necessary given the potential for bankruptcy to affect interest rates, credit accessibility, and societal attitudes about credit.

*1030 III. Legal Background

A. Historical Basis for Anti-Deficiency Protection

Anti-deficiency legislation was first enacted in response to the Great Depression. The high rate of foreclosure in the 1930s, coupled with abuses by creditors in pursuing deficiency judgments, led to the passage of foreclosure and anti-deficiency relief statutes. During the Great Depression, “[f]oreclosures were pervasive, and few had the courage or the capital to bid at foreclosure sales . . . [which] in turn, led to large deficiency judgments against [borrowers], resulting in the ‘complete ruin of the real estate mortgage debtor.’” Without viable competition at the foreclosure sale, the lender could bid low and “acquire the property for pennies on the dollar, sell the property on the open market at a much higher price, and then sue the borrower for the deficiency.” In this way, the lender would receive a “double recovery” at the expense of the borrower--selling the house for profit while simultaneously collecting on the deficiency.

California enacted anti-deficiency legislation and other foreclosure relief statutes to protect the struggling borrower in the wake of the Great Depression. North Carolina did likewise, while Arizona delayed passing anti-deficiency legislation until the early 1970s. The foreclosure crisis of the 1970s reemphasized the severity of deficiency liability on homeowners during hard economic times, and highlighted the potential for creditors to take advantage of borrowers' financial vulnerabilities to turn a quick profit. The National Conference of Commissioners on Uniform State Laws attempted to devise a national anti-deficiency provision to unify state mortgage law, but the provision was never successfully adopted by the states. Today, only a few states have far-reaching anti-deficiency protection statutes, while most provide at least some form of foreclosure relief.

B. State Survey of Anti-Deficiency Legislation

Most states have some form of anti-deficiency legislation, but only a few provide far-reaching anti-deficiency protection. California, North Carolina, and Arizona all have anti-deficiency statutes in the latter category, ensuring expansive protection for homeowners.

1. California
California was one of the first states to enact anti-deficiency legislation during the plight of the Great Depression. California enacted legislation for a number of interrelated reasons. First, California sought to prevent the overvaluation of land. Holding a lender accountable for overvalued property renders it less likely that the lender will offer a mortgage that exceeds the value of the home. Second, the state aimed to ameliorate the effects of foreclosure on homeowners by eliminating deficiency liability. By protecting a troubled homeowner from the additional burden of personal liability, the prospect that the homeowner will financially rebound and avoid bankruptcy greatly increases. Third, California intended to preclude “double recovery,” whereby a lender purchases the mortgaged home at foreclosure for a significantly reduced price and subsequently sells it for a substantial profit, meanwhile holding the debtor liable for the deficiency.

To achieve these goals, California enacted two generous anti-deficiency statutes. First, California's purchase money anti-deficiency statute (hereinafter section 580b), precludes a lender from pursuing a deficiency judgment “in any event after any sale” of real property secured by a purchase money loan, subject to qualifying conditions. The phrase “in any event” means section 580b prohibits a deficiency judgment whether the sale event occurs by means of foreclosure or trustee's sale. In other words, under section 580b, if the home is secured by a purchase money loan and meets the qualifying conditions, the purchaser is protected from deficiency collection regardless of whether the home is foreclosed judicially or by trustee's sale. Additionally, the phrase “after any sale” means all purchase money lenders are precluded from seeking a deficiency judgment after any lender has forced a sale of the home. This includes the senior lienholder, who is usually first to seek sale by foreclose or trustee's sale, and any subsequent junior lienholders. But it similarly applies to the senior lienholder if a junior lienholder forced a sale first. In effect, no matter which lienholder exhausts the security first, no other lienholder can take action to collect. The California courts have interpreted section 580b to mean that “the security alone can be looked to for recovery of the debt.” Second, California trustee's sale anti-deficiency statute (hereinafter section 580d) precludes the lender who conducted the trustee's sale on the borrower's home from pursuing a deficiency judgment. Although section 580b and section 580d often overlap, the California courts have interpreted section 580d rather differently, leaving the door open for deficiency collection under certain circumstances. First, section 580d only applies to trustee's sales, not to foreclosures. Second, the qualifying conditions necessary under section 580b to receive anti-deficiency protection do not similarly apply under section 580d. Third, and most importantly, section 580d only applies to the specific lender conducting the trustee's sale, and not to additional lenders who may seek action subsequent to foreclosure. In essence, unlike section 580b, whereby a forced sale subsequently precludes any deficiency collection by any lender, section 580d suggests that any lender besides the lender who conducted the trustee's sale retains the right to pursue a deficiency.

Overall, if a home is judicially foreclosed, it is subject to anti-deficiency protection solely under section 580b, but only if the qualifying conditions are satisfied. However, if a home is sold by trustee's sale, it is subject to anti-deficiency protection under section 580b if the qualifying conditions are satisfied, and under section 580d no matter the circumstances. Yet under section 580d, a borrower is only protected from anti-deficiency collection from the same lender who conducted the trustee's sale; the borrower's other lenders may possibly seek a deficiency judgment following foreclosure.

2. North Carolina

North Carolina similarly passed anti-deficiency legislation during the foreclosure crisis of the Great Depression. The high rate of foreclosures, joined with depressed housing prices, created large potential deficiency judgments against already struggling homeowners. In response, the North Carolina General Assembly passed legislation to “limit the creditor to the property conveyed,” thus reallocating “the risk of decline in property values [to] the [lender].” The North Carolina anti-deficiency statute (hereinafter section 45-21.38) precludes a deficiency judgment when the lender forcing a sale is the original seller who provided the borrower with the purchase money loan to acquire the property. Section
45-21.38 is unique from several other states' anti-deficiency statutes in two noteworthy respects. First, anti-deficiency protection only applies in the case of “seller financing.” In other words, if the mortgage was provided by a third-party lending institution, in fact any party besides the seller, section 45-21.38 anti-deficiency protection does not apply. Second, section 45-21.38 is not limited to residential real property. Section 45-21.38 also provides anti-deficiency protection to purchasers of commercial property, provided the rest of the qualifying conditions are satisfied. Thus, in one aspect, section 45-21.38 is narrower in that it only provides anti-deficiency protection for “seller financing” purchases; on the other hand, it is also broader in the sense that it extends beyond residential real property to also encompass commercial investment property within its purview.

*C. The Uniform Land Security Interest Act's Anti-Deficiency Provision*

In 1985, the National Conference of Commissioners on Uniform State Laws (hereinafter NCCUSL) promulgated the Uniform Land Security Interest Act (hereinafter ULSIA) in an effort to assist states in “codify[ing] and moderniz [ing] the law of mortgages.” ULSIA developed as an offshoot of the larger Uniform Land Transactions Act (hereinafter ULTA). The NCCUSL originally proposed ULTA in 1969 as a single, uniform statute designed to embrace the entire subject of land law. However, it soon became apparent that such a comprehensive approach was unfeasible, and the NCCUSL broke down ULTA into “separate statutes” to address “discrete aspects of land law.” ULSIA emerged as one such separate statute, and specifically addressed security interests in land.

ULSIA addresses a multitude of issues regarding mortgages and other security interests in land, but in pertinent part, includes an anti-deficiency statute. Section 511(b) provides that a “protected party” whose residential real estate is secured by a “purchase money loan” may not be held liable for a deficiency. There are three major components to section 511(b): (1) the borrower must be a “protected party” as defined under section 113(a); (2) the property must be “residential real estate” as defined under section 113(b); and (3) the obligation must be secured by a “purchase money loan” as defined under section 111(18).

