UTA
United Trustees Association

UTA Quarterly

Spring 2013

Arizona Court of Appeals Holds That An Appraiser May Be Liable to Third Parties On An Appeal

By Michael R. Scheurich, Esq., Dickinson Wright/ Mariscal Weeks

The Arizona Court of Appeals has ruled that an appraiser of commercial property may be liable for a faulty appraisal to someone other than the client. In *Belen Loan Investors, LLC v. Bradley,* 2 CA-CV 2011-0153 (filed December 21, 2012), the Court held that an appraiser can be sued for negligent misrepresentation of the value of the property even though the appraisal clearly states that the only intended user is the appraiser's client.

The lenders in *Belen* loaned the borrowers $5.55 million to purchase and develop unimproved residential lots in New Mexico. The borrowers hired the appraiser to provide appraisals for use by one of the principals of the borrowers in obtaining the loans.

> *"The Court of Appeals held that it was possible that the appraiser owed a duty to the lenders even though one of the appraisals stated it was "not intended to be used, transferred or relied upon by any person other than" its specified recipient."*

The borrowers defaulted on the loan. The lenders filed a judicial foreclosure action and sued numerous defendants on a variety of claims. Among other things, the lenders alleged that the borrowers had made false representations of the properties' value to induce the lenders to provide "excess" loans funds, which were then transferred to the borrowers' personal profit sharing plans. The lenders alleged that the appraiser, hired by the borrowers, had intentionally or negligently provided "falsely inflated appraisals" upon which the lenders had relied. The lenders claimed that the borrowers had influenced the appraiser to nearly triple a valuation from $1.68 million in a draft report to $4.5 million in the final report even though that property had been sold only a year earlier for $360,000. The lenders also claimed that the appraiser had failed to obtain information about any available comparable sales.

The trial court granted the appraiser's motion to dismiss the lawsuit, concluding that the lenders were not entitled to rely on the appraisal. The Court of Appeals, however, reversed the trial court.

Continued on page 28

Inside This Issue

FEATURED ARTICLES

President's Message....4
Evictions....6
Protection for Foreclosed Owners....8
Foreclosing on Active Duty Military....10
NV Mediation Program....12
Deed of Trust....14
CFPB's New Servicing Rules....16
Fraudulent Conveyance Claims....18
UTA Wins on Trustee Brief....20

STATE NEWS

Period of Repose?....22
Nevada Update....23
Oregon Mediation....23
Washington State Update....24
Washington Court Rules....25
San Bernardino Stops Eminent Domain Proposal....25

UTA & INDUSTRY NEWS

AB 2610 Effective Date....26
Fannie Updates Time Frames....26
Fannie Increases Foreclosure Fees....26

MEMBER INTERVIEW

Cheryl McKeown....27

Featured Article

Appraiser May Be Liable — *Continued from Page 1*

The Court of Appeals held that it was possible that the appraiser owed a duty to the lenders even though one of the appraisals stated it was "not intended to be used, transferred or relied upon by any person other than" its specified recipient. That language, the Court concluded, did not preclude a claim based upon the fact that the appraiser knew the appraisal would be provided to and relied upon by others ☒ namely, the lenders.

As with other professionals, an appraiser's liability to others is limited to loss suffered "by the person or one of a limited group of persons for whose benefit and guidance [the appraiser] intends to supply the information or knows that the recipient intends to supply it" and extends only to those transactions "that he intends the information to influence or knows that the recipient so intends." Restatement (Second) of Torts § 552(2). The appraiser need not know the identity of the third-party recipient at the time he supplies the information, as long as the third party falls within a distinct group or class of persons the appraiser intends to reach and influence with the information. Restatement § 552, comment h. Accordingly, the appraiser's liability is not limited to a particular type of transaction, such as, an appraisal of residential versus commercial property.

If, on the other hand, the appraiser and the named recipient of the information regard the identity of the recipient as "important and material" and the appraiser "understands that his liability is to be restricted to the named person" only, then the appraiser owes a duty to the named recipient and no others. Restatement § 552, comment h.

The Court of Appeals noted that in order "to ascertain whether a duty exists, the circumstances and relationships between the parties" will determine whether the lenders were entities "for whose benefit and guidance" the appraiser intended to supply appraiser or knew that the borrowers intended to supply it. In either case, the appraiser would owe a duty to the lenders.

The appraiser contended that the lenders' awareness of express language in at least one appraisal that "[t]he intended user of this report is" the borrower, barred the lenders from relying upon the appraisal. The Court of Appeals concluded, however, that this language did not preclude finding a duty based on the appraiser's alleged knowledge that the borrowers would give the reports to third parties, i.e., the lenders, despite the provision that the appraisals were "not intended to be used, transferred or relied upon by any person other than those noted."

The case was remanded to the trial court for a determination whether the appraisal knew his appraisal would be provided to and relied upon by the lenders.

Michael R. Scheurich is member of the Phoenix, Arizona office of Dickinson Wright/Mariscal Weeks, where he has practiced law for over 30 years. Mr. Scheurich's practice focuses upon the litigation of real estate disputes and the enforcement of creditor's rights. He may be contacted at mscheurich@dickinsonwright.com.

WANT AN UPDATE
ON STATE LEGISLATIVE
ACTIVITY?

VISIT

WWW.UNITEDTRUSTEES.COM

AND CLICK ON
"LEGISLATIVE ADVOCACY!"