



**ACBC
Pop-Up CLE**

Arizona's New Homestead Exemption Statutes – A cause for anxiety or a sigh of relief?

Presented by Scott Malm, Larry Folks, Delbert Evans, Kenn Neeley, and Diane Drain

July 21, 2021 12:00 noon to 2:00 pm

ACBC offers CLE credit to those attending the live presentation. This program may qualify for Self-Study

This program is being recorded.

SCOTT A. MALM



Gust Rosenfeld

Scott concentrates his practice on litigation and dispute resolution for businesses and individuals. He primarily advises and represents title insurance companies and their insureds, escrow agents, lenders, developers, brokers, contractors and similar clients in trial and appellate courts at the state and federal level.

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University of Wales, Cardiff Business School (MBA)

University of Arizona School of Law (JD)

LARRY O. FOLKS



Folks Hess, PLLC

Certified Business Bankruptcy Specialist
American Board of Certification

Certified Bankruptcy Specialist
Arizona Board of Legal Specialization

Past Chair (2009-2010), Bankruptcy Section, State
Bar of Arizona

Super Lawyers, 2010-present

The Best Lawyers in America, 2015-present

Northwestern University School of Law

DELBERT EVANS



Pioneer Title Agency

Delbert Evans has been in the title industry for 20 years. He started out with no knowledge of the industry in the customer service department. At various points has worked in residential, commercial and/or the foreclosure realm before becoming Chief Title officer and eventually managing the Title Department for the Arizona and Texas production centers of a national title company. Those production centers handled commitment prep, recording and/or policy production for 10 different states including involvement with underwriting decisions. Currently he is a Senior Title Officer for Pioneer Title Agency. In addition to being the current Treasurer for the LTAA's PAC he has also been chair of the Education Committee for the Arizona Trustee's Association.

Why the Change?

Pacific Western Bank v. Castleton, 246 Ariz. 108 (App. 2018)

Facts:

- Recorded \$5.2 million judgment
- Judgment debtor conveyed title to a short sale buyer which conveyed to insured for \$535,000
- Recorded judgment missed
- Judgment creditor started judicial foreclosure

Court:

Any person entitled to a homestead exemption “holds the homestead property free and clear of the judgment lien. A.R.S. § 33-964(B).”

Why the Change?

Historic precedent:

Union Oil Co. of Ariz. v. Norton Morgan Commercial Co.,
23 Ariz. 236 (1922): “no lien shall be permitted to attach
to the real property claimed as a homestead.”

In re Rand, 400 B.R. 749 (Bankr. D. Ariz. 2008) (J. Haines):
“recorded judgment does not constitute a lien on the
debtors' real property claimed as a homestead.”

New world: HB2617

Highlights:

- Attempted in 2020 legislative session, but abandoned
- Pushed by the Attorney General's Office
- Sponsored by the House Majority Leader
- Amends A.R.S. §§ 12-1551, 33-964, 33-1101, 33-1103
- Effective January 1, 2022
- \$250,000 homestead exemption amount
- Recorded judgment is a lien on homestead property

Enforcement of Money Judgments Against a Judgment Debtor's "Homestead" Property/Residence Under Arizona's New Laws Effective January 1, 2022

OVERVIEW:

▶ Arizona HB 2617

- ▶ Effective date January 1, 2022
- ▶ Amendments to Arizona judgment lien (A.R.S. § 33-964), judgment execution (A.R.S. § 12-1551) and homestead exemption (A.R.S. §§ 33-1101 and -1103) statutes

▶ Most significant amendments to the statutes

- ▶ Judgment lien on homestead property
- ▶ Increase in the homestead exemption from \$150,000 to \$250,000

FOUR STEPS TO EVALUATE ENFORCEMENT OF A MONEY JUDGMENT AGAINST A “HOMESTEAD” PROPERTY ON OR AFTER 12/31/21

Step 1: Confirm that the Judgment Has Not Expired

- ▶ 2018: Arizona Judgment Execution Statute extended the validity of civil money judgments from five years to ten.
- ▶ 2021: HB 2617 confirmed the validity of money judgments for ten years that were entered:
 - ▶ on or after August 3, 2013; or
 - ▶ on or before August 2, 2013, and that were renewed on or before August 2, 2018.
- ▶ Expired civil money judgment is no longer enforceable.
 - ▶ Review the court docket to determine the date of entry.
 - ▶ Review the face of the judgment to determine the date of renewal of the judgment.

FOUR STEPS TO EVALUATE ENFORCEMENT OF A MONEY JUDGMENT AGAINST A “HOMESTEAD” PROPERTY ON OR AFTER 12/31/21

Step 2: Determine Whether the Real Property at Issue Qualifies for the Homestead Exemption and the Amount that Applies

- ▶ Revisions to the Homestead Exemption Statute (A.R.S. § 33-1101[A])
- ▶ Homestead exemption, for Arizona residents 18 or older, applies to the following types of real property (“Homestead Property”):
 - ▶ the person’s interest in real property in one compact body on which exists a dwelling house in which the person resides;
 - ▶ the person’s interest in one condominium or cooperative in which the person resides;
 - ▶ a mobile home in which the person resides; or
 - ▶ a mobile home in which the person resides plus the land on which that mobile home is located.
- ▶ Exemption is increased to \$250,000 (from \$150,000)

FOUR STEPS TO EVALUATE ENFORCEMENT OF A MONEY JUDGMENT AGAINST A “HOMESTEAD” PROPERTY ON OR AFTER 12/31/21

Step 3: Determine Whether the Judgment Is a Lien Upon the Homestead Property

- ▶ Current Arizona Judgment Lien Statute
 - ▶ GENERAL RULE: A recorded money judgment creates a statutory judgment lien on all real property then owned by a judgment debtor, or acquired by the judgment debtor in the future, in the county where the judgment is recorded.
 - ▶ EXCEPTION: A recorded money judgment is not a lien upon real property that qualifies under the definition of a Homestead Property.

FOUR STEPS TO EVALUATE ENFORCEMENT OF A MONEY JUDGMENT AGAINST A “HOMESTEAD” PROPERTY ON OR AFTER 12/31/21

Step 3: Determine Whether the Judgment Is a Lien Upon the Homestead Property

- ▶ HB 2617 repeals the exception to the “general rule.”
- ▶ Effective January 1, 2022, all recorded civil money judgments shall become a lien upon:
 - ▶ all real property, including Homestead Property, owned by the subject judgment debtor in that county on the date that the judgment is recorded; and
 - ▶ all real property that may be acquired by the subject judgment debtor in that county in the future.

FOUR STEPS TO EVALUATE ENFORCEMENT OF A MONEY JUDGMENT AGAINST A “HOMESTEAD” PROPERTY ON OR AFTER 12/31/21

Step 3: Determine Whether the Judgment Is a Lien Upon the Homestead Property

- ▶ Transitional rules (1 and 2 of 4)
 1. If a sale, transfer or refinance of the judgment debtor's Homestead Property is completed prior to January 1, 2022, the judgment creditor does not have a judgment lien upon the Homestead Property.
 2. If the judgment debtor receives a bankruptcy discharge prior to January 1, 2022, the judgment creditor does not have a judgment lien upon the Homestead Property.

FOUR STEPS TO EVALUATE ENFORCEMENT OF A MONEY JUDGMENT AGAINST A “HOMESTEAD” PROPERTY ON OR AFTER 12/31/21

Step 3: Determine Whether the Judgment Is a Lien Upon the Homestead Property

► Transitional rules (3 and 4)

3. If the judgment debtor has filed for bankruptcy protection prior to January 1, 2022, and ultimately receives a discharge, the judgment creditor does not have a judgment lien upon the Homestead Property.
4. For any sale, transfer or refinance that is completed on or after January 1, 2022, judgments that are recorded before January 1, 2022, and that are still valid attach to the homestead property, are enforceable, and create judgment liens pursuant to the priority rules listed in the statute.

FOUR STEPS TO EVALUATE ENFORCEMENT OF A MONEY JUDGMENT AGAINST A “HOMESTEAD” PROPERTY ON OR AFTER 12/31/21

Step 4: Determine What Collection Rights the Judgment Creditor Has Under the Circumstances as a Result of Its Judgment Lien Upon the Homestead Property

- Recurring scenarios addressed by HB 2617 ...

SCENARIO 1

“Cash Out” Refinance Transaction by the Judgment Debtor Concerning a Homestead Property Secured by a Judgment Lien

- ▶ Significant new collection right
- ▶ A.R.S. § 33-964(C): Judgment creditor's judgment lien balance must be paid in full from the refinance “cash out” proceeds before the judgment debtor or any other person receives any of the proceeds.
- ▶ A.R.S. § 33-1101 (C): Homestead exemption does not attach to the person's interest in identifiable cash proceeds from refinancing the homestead property.
- ▶ A.R.S. § 33-1101 (D): Guidance concerning how to determine whether there is equity in a Homestead Property for the purpose of complying with several provisions of the Judgment Lien Statute, Judgment Execution Statutes, and Homestead Exemption Statutes.

SCENARIO 2

Voluntary Sale of Homestead Property Subject to a Judgment Lien by the Judgment Debtor

- ▶ A.R.S. § 33-964(B): Grants a judgment creditor rights with respect to payment of its judgment lien balance upon a judgment debtor's voluntary sale of a Homestead Property.
- ▶ Codifies judgment creditor's substantive right to payment under existing lien priority and Homestead Exemption Statutes now that the judgment creditor's recorded judgment is recognized as a statutory judgment lien upon the Homestead Property.

SCENARIO 2 (continued)

Voluntary Sale of Homestead Property Subject to a Judgment Lien by the Judgment Debtor

- ▶ A.R.S. § 33-964(B): Expands judgment creditors' rights to sale proceeds without having to take other enforcement steps that were previously necessary as a result of the judgment creditor not having an actual lien upon the sale proceeds
- ▶ Grants title companies the right to record a partial release of the judgment creditor's judgment under certain circumstances

SCENARIO 3

Involuntary Sheriff's Execution Sale of the Homestead Property Forced by the Judgment Creditor

- ▶ HB 2617 expressly authorizes a judgment creditor to force an involuntary Sheriff's execution sale of a Homestead Property (with equity in it that exceeds the homestead exemption amount) encumbered by its judgment lien by amending A.R.S. § 33-1103(A)

Maricopa County Sheriff's forced execution sale requirements (1-3 of 5)

1. Judgment Creditor obtains a money judgment against an individual judgment debtor.
2. The Judgment is recorded with the Maricopa County Recorder while Judgment Debtor owns a residence located in Maricopa County that is the Judgment Debtor's Homestead Property.
3. Judgment Creditor obtains a Writ of General Execution from the Clerk of the Superior Court to direct the Sheriff to schedule a Sheriff's execution sale of the Homestead Property.

Maricopa County Sheriff's forced execution sale requirements (continued)

4. The Writ of General Execution is delivered to the Civil Enforcement Division of the Sheriff's Department along with an initial \$200 fee deposit.
5. The Sheriff schedules an execution sale of the Homestead Property to enforce the Judgment after all legal requirements are satisfied.

SCENARIO 3 (continued)

Involuntary Sheriff's Execution Sale of the Homestead Property Forced by the Judgment Creditor

- ▶ Judgment Creditor must comply with the Sheriff's bidding requirements to prepare for and participate in the Sheriff's execution sale of the Homestead Property.
- ▶ Per A.R.S. § 33-1105:
 - ▶ Judgment Creditor provides Sheriff with the dollar amount of unpaid real property taxes.
 - ▶ Judgment Creditor provides Sheriff with payoff amounts of all Deeds of Trust and other liens of record that are senior to the money Judgment being enforced.

SCENARIO 3 (continued)

Involuntary Sheriff's Execution Sale of the Homestead Property Forced by the Judgment Creditor

► Per A.R.S. § 33-1105 (continued):

- Judgment Creditor is required by the Sheriff to bid \$1.00 over the total amount of the Senior Real Property Tax Lien Amount + the Senior Lien Payoff Amount + the \$250,000 Homestead Exemption Amount as its opening credit bid at the Sheriff's Execution Sale.
- If the Judgment Creditor is the successful bidder for the Homestead Property, the Judgment Creditor is responsible for paying the \$250,000 Homestead Exemption Amount, the prior unpaid real property taxes, the prior consensual liens, and the Sheriff's costs of sale in cash within five days after the date of the Sheriff's Execution Sale.

ARS 33-964 B (8)

In addition to any other remedy provided by law, a title insurer that prepares or records the notice of partial release of the judgment lien under this subsection is liable to any party for the actual damages, including attorney fees and court costs, that are caused by wrongfully recording the notice of partial release of the judgment lien.

Sale Scenario 1

Proceeds to
judgment debtor do
not exceed 80% of
the homestead
allowance (80% of
\$250,000 =
\$200,000 threshold)

Rule:

- Title company may record a release of the property from the judgment lien without paying the judgment lien.

Example:

- Home sale price is \$500,000
- Deed of trust with priority over judgment lien is \$275,000
- Total of reasonable closing and real estate agent fees is \$37,500
- Judgment debtor/seller to receive \$187,500

Application of rule:

- Escrow may record a release of the property from the judgment lien without paying judgment and pay the \$187,500 to judgment debtor/seller.

Sale Scenario 2

Proceeds to
judgment debtor are
between \$200,000
and \$250,000

Rule:

- Title company may not record a release of the property from the lien.

Example:

- Home sale price is \$500,000
- Deed of trust with priority over judgment lien is \$240,000
- Total of reasonable closing and real estate agent fees is \$37,500
- Judgment debtor/seller to receive \$222,500

Application of rule:

- Notice of pending sale must be sent to judgment lien holder, which may object to the recording of a release within 20 days after notice.
- If no objection, title company may record release of property from lien.
- If an objection, judgment debtor/seller may file a lawsuit to clear lien.

Sale Scenario 3

Proceeds to
judgment debtor
exceed the \$250,000
homestead
allowance

Rule:

- Title company may not record a release of the property from the lien.

Example:

- Home sale price is \$500,000
- Lender's deed of trust with priority over judgment lien is \$165,000
- Judgment lien securing \$17,500 judgment
- Total of reasonable closing and real estate agent fees is \$37,500
- Settlement statement will show judgment debtor to receive \$280,000 not including payment of judgment

Application of rule:

- Typical escrow; judgment lien is paid from escrow in exchange for a release of lien.

Sale Scenario 3a

Proceeds to
judgment debtor
exceed the \$250,000
homestead
allowance

Rule:

- Title company may not record a release of the property from the judgment lien.

Example:

- Home sale price is \$400,000
- Lender's deed of trust with priority over judgment lien is \$100,000
- Judgment lien securing \$55,000 judgment
- Total of reasonable closing and real estate agent fees is \$37,500
- Closing disclosure will show judgment debtor to receive \$270,000 not including payment of judgment

Question:

Should you release \$250,000 to the judgment debtor and the excess \$47,500 to the judgment lienholder?

Sale Scenario 3a

Proceeds to
judgment debtor
exceed the \$250,000
homestead
allowance

Rule:

- Title company may not record a release of the property from the judgment lien.

Example:

- Home sale price is \$400,000
- Lender's deed of trust with priority over judgment lien is \$100,000
- Judgment lien securing \$55,000 judgment
- Total of reasonable closing and real estate agent fees is \$37,500
- Closing disclosure will show judgment debtor to receive \$270,000 not including payment of judgment

Question:

Should you release \$250,000 to the judgment debtor and the excess \$47,500 to the judgment lienholder?

Answer:

NO! Need to pay judgment in full for a release.

Refinance Scenario 1

No cash proceeds to judgment debtor

Rule:

- Title company may record a subordination of the judgment lien.

Example:

- Home value is \$500,000
- Deed of trust with priority over judgment lien is \$165,000
- Judgment debtor refinances the existing deed of trust
- Reasonable fees and closing costs are charged
- Judgment debtor receives no money from refinance

Application of rule:

- Title company may record a subordination of the judgment lien to the new deed of trust.

Refinance Scenario 2

Cash proceeds to
judgment debtor

Rule:

- Title company may not record a subordination of the judgment lien; judgment lien must be paid before judgment debtor receives any money.

Example:

- Home value is \$500,000
- Deed of trust with priority over judgment lien is \$165,000
- Judgment lien encumbering a \$17,500 judgment
- Judgment debtor refinances the existing deed of trust
- Reasonable fees and closing costs are charged
- Judgment debtor pulls out \$25,000 in equity from refinance

Application of rule:

- Judgment lien must be satisfied before debtor gets any money.

KENNETH L. NEELEY



NEELEY LAW

Kenn believes in second chances. He specializes in debt relief matters including bankruptcy, debt settlement, IRS tax problem resolution, and student loan relief.

Kenn has an amazing wife and 5 awesome kids who keep him sharp with their debate skills.

He is a die-hard entrepreneur and loves small businesses.

Professionally, he is proud of his perfect appellate record representing consumer debtors (4-0).

Bankruptcy Implications of HR 2617

- ▶ The good: It will allow some people to file Chapter 7 who are currently stuck with too much homestead equity to file Chapter 7 but not enough income to file Chapter 13.
- ▶ However, judgment creditors will be secured creditors on the petition date and will have the rights of a secured creditor in bankruptcy proceedings.
- ▶ Unless set aside by the Bankruptcy Court, judgment liens will now pass through the bankruptcy and remain enforceable post-discharge *in rem* against real property (including Homestead Property) through a Sheriff's sale or through payment upon a voluntary sale.

Avoiding Judicial Liens

- ▶ Section 522(f)(1)(A) gives the debtor a right to avoid a judicial lien that impairs an exemption
 - ▶ Exception for domestic support obligations
 - ▶ Exception for criminal fines or restitution, 28 U.S.C. 3613(e)
- ▶ Section 522(f)(2) contains the formula for determining whether a lien can be avoided

The Formula

Lien is avoidable to the extent that:

$$\begin{aligned} & \text{the judgment lien} \\ & + \text{all other liens on the property} \\ & + \text{the available exemption} \\ & > \\ & \text{value of debtor's interest} \end{aligned}$$

What about multiple judicial liens?

The Transition Period

- ▶ Considerations in timing of filing 2021 vs. 2022
 - ▶ How much equity (and how much might there be)?
 - ▶ Will lien be avoidable?
 - ▶ Is there priority debt?
 - ▶ Will anything else change by 2022 (income, exemptions, dischargeability of taxes)

SCENARIO

Married Couple w/ Judicial Lien Considers their Options

- ▶ Home w/ FMV of \$600,000
- ▶ Purchase Money Security Interest of \$300,000
- ▶ Judicial Lien of \$100,000
- ▶ Presume Costs of Sale of \$50,000

Married Couple w/ Judicial Lien Considers their Options

- ▶ What would bankruptcy filed in 2021 look like?
 - ▶ Chapter 13?
 - ▶ Chapter 7?
 - ▶ What if there's \$100,000 in priority tax debt (no lien)?

Married Couple w/ Judicial Lien Considers their Options

- ▶ What would bankruptcy filed in 2022 look like?
 - ▶ Chapter 13?
 - ▶ Chapter 7?
- ▶ What if there's \$100,000 in priority tax debt (no lien)?
- ▶ What if house is worth \$650,000 in 2022?

Traps and Tips

- ▶ Divorced couple as joint owners
- ▶ Judicial lien doesn't impair exemption
- ▶ Joint ownership with non-spouse
- ▶ Property acquired before bankruptcy but after judgment is recorded ("fixing of lien")
- ▶ Judicial lien for non-dischargeable debt
- ▶ Action to avoid judicial lien is not pursued during pendency of bankruptcy case

Tools

- ▶ Word template 522(f) notice, motion, order
- ▶ Calculator for determine extent that judgment liens can be avoided
 - ▶ Including multiple liens
 - ▶ Including co-owner property
- ▶ Case law
- ▶ **Text “Tools” to 480-470-0110**

DIANE L. DRAIN



Law Office of Diane L. Drain

DIANE is a conservative and practical advocate for her clients. As a well-known Phoenix bankruptcy attorney, she truly believes that “when you find your passion, going to work every day is a joy, not a job.” Her clients and fellow lawyers will attest to her passion and commitment to excellence. “Our reputation is built on our client’s trust that we can help them during a very difficult time. Our commitment to each client is to provide them the best guidance we can.”

Awards: AV rated since 2006. Of her numerous awards, the one she cherishes the most is her Lifetime Achievement Pro Bono Award, presented by Chief Bankruptcy Judge Daniel Collins and the Bankruptcy Section - “for a career of overwhelming and extraordinary pro bono services in establishing the Bankruptcy Court Self Help Center and leadership in the bankruptcy pro bono programs.”

Mentorship: Diane believes that everyone has an obligation to give back to their community and fellow professionals. She follows the guidance of her mentor, James Kahn, who always has an open-door policy. As part of her commitment to her fellow attorneys, Gary Stickell and Diane created the Arizona Consumer Bankruptcy Counsel, a safe place for consumer bankruptcy attorneys to hone their skills.

Let's recap:

ARS 12-1551: Issuance of writ of execution, limitation, renewal, death of judgment debtor:

- ▶ (C) the court shall not issue a writ of execution after the death of the judgment debtor unless it is for the recovery of real or personal property, or enforcement of a lien.
- ▶ (D) 1 & 2. applies to all judgments entered on or after August 3, 2013, or renewed timely.
- ▶ (E) 4 – state judgments excepted from limitations
 - ❑ This is the reason the AG's office filed HB2617.

Let's recap:

ARS 33-964: lien of judgment, duration, homestead, release, satisfaction:

- ▶ A. Removed the exception that judgments did not attach to homestead property.
 - ❑ Still limited to county where judgment recorded
 - ❑ Includes property currently owned by judgment debtor or later required.

Let's recap:

ARS 33-964: lien of judgment, duration,
homestead, release, satisfaction:

- B. SALE PROCEEDS: Proceeds shall be paid to recorded, valid judgment creditor, after paying homestead exemption to judgment debtor, and paying liens with priority over recorded, valid judgment and reasonable costs of sale.
- ❑ Title insurer may record partial release of judgment, without notice to judgment creditors, if the anticipated payment to judgment debtor (homeowner):
 - is less than 80% of homestead exemption.
- ❑ If payment to judgment debtor is 80% or more – then notice to judgment creditor is required.
 - ❑ 20 days negative notice

Let's recap:

ARS 33-964: lien of judgment, duration, homestead, release, satisfaction:

- (B)(1)(f) Title determines if homestead exemption applies to real property
- (B)(1)(g) Title determines equity
- (B)(1)(j) Title determines priority of who gets paid
 - ❑ (B)(1)(j)(3) judgment creditor can bring court action if does not agree with title's determination regarding extinguishing the lien.
- (B)(1)(j)(5) title can charge reasonable fee to owner of property or anyone who requests a notice of partial release.
- (B)(1)(j)(6) recorded notice of partial release is conclusive evidence judgment lien extinguished in favor of purchasers/encumbrancers for value.
- **THIS WILL MOST CERTAINLY HOLD UP THE SALE OF THE PROPERTY**

Let's recap:

ARS 33-964: lien of judgment, duration,
homestead, release, satisfaction:

- C. Cash Proceeds from Refinancing:
 - Judgment creditor paid in full BEFORE HOMEOWNER or other person received any proceeds, except direct costs or priority liens.
 - Judgment lien subordinated to new lender's interest.

Let's recap:

ARS 33-964: lien of judgment, duration, homestead, release, satisfaction:

- G. Sale, transfer or refinance: **Pre January 1, 2022:**
- Judgment lien does not attach to homestead (current law).
- A judgment lien is not created on the judgment debtor's homestead property if either:
 - G(1) If bankruptcy discharge entered before 1/1/22 – judgment does not attach.
 - G(2) If bankruptcy petition, resulting in discharge, that is filed before 1/1/22 – judgment does not attach.
 - (This will cover pending chapter 13 cases).

Let's recap:

ARS 33-964: lien of judgment, duration, homestead, release, satisfaction:

- H. Sale, transfer or refinance: **Completed on or after**
- **January 1, 2022:**
- A valid judgment recorded before 1/1/22 is a lien on homestead:
- H (1) Judgment liens junior to all existing consensual liens (as of 12/31/21).
- H (2) Priority of judgment lien determined by judgment recording date.
- NOTE - 33-964(H) limits to “only homestead property”. Why?

Let's recap:

ARS 33-1101: Homestead exemptions, persons entitled to hold homesteads, equity

- Raises exemption from \$150,000 to \$250,000
- Homestead exemption does not attach to identifiable cash proceeds from refinancing homestead property.
- Equity determined by value of property in final closing document disclosure used for refinance transaction.

Let's recap:

ARS 33-1103: Effective date of homestead exemption, extent of exemption; exceptions

- A. Homestead property exempt from involuntary sale, except:
 - 4. recorded civil judgment or other nonconsensual liens (what does this mean?) if the debtor's equity exceeds homestead allowance.
 - Which means the judgment creditor can use a Sheriff's sale if the equity is greater than \$250,000. See ARS 33-1105.
 - Redemption period of either 30 days or 6 months after the sheriff's sale, whichever is applicable. ARS § 12-1282(B).

Faculty Contact Information

Scott Malm

602-257-7481

samalm@gustlaw.com

Delbert Evans

602-328-8896

Delbert.Evans@ptaaz.com

Diane Drain

602-246-7106

DDrain@dianedrain.com

Larry Folks

602-256-5906

folks@folkshess.com

Kenn Neeley

480-802-4647

kenn@neeleylaw.com

Text “tools” to 480-470-0110



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