First, a “protected party” includes more than simply the borrower who currently resides in the home. A “protected party” also encompasses a borrower who purchased the home for use by a relative, and a purchaser who bought the home from the initial borrower and assumed the original debt. Unlike most states' anti-deficiency laws, section 511(b) covers situations beyond the traditional parameters whereby the borrower must personally occupy the residence. Additionally, the “protected party” does not have to currently reside in the home as long as there is intent to occupy the residence in the future.

Second, the property must be “residential real estate,” meaning the home must be situated on less than three acres, contain no more than four dwelling units, and the protected party must refrain from commercial use of the property as a rental unit. As to the last requirement, the protected party may use the residence for commercial purposes to conduct a business, but if the commercial purpose concerns renting the property, anti-deficiency protection does not apply. Importantly, section 511(b) anti-deficiency protection is not limited to the protected party's primary residence. The drafters intentionally used the phrasing “a residence,” as opposed to “primary residence,” to ensure that anti-deficiency protection extends to second residences and vacation homes. Additionally, the phrase “intent to occupy” bolsters the drafters' purpose in covering protected parties who own multiple residences that are not all currently occupied.

Third, section 511(b) anti-deficiency protection only extends to residential property purchased by means of a purchase money loan. If a purchase money loan is involved, it is irrelevant whether it was obtained by the seller or a third party as in North Carolina. Importantly, the purchase money loan requirement encompasses a loan obtained by either the seller or a third party.

Given ULSIA's potential to substantially impact the mortgage market and foreclosure process, the drafters were careful in limiting the changes to prospective security interests created after the date of enactment. Nonetheless, despite the NCCUSL’s
innovate attempt to create a uniform body of mortgage law, ULSIA as a whole was withdrawn from recommendation for state enactment in 1999 for obsoleteness.\(^{113}\) While the Uniform Nonjudicial Foreclosure Act is the NCCUSL's current proposal for uniform foreclosure reform, ULSIA's conception of anti-deficiency protection under section 511(b) remains a viable model for state enactment.\(^{114}\)

D. Arizona's Anti-Deficiency Statutes

Unlike California and North Carolina, Arizona enacted anti-deficiency legislation decades later in 1971 in conjunction with several other consumer protection laws.\(^{115}\) Nonetheless, the Arizona Legislature passed anti-deficiency statutes with the same purpose of “preclud[ing] “artificial deficiencies resulting from forced sale,”\(^{116}\) as had California and North Carolina during the Great Depression. Additionally, the Legislature was concerned with the added hardship of deficiency liability following foreclosure and sought to protect unsuspecting homebuyers.\(^{117}\) Given Arizona's adoption of much of its mortgage law from California, including similar purchase money and trustee's sales anti-deficiency statutes, Arizona courts have often looked to California case law for interpreting Arizona's anti-deficiency laws.\(^{118}\)

1. The Arizona Purchase Money Anti-Deficiency Statute

Arizona's purchase money anti-deficiency statute (hereinafter section 33-729(A)) precludes a lender holding a purchase money loan from pursuing a deficiency judgment after judicial foreclosure of a residence situated on 2.5 acres or less, which is utilized as a single or dual family home.\(^{119}\) In effect, section 33-729(A) prohibits deficiency collection when: (1) the loan is a purchase money mortgage, (2) the house was judicially foreclosed, and (3) the house meets the above physical specifications.

The key to anti-deficiency protection under section 33-729(A) is that the loan take the form of a purchase money mortgage. A purchase money mortgage is a loan obtained to purchase a house, the house in turn serving as collateral for repayment of the loan.\(^{120}\) Section 33-729(A) at first glance appears only to apply to mortgages and not to deeds of trust.\(^{121}\) A mortgage must be judicially foreclosed,\(^{122}\) but a deed of trust may be foreclosed either judicially or by trustee's sale.\(^{123}\) By means of sections 33-805 and 33-807(A), a trustee can elect to treat a deed of trust like a mortgage, and thus judicially foreclose and garner anti-deficiency protection as if a mortgage under section 33-729(A).\(^{124}\) In reality, mortgages are the exception in Arizona, and the option to treat a deed of trust like a mortgage is rarely invoked because a trustee's sale is quick and inexpensive, in stark contrast to a costly and drawn-out judicial foreclosure; nonetheless, the option remains available.\(^{125}\) Thus, as long as judicial foreclosure is the method of forced sale, it is irrelevant whether the home loan was executed by means of a mortgage or deed of trust. However, even if the house was purchased by use of a purchase money loan and the lender judicially foreclosed, the house must still meet the physical specifications to warrant anti-deficiency protection under section 33-729(A): the house must be located on 2.5 acres or less and utilized as a single or dual family dwelling.\(^{126}\)

2. The Arizona Trustee's Sale Anti-Deficiency Statute

Arizona's trustee's sale anti-deficiency statute (hereinafter section 33-814(G)) precludes a deficiency judgment following foreclosure by trustee's sale of residential real property situated on 2.5 acres or less, which is utilized as a single or dual family home.\(^{127}\) Section 33-814(G) differs from section 33-729(A) in several respects, making it both broader and narrower in a variety of ways. First, section 33-814(G) only applies to deeds of trusts, not mortgages.\(^{128}\) This may appear to narrow the scope of section 33-814(G), but given the rarity of mortgages and wide use of deeds of trust, this requirement has a negligible impact on the forced sale process as a whole.\(^{129}\) Second, section 33-814(G) is not limited to purchase money loans.\(^{130}\) In other words, if the loan secured by the home was obtained for another purpose besides purchase of the property, the borrower is still apt to receive anti-deficiency protection; this renders section 33-814(G) substantially broader than section 33-729(A). Again, given the standardized use of deeds of trust and the preferred method of trustee's sale in Arizona, section 33-814(G) is the basis for most anti-deficiency protection in the state.
3. The Arizona Mortgage Election Statute

It is worth analyzing Arizona's mortgage election statute (hereinafter section 33-722) due to its conflict with case law interpretation of Arizona's anti-deficiency statutes. Section section 33-722 provides the lender with the choice of either judicially foreclosing on the property or suing on the debt in the event of default. Before case law expanded the scope of anti-deficiency protection, the Arizona courts had interpreted section 33-722 to allow a lender to judicially foreclose first and then seek a deficiency judgment, as long as both actions were not pursued simultaneously. The conflict arises because the Arizona courts subsequently interpreted the anti-deficiency statutes to eliminate the option of suing on the note when these statutes apply. The Arizona courts reached such an interpretation so as to preclude deficiency collection, thereby undermining the choice established under section 33-722 in such circumstances.

4. Case Law Expansion of Arizona's Anti-Deficiency Statutes

In 1989, the seminal case of Baker v. Gardner significantly bolstered the strength of Arizona's anti-deficiency statutes. The Baker court recognized the conflict between section 33-722, whereby a lender has the choice to sue on the debt or foreclose, and sections 33-814(G) and 33-729(A), which preclude a lender from seeking a deficiency judgment. Nonetheless, the Baker court found in favor of sections 33-814(G) and 33-729(A) (hereinafter anti-deficiency statutes), holding that when either anti-deficiency statute applies, the lender is limited to forcing sale and cannot choose to sue on the debt. The court reasoned that allowing a lender who would otherwise be prohibited from obtaining a deficiency judgment under the anti-deficiency statutes to waive the foreclosure option and sue on the debt would “effectively” enable the lender to obtain a deficiency against the borrower. In effect, when either anti-deficiency statute applies, the lender is limited to foreclosure and cannot waive this remedy to sue on the debt. However, if neither anti-deficiency statute applies, the lender can choose his remedy pursuant to section 33-722, and thus can elect to foreclose or sue on the debt. Yet, Baker left many questions unanswered, and the court subsequently wrote a supplemental opinion to clarify its initial holding. The court elucidated that “Baker's reach [is] limited to purchase money loans.” The rationale is convoluted, but to qualify under section 33-729(A), the loan must be a purchase money mortgage, if it is not, section 33-729(A) does not apply, and the lender can elect to sue on the debt under section 33-722. On the other hand, section 33-814(G) does not require the loan to be a purchase money mortgage to qualify for protection; no matter the type of loan, if a trustee's sale is conducted, the lender cannot collect on the deficiency. Yet, a lender can choose to treat a deed of trust like a mortgage and judicially foreclose pursuant to section 33-729(A). If the deed of trust is judicially foreclosed and it is not a purchase money loan, then the anti-deficiency protection of section 33-729(A) does not apply. Additionally, the anti-deficiency protection of section 33-814(G) would not apply if no trustee's sale took place.

The court thus carved out an exception: if a lender holding a non-purchase money deed of trust decides to judicially foreclose under section 33-729(A) instead of conducting a trustee's sale under section 33-814(G), the lender can choose to sue on the note. This is because neither section 33-814(G) nor 33-729(A) would apply, and when the anti-deficiency statutes are inapplicable, the lender can elect his remedy under section 33-722. In effect, this benefits second position non-purchase money lenders who may elect to sue on the note after the first position lender forecloses and the proceeds are insufficient to cover the second position lender's loan. Yet, the clarification does not help sold-out second position purchase money lenders who are hemmed in by section 33-814(G) or 33-729(A), and cannot pursue any action after the home is foreclosed by the first position lender.

Arizona's anti-deficiency statutes were further expanded in Mid Kansas Federal Savings and Loan Association of Wichita v. Dynamic Development Corporation. In a sweeping opinion, the Mid Kansas court stated that the identity of the borrower is irrelevant. In other words, “neither of the [anti-deficiency] statutes is limited to individual homeowners rather than residential developers. Rather, the statutes apparently protect any mortgagor, provided [the qualifying conditions
apply].” Thus, commercial developers and investors, in addition to individual homeowners, are potentially protected by the anti-deficiency statutes. However, the court did further qualify the type of property protected under the anti-deficiency statutes. Homes that are in the process of construction and are not yet occupied do not warrant anti-deficiency protection because they are not yet “limited to and utilized” as a dwelling. Therefore, while technically a developer can qualify for anti-deficiency protection, it is rare to find a case where a developer still owns a home that is actually utilized as a dwelling. The same rationale does not hold true for investors, who frequently own homes that are occupied by renters.

*1045 In Bank One, Arizona v. Beauvais, the Arizona courts once again broadened the anti-deficiency statutes to potentially cover refinanced loans. The Bank One court held that a workout loan that extends, renews, or refines a purchase money loan retains its character as a purchase money loan. In other words, the purchase money loan status of the original loan carries over to the new extended, renewed, or refinanced loan. This is true even if the original loan was only partially comprised of purchase money funds; as long as the original loan consisted of some purchase money funds, it retains its status as a purchase money loan to warrant anti-deficiency protection. In Bank One, the lender who held the original purchase money loan was the same lender who executed the workout loan.

*1046 It remains less clear whether the purchase money status of the original loan is retained if a third-party refinances the loan.

Gradually through Baker, Mid Kansas, and Bank One, the scope of Arizona's anti-deficiency protection has expanded beyond the literal reading of the statutes, eventually leading to the predicament the Legislature sought to address in a 2009 amendment to section 33-814(G).

*1046 5. The Repealed Amendment to Arizona's Trustee's Sale Anti-Deficiency Statute

On July 10, 2009, the Legislature drastically narrowed Arizona's anti-deficiency protection by amending section 33-814(G), the most substantial change to Arizona's anti-deficiency statutes in over twenty years. If the amendment had gone into effect, it would have sharply curtailed the anti-deficiency protection provided to homeowners following a trustee's sale by requiring the trustor: (1) to have “utilized” the home prior to foreclosure, (2) for a time period of at least six consecutive months, (3) to obtain a certificate of occupancy for the home, and (4) to shoulder the responsibility of demonstrating satisfaction of the section 33-814(G) requirements in order to preclude a deficiency judgment. The amendment was set to take effect on September 30, 2009; however, in a quick turn of events, the Legislature repealed the amendment in a special legislative session. While for the time being homeowners are safe from anti-deficiency protection curtailment, the underlying problem persists and the Legislature will likely address the issue in coming legislative sessions. Thus, it is essential to examine the flaws of the repealed amendment for the purpose of crafting an unambiguous and effective new amendment narrowly tailored to achieve the Legislature's goal without the accompanying adverse consequences.

IV. Legislation to Accomplish the Legislature's Goal Without the Accompanying Adverse Effects

Ideally, the rights and obligations of lenders and borrowers must achieve a balance. Lenders should be able to collect from culpable borrowers who break their contractual obligations, and should be incentivized to continue lending, albeit in a responsible manner. On the other hand, struggling homeowners should be protected from the hardships of economic decline and left with the hope of recovery following foreclosure. Yet in reality, when the market declines, the lender stands as the party better able to weather the consequences of a housing crisis: the lender is the more sophisticated party to the transaction, holds the tools to better predict market trends, and is not subject to personal ruin like the individual homeowner. Conversely, “[i]ndividual home mortgagors cannot shoulder the cost of massive economic decline, foreclosure, and deficiency liability. It is unrealistic and cruel to act as if they could.” Nonetheless, not all borrowers are innocent homeowners merely trying to hold onto their homes. Speculative builders and commercial investors are sophisticated buyers who have been riding on the coattails of Arizona's anti-deficiency statutes for too long. The Legislature's goal was cause worthy, but the means employed threatened to harm the same individual
homeowners the statutes were intended to protect. Yet, section 33-814(G) can be altered to achieve the Legislature's objective of precluding speculative builders and commercial investors from benefiting from anti-deficiency protection while still ensuring that individual homeowners remain protected.

Unfortunately, the repealed amendment addressed the Legislature's goal, but at the expense of producing substantive adverse effects. The repealed amendment contained ambiguous language, imposed unrealistic requirements, raised potential constitutional issues, and sought to achieve its goal at the expense of struggling homeowners. The following provides a brief overview of the amendment's major flaws.

A. Critique of Arizona's Repealed Amendment

The purpose of the repealed amendment was to limit anti-deficiency protection to homeowners who have purchased a home for their own personal use as a residence. However, the repealed amendment retained the original language of section 33-814(G) instead of changing the wording to explicitly require the homeowner to actually "live" or "reside" in the home. Before passage of the amendment, the term "utilized for" in section 33-814(G) was definitively interpreted so as not to require the trustor himself to actually live in the home. As long as the home was being occupied by somebody, it was sufficiently being utilized as a home by the trustor to warrant anti-deficiency protection. Given that the Legislature retained language expressly interpreted by the Arizona Court of Appeals, the same meaning should apply. Nonetheless, adhering to the expansive definition of "utilized" would contradict the Legislature's goal in limiting the scope of anti-deficiency protection to homeowners who personally "live" in the foreclosed home.

