

**SUPREME COURT
STATE OF ARIZONA**

CSA 13-101 LOOP, LLC,

Plaintiff/Appellant,

v.

LOOP 101, LLC; PAUL S. ANTON and
VALERIE J. CHRISTIE; and OSCAR E.
SWANKY and HELEN SWANKY,

Defendants/Appellees.

Arizona Supreme Court
No. CV-14-0029-PR

Court of Appeals
Case No. 1 CA-CV12-0167

Maricopa County Superior Court
Case No. CV2009-034774

**ARIZONA BANKERS ASSOCIATION'S AMICUS BRIEF
IN SUPPORT OF PETITION FOR REVIEW**

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TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES ii

INTRODUCTION1

I. EXPRESS WAIVERS OF STATUTORY PROTECTIONS ARE PRESUMED ENFORCEABLE.....3

II. A PROHIBITION AGAINST WAIVER MAY BE IMPLIED ONLY WHEN THE IMPLICATION IS SO STRONG THAT THE CONTRARY CANNOT REASONABLY BE SUPPOSED.....6

III. IT IS NOT NECESSARY TO A REASONABLE CONSTRUCTION OF A.R.S. § 33-814(A) TO IMPLY A PROHIBITION AGAINST WAIVER.....9

IV. THE VAGUE STANDARD ESTABLISHED BY THE COURT OF APPEALS WOULD CHILL THE FREEDOM OF CONTRACT..... 12

CONCLUSION14

TABLE OF AUTHORITIES

Cases

<i>1800 Ocotillo, LLC v. WLB Group, Inc.</i> , 219 Ariz. 200, 196 P.3d 222 (2008).....	1, 4, 5
<i>Brown v. Jefferson</i> , 451 A.2d 74 (D.C. 1982).....	9
<i>Consumers Int'l, Inc. v. Sysco Corp.</i> , 191 Ariz. 32, 951 P.2d 897 (App. 1997).....	1, 4
<i>CSA 13-101 Loop, LLC v. Loop 101, LLC</i> , 233 Ariz. 355, 312 P.3d 1121 (App. 2013).....	6, 11
<i>Envirotest Sys. Corp. v. Comm'r of Motor Vehicles</i> , 293 Conn. 382, 978 A.2d 49 (Conn. 2009).....	8
<i>Greenlee Cnty. v. Laine</i> , 20 Ariz. 296, 180 P. 151 (1919).....	9
<i>Hawkins v. Freeman</i> , 195 F.3d 732 (4th Cir. 1999).....	8
<i>Holmes v. Graves</i> , 83 Ariz. 174, 318 P.2d 354 (1957).....	5
<i>In re Estate of King</i> , 228 Ariz. 565, 269 P.3d 1189 (App. 2012).....	10
<i>Lubner v. City of Los Angeles</i> , 53 Cal. