



## PUBLIC LAWYERS DIVISION PRESIDENT

Hon. David Garbarino

# Post-Trustee's Sale Excess Proceeds Cases

When a trustee holds a trustee's sale pursuant to a deed of trust and the sale results in proceeds in excess of the balance of the underlying loan, the trustee has two choices: (1) distribute the excess proceeds to the junior interest holders in the order of their priority or (2) file an excess proceeds case in Superior Court and deposit the excess proceeds with the County Treasurer. See A.R.S. § 33-812(A) & (C). If the trustee files an excess proceeds case, the trustee is the plaintiff, the County Treasurer is the named defendant, and persons or entities seeking to enforce their rights to recover the excess proceeds file and prosecute applications for release of the excess proceeds. See *id.* § 33-812(G). With several minor exceptions, the plaintiff/trustee and the defendant/County Treasurer generally take no further action in the case, and the litigation that occurs relates to applications seeking release of the excess proceeds. In Maricopa County, excess proceeds cases are assigned to one of the four Civil Department Superior Court Commissioners.

The procedures followed by the trustee/plaintiff, applicants, and the court in an excess proceeds case are governed by A.R.S. § 33-812 and the Arizona Rules of Civil Procedure. Section 33-812 establishes special procedures and deadlines for the adjudication of excess proceeds cases that are different from the normal procedures under the Rules of Civil Procedure. Practitioners assisting applicants should read A.R.S. § 33-812 carefully as there are some unique requirements applicants must satisfy before the court can release excess proceeds.

Some of the unique requirements that applicants must satisfy are the notice and mailing requirements described in A.R.S. § 33-812(G). When the trustee/plaintiff files an excess proceeds case, he/she/it must identify in the complaint any persons and entities who may have held an interest in the property at time of the trustee's sale, and are entitled to receive notice of the case and notice of any applications for release of the excess proceeds. See *id.* § 33-812(D)(2). The trustee/plaintiff creates the list based upon information from a trustee's sale guarantee which the trustee/plaintiff also files with the complaint. See *id.* According to A.R.S. § 33-812(G), applicants must mail their applications to the County Treasurer and each person or entity identified by the trustee/plaintiff via a manner of mailing that requires a signed return receipt. Later, applicants must file an affidavit or declaration verifying the date and manner of mailing and attach a copy of the signed return receipt or an envelope marked as undeliverable for the County Treasurer and each person and/or entity identified by the complaint. See *id.* If an envelope is returned to an applicant identifying a forwarding address, the applicant must repeat the mailing for the forwarding address(es) until either a signed return receipt is received or an envelope marked undeliverable is received. See *id.* § 33-812(G)(2). While

the procedure is not as onerous as a personal service requirement, it can be cumbersome and can take time to satisfy.

The deadlines set by A.R.S. § 33-812 are also unique. The trustee/plaintiff is required to include in the complaint a narrative of the priority of interest holders. See *id.* § 33-812(D)(4). If an applicant is junior to other potentially interested parties identified on the narrative, the Court cannot release the excess proceeds to the junior applicant until 180 days elapse from the filing of the complaint or after a hearing and determination of priority. See *id.* § 33-812(J). Even an applicant identified as holding the most senior interest must wait at least forty-five days from the date of mailing the application for any objections or competing applications to be filed. See *id.* § 33-812(I). If funds remain unclaimed for two years and the balance exceeds \$50, the proceeds are deemed abandoned and the County Treasurer will remit the proceeds to the Arizona Department of Revenue's Unclaimed Property Unit. See *id.* § 33-812(L) & (N). Abandoned balances of \$50 or less are transferred to the county's general fund. See *id.* § 33-812(M).

The unique procedures and deadlines also require the assigned judicial officer to devise a protocol to manage the cases. Each judicial officer's protocol may be different, but the result should be the same. In my Division, I review applications for release of excess proceeds shortly after filing. At that time, it is unlikely that the notice and mailing requirements have been satisfied, but I can review the substance of the application, i.e., whether the applicant is entitled to recover the excess proceeds. If I have a question or concern regarding the substance of the application, I will set a telephonic status conference to discuss the application with the applicant and/or his/her/its attorney. Similarly, if there are competing applications or objections, I will set a telephonic status conference to determine whether a hearing or other proceedings are necessary. If I do not have any questions or concerns and there are no competing applications or objections, I will tickle the application for review for between forty-five (the objection period) and 180 days depending upon the relative priority of the applicant's interest based upon the narrative in the complaint and the time that has elapsed since the filing of the complaint.

On the tickle date, I will reevaluate priority, look for any objections or competing applications, and determine whether the notice and mailing requirements have been satisfied. Based upon my review, I will either enter the requested order releasing all or a portion of the excess proceeds, set a telephonic status conference to discuss any questions or concerns I may have or to set further hearings or proceedings as needed, or tickle the matter for thirty days if no mailing affidavit/declaration has been filed by the applicant. The majority of applications received are uncontest-

ed. On occasion, there is a dispute between applicants which may require discovery, oral argument, or an evidentiary hearing. Applicants that anticipate the need for discovery or further proceedings should alert the assigned judicial officer to that possibility as soon as possible and/or request a status conference to discuss the issues.

The time-consuming task for the court is determining whether the notice and mailing requirements have been satisfied for each application. Excess proceeds cannot be released until an applicant satisfies A.R.S. §

33-812(G). An applicant's failure to comply with § 33-812(G) may result in significant delay as a result of the forty-five-day objection period. That is, if an applicant fails to satisfy the notice and mailing requirements for a single potentially interested party, the applicant has to start the process over with respect to that party and the forty-five-day objection period will apply to any subsequent mailing. An applicant's attention to the details of their mailings and affidavit/declaration are important for the timely resolution of their application. ■

## Q&A



### LAWYER LIABILITY AND ETHICS

# Confidential vs. Privileged ... Do You Know the Difference?



Jessica L. Beckwith

Most attorneys are familiar with the concept of attorney-client privilege and the protection it affords to our clients. The attorney-client privilege is a creature of statute and is limited in nature. Under Arizona law, the attorney-client privilege is codified both in the civil and criminal contexts. A.R.S. § 13-4062(2) (criminal) and A.R.S. § 12-2234 (civil). A.R.S. § 12-2234(A) states, in relevant part, "In a civil action an attorney shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment." The criminal privilege is nearly identical. Comment 3 to ER 1.6 states, in relevant part, "The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client."

Client confidential information is governed by Arizona Ethical Rule 1.6. The requirements of ER 1.6 operate as a promise by an attorney to a client (current, former and to some extent potential) not to reveal anything the attorney learns from the client during the course of the representation except in very limited circumstances. ER 1.6(a) states, "(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted or required by paragraphs (b), (c) or (d), or ER 3.3(a)(3)." Comment 3 to ER 1.6 states, in relevant part, "The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."

State Bar of Arizona Ethics Opinion 97-05 states, "Although the concepts of confidentiality and the attorney-client privilege have similar objectives, they are entirely separate." A lawyer's duty to maintain a client's confidential information is "extremely broad" according to Opinion 97-05. The fact of the representation itself and the identity of an attorney's client may be client confidential

information. (See State Bar of Arizona Ethics Opinion 97-04 ["... if a firm wants to list some of its existing clients and/or include an endorsement from an existing client, the firm must obtain the clients' consents prior to including their identities in the web site."])

American Bar Association Model Rule 1.6, which substantially parallels Arizona Ethical Rule 1.6, echoes this sentiment. American Bar Association Formal Opinion 480 emphasizes the importance of a broad confidentiality rule, stating that, "The duty of confidentiality extends generally to information related to a representation whatever its source and without regard to the fact that others may be aware of or have access to such knowledge." This holds true even when the information is contained in a public record. Opinion 480 provides guidance, stating that, "information about a client's representation contained in a court's order, for example, although contained in a public document or record, is not exempt from the lawyer's duty of confidentiality under Model Rule 1.6." Thus, the American Bar Association takes the stance that a lawyer "may not reveal information relating to a representation that is protected by Rule 1.6(a), including information contained in a public record, unless disclosure is authorized under the Model Rules." (See American Bar Association Ethics Opinion 480.)

So important is an attorney's duty to safeguard client confidential information, ER 1.6(e) expressly states, "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

As Opinion 97-05 states, "Although the concepts of confidentiality and the attorney-client privilege have similar objectives, they are entirely separate." So, it is important for attorneys to understand when an analysis regarding client confidential information pursuant to ER 1.6 needs to be done versus an analysis of whether something is privileged under the relevant Arizona statutes. ■

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