The requirement that the trustor utilize the home for six consecutive months to qualify for anti-deficiency protection raises another ambiguity concern. Specifically, the amendment does not define what "six consecutive months" entails. For instance, would a homeowner who had purchased his home six months prior to foreclosure fail to satisfy the requirement if he had gone on an extended vacation within this six months time frame? Would the same apply to a business trip? How about an extended hospital stay? It is altogether unclear how the courts would have interpreted this timing requirement.

For many homeowners, the certificate of occupancy provision is an impossible requirement to satisfy. Some Arizona cities do not issue such certificates, and others only recently began doing so for newly built homes. Additionally, even for those cities that do currently issue certificates, requiring them to issue certificates retroactively for preexisting homes would unduly tax these cities' building departments and require a great deal of manpower and expense. Anti-deficiency protection operates by shifting the risk of market decline to the lender to relieve the troubled homeowner of the added burden of personal liability following foreclosure. The repealed amendment proposed shifting the burden back to the homeowner, essentially eroding the protection guaranteed under section 33-814(G). Given the infeasibility for many homeowners of fulfilling all of the amendment's requirements, the amendment would likely have led to a barrage of litigation: lenders would have engaged in "fishing" lawsuits hoping homeowners would be unable to overcome their statutory burden in court.

Compounding the amendment's ambiguity was the mystery as to whether it would apply retroactively to preexisting mortgages. Retroactive laws that impair contractual obligations raise constitutional concerns. However, under Arizona law, statutes generally do not have retroactive effect unless expressly declared to apply retroactively. Nonetheless, given the inclusion of only a vague general effective date, it was unclear whether the amendment would have applied to mortgages entered into before that date, leaving the issue ripe for litigation.

B. A New Approach Toward Amending Arizona's Trustee's Sale Anti-Deficiency Statute
The Legislature could achieve its goal of precluding speculative builders and commercial investors from benefiting from anti-deficiency protection without spurring the adverse effects generated by the repealed amendment by amending section 33-814(G) to read as follows:

If trust property of two and one-half acres or less which is limited to and utilized for either a single one-family or a single two-family dwelling by the individual trustor under the deed of trust who occupies the dwelling as a residence, is sold pursuant to the trustee's power of sale, no action may be maintained to recover any difference between the amount obtained by sale and the amount of the indebtedness and any interest, costs, and expenses. Changes to this provision shall apply prospectively to all applicable trust property recorded with the county recorder after the general effective date.

The proposed amendment differs from the repealed amendment and the original text of section 33-814(G) by only a few words. Yet, these simple and minimal alterations function to drastically alter the scope of deficiency liability in Arizona.

First, to avoid the complications arising under the United States Constitution, Arizona Constitution, and Arizona statutes, the proposed amendment expressly declares that it applies prospectively to qualifying loans created by recordation with the county recorder after the general effective date. The general effective date would depend on the legislative session in which the amendment was passed. This approach is comparable to the ULSIA provision that similarly states that ULSIA's applicability is limited to “transactions entered into and events occurring on or after” the effective date.

Second, the proposed amendment does not limit anti-deficiency protection to a trustor's primary residence. If a trustor owns multiple residences that he occupies throughout the year, for example, a winter home and vacation residence, he can obtain anti-deficiency for both homes, provided the other statutory requirements are satisfied. The proposed amendment borrows language from the ULSIA, specifically using the term “a” residence to dispel the notion that the home has to be the trustor's “primary” residence. This is a more practical solution than imposing an arbitrary six month occupancy requirement on trustors. Particularly in Arizona, many residents own more than one home, one of which the resident may never occupy for more than six consecutive months in a given year. Beyond the interest of the individual homeowner, Arizona has a vested economic interest in promoting the purchase of multiple residences.

Third, the term “occupy” is specifically included in the proposed amendment so as to avoid any confusion as to whether the trustor must personally live in the home. As discussed above, the phrase “utilized for” in section 33-814(G) was explicitly interpreted to mean that the trustor did not have to actually reside in the home, as long as somebody was occupying the residence. Drawing on the language employed by the ULSIA, the requirement that the trustor must “occupy” the residence ensures that the trustor personally lives in the home and precludes speculative builders and commercial investors from claiming protection.

Fourth, the proposed amendment limits anti-deficiency protection to the “individual” trustor under the deed of trust. Both the repealed amendment and section 33-814(G) failed to designate whether the entity seeking protection must be an individual or may also be a corporation. A “trustor” for purposes of section 33-814(G) is defined as a “person” conveying trust property as security for the performance of a contract. Yet, the term “person” is not generally limited to individuals; it also includes other entities such as corporations and organizations. By specifically requiring the trustor to be an “individual,” the proposed amendment precludes corporate investors and builders whom the repealed amendment was trying to target, from reaping the benefits of anti-deficiency protection to the detriment of lenders.

V. Conclusion

Since the Great Depression, several states have recognized the need to protect individual homeowners, particularly during hard economic times. When the housing market crashes, home values plummet and foreclosure rates rise. Neither the lender nor borrower stands to gain from the ensuing mortgage fallout. Nonetheless, during an economic crisis, one party must bear the greater burden of market decline. The significant hardship a deficiency judgment places on a struggling homeowner outweighs
the minimal benefit that deficiency collection produces for the lender, tipping the balance in favor of placing the deficiency burden on the lender.

Recognizing this inequity, Arizona’s anti-deficiency statutes were enacted to protect the individual homeowner in such situations, even at a small expense to lenders. However, Arizona’s anti-deficiency statutes were not intended to further shield speculative builders and commercial lenders from the consequences of their own risky business practices. The Arizona Legislature attempted to roll back the anti-deficiency protection these borrowers had managed to acquire by passing an ambiguous and impractical amendment in 2009. Although the amendment was unsuccessful and subsequently repealed, an effective solution can still be devised. By implementing the amendment proposed in Part IV.B, lenders will be able to pursue deficiency judgments against speculative builders and commercial investors, while individual homeowners will retain relief from personal liability. At a time when the housing market is in disarray, it is particularly important to keep the Legislature’s intent in protecting the individual homeowner in mind, and not to deny individual homeowners of the anti-deficiency protection enacted for exactly these tough times.

Footnotes

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8 A deficiency is the “amount still owed when ... property secured by a mortgage is sold at a foreclosure sale for less than the outstanding debt.” Black's Law Dictionary 455 (8th ed. 2004); see also Milton Widem, Deficiency Judgments Arising Out of Foreclosure Action, in Real Estate Foreclosures 61, 61 (James L. Lipscomb et al. eds., 1992); Foreclosure: Defenses, Workout, and Mortgage Servicing § 10.3 (John Rao et al. eds., 1st ed. 2005).


See discussion infra Part III.B.


See cases infra notes 144-45.

See Reagor, supra note 4, at A1 (the amendment was “designed to protect small community banks from people buying speculative new homes they can't sell for a profit”); see also New Arizona Law Would Allow Post-Foreclosure Suits, Associated Press, July 24, 2009, available at http://www.nytimes.com/aponline/2009/07/24/business/AP-AZ-XGR-Foreclosure-Rights (the amendment was urged by the “state's banking industry, which said the anti-deficiency law has been abused by investors and builders, including some who try to limit lenders' recoveries by living temporarily in homes being foreclosed”).

See discussion infra Parts III.C.5, IV.A for an explanation and analysis of the repealed amendment.


H.R. 2008, 49th Leg., 3d Spec. Sess. (Ariz. 2009) (repealing the amendment as part of a budget bill); see also discussion infra note 159.

See John Mixon & Ira B. Shepard, Antideficiency Relief for Foreclosed Homeowners: ULSIA Section 511(b), 27 Wake Forest L. Rev. 455, 458 (1992). The note is the unconditional promise to repay the loan, while the mortgage secures that promise.


Elizabeth Warren & Jay Lawrence Westbrook, The Law of Debtors and Creditors 198 (6th ed. 2009) (“[H]omes are the most significant assets owned by most Americans. More than 60 percent of all wealth held by individuals is in the form of homes.”).

As a result of the housing bubble, many homeowners now owe more money than their homes are worth, perhaps providing an incentive to default on costly mortgages. See, e.g., Nicole Stelle Garnett, The Unbounded Home: Property Values Beyond Property Lines by Lee Anne Fennell New Haven CT: Yale University Press, 2009, PP. 312. $45.00, 119 Yale L.J. 1904, 1926 n.78 (2010); David Streitfeld, No Help in Sight, More Homeowners Walk Away, N.Y. Times, Feb. 2, 2010, at A1, available at http://www.nytimes.com/2010/02/03/business/03walk.html (“Suggestions that people would be wise to renege on their home loans ... are turning into a full-throated barrage.... [L]andlords of an 11,000-unit residential complex in Manhattan showed no hesitation, or shame, in walking away from their deeply underwater investment.” But also acknowledging that “[s]ome experts argue that walking away from mortgages is more discussed than done. People hate moving; their children attend the neighborhood school; they do not want to think of themselves as skipping out on debt.”). But see Vikas Bajaj, Mortgage Holders Find It Hard to Walk Away From Their Homes, N.Y. Times, May 10, 2008, available at http://www.nytimes.com/2008/05/10/business/10housing.html (“So far, however, there is little evidence that people who have the means to pay are walking away from their homes as values sink.... For a variety of reasons, most homeowners find walking away difficult and expensive. A foreclosure can make it hard for borrowers to get other loans .... Lenders can also pursue deficiency judgments against borrowers [in some states].”) As discussed in Part II.A.1, homeowners face countervailing incentives to stay in their homes despite temporarily remaining upside down on their home mortgages.

Not all home purchasers are innocent parties unable to make mortgage payments. Some investors and homeowners simply choose to walk away from their homes when they owe more than their homes are worth. See sources cited supra note 20. Yet, real estate speculators are much more likely to abandon their properties when prices fall than homeowners. See Bajaj, supra note 20. While anti-deficiency protection allows some home purchasers to walk away at the expense of lenders, the benefits to innocent homeowners and the economy at large, as discussed in Part II, justify such protection.


Id.

See id.

See Mixon & Shepard, supra note 17, at 460.

Id. at 461.


See Mixon & Shepard, supra note 17, at 461.

See id.

See id. at 463.

Id. at 461.

See id.

Id. at 462 (“Federal and corporate policies concerning matters such as industry bailouts, tax shelters, tariffs, fuel usage, military bases, environmental preservation, and plant openings and closings, determine boom or bust for individual local and regional markets.”).


See Mixon & Shepard, supra note 17, at 485.

See id. at 486.

Id. at 483.

Mortgage insurance is commonly required by the lender when the loan-to-value ratio exceeds 80%. The mortgage insurer charges a premium for the mortgage insurance, and the cost is generally passed onto the borrower even though the lender is the party to benefit from the insurance. Grant S. Nelson & Dale A. Whitman, *Real Estate Finance Law* § 11.2 (5th ed. 2009); see also Mixon & Shepard, supra note 17, at 484.

See supra note 39. In fact, borrowers often purchase mortgage insurance policies with the expectation that they will be covered upon default. In reality, such policies only protect the lender in the event of foreclosure.

See Mixon & Shepard supra note 17, at 484.

Id. at 483.


See Mixon & Shepard, supra note 17, at 484.
See Mixon & Shepard, supra note 17, at 483.

See id. at 470, 487-88.


See id. at 458.

See id. at 474.

See id.; see also Kwan, supra note 28, at 266 n.187 (describing the common practice of repackaging home mortgage loans and selling them on the secondary market).

See Kwan, supra note 28, at 265.


Id.

See Kwan, supra note 28, at 265.

Id.


When a debtor files a petition for bankruptcy, an automatic stay immediately takes effect, halting creditors in most circumstances from collecting debts from the debtor, including foreclosing on the debtor's property. 11 U.S.C. § 362(a) (2006). Under qualifying circumstances, a creditor may move to lift the automatic stay and foreclose before the debtor receives a discharge. Id. § 362(d). However, without a grant from the court for relief from stay, the stay remains in effect until the case is closed, dismissed, or discharge is granted. Id. § 362(c).

Generally, in a Chapter 13 bankruptcy, a home mortgage cannot be modified, even if the lien on the house is partially unsecured. 11 U.S.C. § 1322(b)(2) (2009) (prohibiting the modification of a home mortgage); Nobelman v. Am. Sav. Bank, 508 U.S. 324 (1993) (holding that 1322(b)(2) prohibits the modification of a partially unsecured home mortgage). However, when a home mortgage is wholly unsecured, meaning there is no equity in the home to even partially cover the lien, 1322(b)(2) does not apply and the lien can be “stripped off” and modified. In re Wegscheid, 361 B.R. 144 (Bankr. D. Ariz. 2007) (permitting “strip off” of a wholly unsecured lien on the debtor's home).

See Kwan, supra note 28, at 267.

Id.

See Gotch, supra note 28, at 82; Hughes, supra note 22, at 125-26; Kwan, supra note 28, at 258; Mixon & Shepard, supra note 17, at 475.

See Gotch, supra note 28, at 82; Kwan, supra note 28, at 258; Mixon & Shepard, supra note 17, at 475.

To many commentators, anti-deficiency legislation encompasses less protective measures aside from complete preclusion of a deficiency judgment. See H.R. 330, Minutes of Meeting, H.R. Comm. on Ways & Means, March 31, 1971, at 2; Shough, supra note 9, at 474.

California provides the most extensive anti-deficiency protection. See Gotch, supra note 28, at 82.

See infra Part III.C.

See Mixon & Shepard, supra note 17, at 475; see also Shough, supra note 9, at 475.


See H.R. 330, Minutes of Meeting, H.R. Comm. on Ways & Means, March 31, 1971, at 2; Shough, supra note 9, at 474.

See Gotch, supra note 28, at 82.

See infra Part III.C.


See Shough, supra note 9, at 475.

Spangler v. Memel, 498 P.2d 1055, 1060 (Cal. 1972) (“The purposes [of the statute] are to discourage land sales that are unsound because the land is overvalued and, in the event of a depression in land values, to prevent the aggravation of the downturn that
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would result if defaulting purchasers lost the land and were burdened with personal liability.”); Kwan, supra note 28, at 260; Shough, supra note 9, at 475.

See Shough, supra note 9 at 470.

See Spangler, 498 P.2d at 1060; Kwan, supra note 28, at 260.

See Kwan, supra note 28, at 261.

Cal. Civ. Proc. Code §580b (West 1989). To qualify under section 580b, the dwelling must be for not more than four families, be secured by a purchase money loan, and be at least partially occupied by the purchaser.

No deficiency judgment shall lie in any event after a sale of real property or an estate for years therein for failure of the purchaser to complete his or her contract of sale, or under a deed of trust or mortgage given to the vendor to secure payment of the balance of the purchase price that real property or estate for years therein, or under a deed of trust or mortgage on a dwelling for not more than four families given to the lender to secure repayment of a loan which was in fact used to pay all or part of the purchase price of that dwelling occupied, entirely or in part, by the purchaser.

Id.

See Shough, supra note 9 at 475.

See Brown v. Jensen, 259 P.2d 425, 427 (Cal. 1953) (holding that the junior lienholder could not seek a deficiency judgment because the senior lienholder had already forced sale of the property, even though the junior lienholder did not receive any money under the sale and had not yet taken any action on the note). “The [purchase money anti-deficiency] section states that in no event shall there be a deficiency judgment, that is, whether there is a sale under the power of sale or sale under foreclosure, or no sale because the security has become valueless or is exhausted.” Id.; see also Shough, supra note 9, at 476.

See Brown, 259 P.2d at 427.


No judgment shall be rendered for any deficiency upon a note secured by a deed of trust or mortgage upon real property or an estate for years therein hereafter executed in any case in which the real property or estate for years therein has been sold by the mortgagee or trustee under a power of sale contained in the mortgage or deed of trust.

Id.

See Spangler v. Memel, 498 P.2d 1055, 1059 (Cal. 1972); Shough, supra note 9, at 476.

§ 580d (limited to “power of sale”).

Under section 580d, as long as the property is “real property,” it is irrelevant whether “the dwelling [is] for not more than four families given to the lender to secure repayment of a loan which was in fact used to pay all or part of the purchase price of that dwelling occupied, entirely or in part, by the purchaser,” as required under section 580b. Id. In other words, the qualifying limitations on real property do not apply and there is no purchase money loan requirement.

See Roseleaf Corp. v. Chierighino, 378 P.2d 97, 101 (Cal. 1963); Walter E. Heller W., Inc. v. Bloxham, 221 Cal. Rptr. 425, 429 (Cal. Ct. App. 1985); see also Shough, supra note 9, at 475.

See Diab, supra note 67, at 1449.

See id.

A Survey of Statutory Changes in North Carolina in 1933, 11 N.C. L. Rev. 191, 219 (1933); see also Diab, supra note 67, at 1449.


In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust executed after February 6, 1933, or where judgment or decree is given for the foreclosure of any mortgage executed after February 6, 1933, to secure to the seller the payment of the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same: Provided, said evidence of indebtedness shows upon the face that it is for balance of purchase money for real estate: Provided, further, that when said note or notes are prepared under the direction and supervision of the seller or sellers, he, it, or they shall cause a provision to be inserted in said note disclosing that it is for purchase money of real estate; in default of which the seller or sellers shall be liable to purchaser for any loss which he might sustain by reason of the failure to insert said provisions as herein set out.

93 See Diab, supra note 67, at 1446.


95 See Diab, supra note 67, at 1446.


97 See Geis, supra note 96, at 307.

98 See ULSIA prefatory note.

99 Id.

100 See id.

101 Id. § 511(b).

102 Id. § 113(a).

(a) “Protected party” means:

(1) an individual who gives a security interest in residential real estate all or part of which the individual occupies or intends to occupy as a residence;

(2) a personal obligated primarily or secondarily on an obligation secured by residential real estate if, at the time the obligation is incurred, that person is related to an individual who occupies or intends to occupy all or a part of the real estate as a residence; or

(3) an individual who acquires residential real estate and assumes or takes subject to the obligation of a prior protected party under the real estate security agreement.

Id.

103 Id. John Mixon & Ira B. Sheppard suggest that immunizing relatives who purchase homes for family members will prevent lenders from trying to skirt anti-deficiency statutes by having traditionally non-immune guarantors sign the loan documents. See Mixon & Shepard, supra note 17, at 481.

104 See ULSIA § 113(a).

105 See id.

106 Id. § 113(b).

(a) “Residential real estate” means, in relation to a protected party, real estate, improved or to be improved, containing not more than [three] acres, not more than four dwelling units, and no nonresidential uses for which the protected party is a lessor.”

Id.

107 See id. cmt. n.3.
108  Id. cmt. n.4.
109  Id. John Mixon & Ira B. Sheppard suggest extending anti-deficiency protection to “fourplexes and second homes comes dangerously close to commercial property coverage.” Mixon & Shepard, supra note 17, at 481.
110  See supra Part III.B.2.
111  ULSIA § 111(18). A “purchase money security interest” includes all security interests that enable the debtor to acquire the collateral, whether such security is taken by the seller under section 111(18)(i) or is taken by a third party cash lender under section 111(18)(ii).
112  See id. § 601.
113  Dale A. Whitman, Transfers by Vendors of Interests in Installment Land Contracts: The Impact of Revised Article 9 of the Uniform Commercial Code, 38 Real Prop. Prob. & Tr. J. 421, 425 n.9 (2003) (ULSIA was withdrawn from recommendation for enactment by the NCCUSL in 1999, however, some of its concepts have still influenced state legislation).
114  The NCCUSL's current anti-deficiency protection proposal is contained in the Uniform Nonjudicial Foreclosure Act. Unif. Nonjudicial Foreclosure Act § 607, 14 U.L.A. 13, 59 (Supp. 2003). Section 607 flat out precludes liability for a deficiency “if ... the debtor is a residential debtor, unless the debtor is found by the court not to have acted in good faith and the debtor's conduct caused significant loss or damage to the foreclosing creditor or the collateral.” Id. § 607(b)(2) (emphasis added). A “residential debtor” is defined as “a debtor who is an individual and who owns, or is obligated on an obligation secured in whole or in part by, residential real property. The term includes a person that is owned or controlled by such an individual.” Id. § 102(15). There appears to be no conflict between the Uniform Nonjudicial Foreclosure Act's and ULSIA's anti-deficiency statutes; however, the former's provision is less explicit and seems to leave more questions unanswered than resolved. For instance, does the loan have to be a purchase money mortgage? Are there any acreage or dwelling unit requirements? Can the debtor claim several properties under this provision? What if the property is strictly used for rental purposes and not occupied by the owner? For these reasons, I have looked to ULSIA's anti-deficiency provision as a model.
115  See sources cited supra note 9.
116  Boyd & Balentine, supra note 11, at 654.
117  Id. (The anti-deficiency statutes created the “direct benefit of ... the elimination of hardships resulting to consumers who, when purchasing a home, fail to realize the extent to which they are subjecting assets besides the home to legal process”).
118  Baker v. Gardner, 770 P.2d 766, 770 (Ariz. 1989) (in banc supplemental opinion); see also Shough, supra note 9, at 474.
119  Ariz. Rev. Stat. Ann. § 33-729(A) (1971). A. Except as provided in subsection B, if a mortgage is given to secure the payment of the balance of the purchase price, or to secure a loan to pay all or part of the purchase price, of a parcel of real property of two and one-half acres or less which is limited to and utilized for either a single one-family or single two-family dwelling, the lien of judgment in an action to foreclose such mortgage shall not extend to any other property of the judgment debtor, nor may general execution be issued against the judgment debtor to enforce such judgment, and if the proceeds of the mortgaged real property sold under special execution are insufficient to satisfy the judgment, the judgment may not otherwise be satisfied out of other property of the judgment debtor, notwithstanding any agreement to the contrary. Id. (emphasis added).
121  This appears as such because section 33-729(A) is under title 33, chap. 6, art.1, which deals specifically with mortgages.
123  By means of section 33-807(A), a trustee can elect to treat a deed of trust like a mortgage and judicially foreclose under section 33-729(A). See id. § 33-805 (1984) (“Deeds of trust may be executed as security for the performance of a contract or contracts. Except with respect to chapter 6 of this title, statutes of this state which refer to mortgages as security instruments are deemed to
also include deeds of trust, unless the context otherwise requires.”) (emphasis added); id. § 33-807(A) (1971) (“At the option of the beneficiary, a trust deed may be foreclosed in the manner provided by law for the foreclosure of mortgages on real property in which event chapter 6 of this title governs the proceedings.”) (emphasis added).

124 Id. §§ 33-805, 33-807(A).


127 Id. § 33-814(G) (2009).

128 If trust property of two and one-half acres or less which is limited to and utilized for either a single one-family or a single two-family dwelling is sold pursuant to the trustee's power of sale, no action may be maintained to recover any difference between the amount obtained by sale and the amount of the indebtedness and any interest, costs and expenses.

129 Id. § 33-814(G) (limited to “trust property”).

130 See Thomason, Pisanelli & Deatherage, supra note 125, at 23.

131 Hansen v. Spear, 734 P.2d 1040, 1041 (Ariz. Ct. App. 1987) (prohibiting a deficiency action after the lender conducted a trustee's sale, regardless of the fact that the lender held a non-purchase money loan).

132 Id.

133 See Smith v. Mangels, 240 P.2d 168, 170 (Ariz. 1952) (interpreting section 33-722 to narrowly prohibit a lender from simultaneously bringing an action to foreclose and another to sue on the debt, but leaving the door open for pursuing either remedy first and then proceeding with the second remedy subsequently; “a mortgagee-creditor has two rights, first, to have the debt paid, and second, a separate and independent right to have the debt paid out of the proceeds of the sale of the mortgaged property”); Shough supra note 9, at 468.

134 Id. at 768.

135 Interestingly, section 33-729(A) did not even apply to the Baker case because the lender had not chosen to judicially foreclose, yet the court included an interpretation of the provision in its holding. See Shough, supra note 9, at 484 (“The Arizona purchase money foreclosure anti-deficiency statute [section 33-729(A)] did not, by its terms apply to the [plaintiffs] in Baker because the senior lienholders elected a trustee's sale rather than a foreclosure. Thus, the Baker court did not need to address [section 33-729(A)].”). However, given the interrelatedness of sections 33-814(G) and 33-729(A), it was important to resolve the conflict between section 33-722 and both of the anti-deficiency statutes.
136 Baker, 770 P.2d at 769 (the “remedy provided by the [anti-deficiency] statute[s] is exclusive”).


138 Thomason, Pisanelli & Deatherage, supra note 125, at 24; see also Baker, 770 P.2d at 774.


140 Id. § 33-814(G) (2009).

141 Id. §§ 33-805, 33-807(A) (2004).

142 Baker, 770 P.2d at 775.

143 Id.

144 Mid Kan. Fed. Sav. and Loan Ass'n of Wichita v. Dynamic Dev. Corp., 804 P.2d 1310 (Ariz. 1991). In Mid Kansas, a commercial developer took out a first position loan from Mid Kansas in order to construct ten “spec” homes; the first position loan was dispersed in the form of ten separate notes and deeds of trust representing each individual spec home. Unable to finish construction, the commercial developer took out a second position loan from Mid Kansas secured by a blanket lien on the remaining unsold homes (by this point, some of the ten spec homes had been completed and sold). The commercial developer subsequently defaulted, and Mid Kansas foreclosed on the remaining unsold homes due under the second position blanket lien. After acquiring the property at foreclosure, Mid Kansas sought to sue on the debt under the first position loan. The court held that the anti-deficiency statutes are not limited to protecting individual homeowners, and may extend to developers and investors. However, the home must be completely constructed and occupied as a dwelling to qualify for protection. Although the commercial developer's homes were not fully constructed and occupied to warrant anti-deficiency protection, the court nonetheless precluded Mid Kansas from suing on the debt under the first position loan under the doctrine of “merger and extinguishment.” Id.

145 Id. at 1315; see also N. Ariz. Prop. v. Pinetop Prop. Group, 725 P.2d 501, 504 (Ariz. Ct. App. 1986) (“While we agree with Northern, that the Legislature perhaps meant only to exclude deficiency judgments in foreclosure actions against a single family homeowner and not against an investment homeowner, the statute just does not say that.”).

146 Mid Kansas, 804 P.2d at 1315 (ruling that “neither the statutory text nor legislative history evinces an intent to exclude any other type of mortgagor”).

147 See Thomason, Pisanelli & Deatherage, supra note 125, at 23.

148 Both sections 33-814(G) and 33-729(A) require the residential real property to be “limited to and utilized for” a dwelling to qualify for anti-deficiency protection, in addition to the other statutory requirements previously discussed to garner protection. See Mid Kansas, 804 P.2d at 1317 (“The property is not utilized as a dwelling when it is unfinished, has never been lived in, and is being held for sale to its first occupant by an owner who has no intent to ever occupy the property.”). However, the Mid Kansas court was not as clear as to whether current occupation is necessary to fulfill the “utilization” requirement; the court suggested that utilization at some point in time may be sufficient.

149 See Thomason, Pisanelli & Deatherage, supra note 125, at 24.

150 Bank One, Ariz., N.A. v. Beauvais, 934 P.2d 809 (Ariz. Ct. App. 1997). In Bank One, the borrowers originally obtained a non-purchase money loan and later consolidated it with a purchase money loan to acquire their home. Unable to make payments, the borrowers entered into a workout loan to modify and extend their consolidated loan. Upon default, Bank One sought to sue on the debt under the workout loan, arguing that it was a new, non-purchase money loan independent from the purchase money loan obtained to purchase the defendants' home. The court disagreed--because a portion of the consolidated loan was a purchase money loan, the workout loan retained its character as a purchase money loan. Id.

151 Id. at 815.
The Arizona courts have yet to address this issue. Bank One involved the same lender in regard to both the original loan and workout loan, and the issue has not been revisited. However, the California Court of Appeals has addressed this issue, and given Arizona court's reliance on California case law regarding mortgage law, see Baker v. Gardner, 770 P.2d 766, 770 (Ariz. 1989) (supplemental opinion), California's interpretation may be foretelling. In Union Bank v. Wendland, the California Court of Appeals suggested that a purchase money loan refinanced by a third-party loses its status as a purchase money loan upon refinancing. 126 Cal. Rptr. 549 (Cal Ct. App. 1976); see also 4 Harry D. Miller & Marvin B. Starr, Current Law of California Real Estate § 9:173, at 582 (2d ed. 1989) (“A loan to refinance a prior purchase-money loan by a new lender is not a purchase-money loan, but if the seller 'refinances' the former loan it remains as a purchase-money loan to the extent of the unpaid balance of the prior loan.”); Charles B. Sheppard, California Code of Civil Procedure Section 580B, Anti-Deficiency Protection Regarding Purchase Money Debts: Arguments for the Disclosure of Refinanced Purchase Money Obligations Within the Anti-Deficiency Protection of Section 580, 6 S. Cal. Interdisc. L.J. 245, 263-77 (1997).


The repeal was originally included in H.R. 2008 entitled, “general government; budget reconciliation,” passed during the Arizona Legislature's Third Special Session commenced to address the 2009-2010 budget. H.B. 2008, 49th Leg., 3d Spec. Sess. (Ariz. 2009). The fact that the Third Special Session was specifically called to consider the state budget and appropriation measures warranted the question as to whether the Legislature violated its constitutional authority by repealing the anti-deficiency amendment. See Ariz. Const. art. 4, pt. 2, § 13 (limiting acts to the subject matter contained in the title and voiding all subject matter outside of the title); Ariz. Const. art. 4, pt. 2, § 20 (general appropriation bills are limited to the subject of appropriations); see also Mary Jo Pitzl, In Budget Session, Disorder was Rule, Ariz. Republic, Sept. 7, 2009, at A1. In response, the Arizona Bankers Association (the original sponsor of the repealed amendment) filed a special action in the Arizona Supreme Court in November of 2009, alleging that repeal of the bill was unconstitutional for exceeding the scope of the special legislative session. As a result, the Arizona Legislature passed a second repeal of the repealed amendment during the Fourth Special Session, which was specifically called to address the anti-deficiency statutes so as to sidestep any constitutionality concerns that went into retroactive effect on November 23, 2009. S.B. 1004, 49th Leg., 4th Spec. Sess. (Ariz. 2009); see also Update on Arizona's Anti-Deficiency Laws, http://marcmeccain.com (Jan. 6, 2010).
See discussion supra Part II.A.3.

Mixon & Shepard, supra note 17, at 484.

News Release, Arizona State Senate, Sen. Pierce Announces Support for the Repeal of SB 1271 (July, 29, 2009), http://www.keytlaw.com/33-814/sb1271pr090729.pdf (stating the “bill [was] intended to limit the time when housing investors ... could use Arizona's anti-deficiency law to shield them from judgment,” and should be repealed because it “could have far-reaching impacts not limited to speculators or investors”) (emphasis added).

The Senate Fact Sheet regarding the amendment states the amendment, “[r]equires the trustor to have lived in the trust property for at least six consecutive months.” Senate Summary of S.B. 1271 as Passed by the Senate, 49th Leg., 1st Reg. Sess. (Ariz. 2009), available at http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/49leg/1r/summary/s.1271%20as%20passed%20by%20the%20senate.doc.htm (emphasis added). In fact, the amendment does not require the trustor to live in the home as stated in the Senate Fact Sheet; rather, it only requires the trustor to utilize the home. Nonetheless, the Senate's inclusion of the word “live," suggests the Legislature intended for the trustor to personally reside in the home. See House Summary of S.B. 1271 as Transmitted to Governor, 49th Leg., 1st Reg. Sess. (Ariz. 2009), available at http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/49leg/1r/summary/h.sb1271_07-14_09_astransmittedtogovernor.doc.htm (similarly using the word “live” in its analysis of the amendment).

Section 33-814(G) requires the property to be “utilized” as a single or dual family dwelling to warrant anti-deficiency protection. Ariz. Rev. Stat. Ann. § 33-814(G) (2009). The repealed amendment did not replace the word “utilized” with language explicitly requiring the trustor to personally “live” in the home.

Problems with Arizona's New Anti-Deficiency Laws (July 19, 2009), http://marcmccain.com/tag/anti-deficiency-laws/ (speculating on how the Arizona courts would have interpreted the ambiguity of the six month requirement).

Other questions include: How many days a month does the trustor have to utilize the property to satisfy the six month requirement? How many hours a day must the home be utilized to constitute a day's worth of utilization? Must the house be slept in overnight? Would the six month requirement be satisfied if the trustor occupied the house for at least six months several years prior to foreclosure? New Arizona Law Limits Borrowers' Protection From Deficiency Judgment After Foreclosure of a Home, http://www.keylaw.com/azrealestate/ars33-814g.htm (last visited Oct. 13, 2010).

The city of Mesa does not even issue certificates of occupancy for homes. Telephone Interview with Mesa Department of Development and Sustainability, Building Safety (Oct. 13, 2009); see also Letter to Arizona Legislators Regarding Arizona Senate Bill 1271 (July 23, 2009), http://marcmccain.com/tag/anti-deficiency-laws/ [hereinafter Letter to Arizona Legislators] (citing Mesa's Permits Supervisor).


See Letter to Arizona Legislators, supra note 168.

See discussion supra Part II.A.

See Letter to Arizona Legislators, supra note 168.
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173 U.S. Const. art. 1, § 10, cl.1 (“No state shall ... pass any ... Law impairing the Obligations of Contracts); Ariz. Const. art. 2, § 25 (“No ... law impairing the obligation of a contract, shall ever be enacted”).

174 “No statute is retroactive unless expressly declared therein.” Ariz. Rev. Stat. Ann. § 1-244 (2009). However, there are exceptions to the retroactivity rule. If the statute is “merely procedural and does not affect an earlier established substantive right,” then it can be applied retroactively, even if not expressly stated. Bouldin v. Turek, 607 P.2d 954, 955 (Ariz. 1979). “[W]hile there is no precise definition of either term [substantive and procedural], it is generally agreed that a substantive law creates, defines, and regulates rights while a procedural one prescribes the method of enforcing such rights or obtaining redress.” Allen v. Fisher, 574 P.2d 1314, 1315 (Ariz. Ct. App. 1978). Additionally, in order to be substantive, the right already has to be “vested.” State v. Gum, 153 P.3d 418, 425 (Ariz. Ct. App. 2007). Because the repealed amendment was not expressly retroactive, and most likely dealt with a substantive right that was already vested, borrowers would have had a good defense in arguing that the amendment could not apply retroactively.

175 For instance, did the general effective date refer to the date of contract formation? The date of default? The date of foreclosure? The date of the deficiency action?

176 See sources cited supra notes 173-74.


178 ULSIA § 113, cmt. n.4, 7A U.L.A. at 223.

179 Arizona attracts a large “snowbird” population, and Valley residents often buy second homes in the Northern part of the state. Limiting anti-deficiency protection to trustors who live in a home for at least six consecutive months “hurt[s] retirees who live in Arizona less than half of the year, or people from the Valley who own second homes up north.” Arizona Senator Calls for Repeal, supra note 5 (quoting Tom Farley, Chief Executive, Arizona Realtors Association). Additionally, denying trustors who own multiple residences anti-deficiency protection hurts the state's bottom line. A 2003-2004 Northern Arizona University study found the statewide economic impact of snowbirds to be approximately $664 million, the equivalence of about 28,000 jobs. Snowbirds Contribute Economically, Socially, The Ariz. Daily Star, Nov. 26, 2005, available at http://www.azstarnet.com/allheadlines/104158. Snowbirds and in-state second home purchasers may think twice about buying multiple residences if anti-deficiency protection is no longer available.


181 ULSIA § 113(a), 7A U.L.A. at 222 (requiring the “protected party” to “occupy” a residence).

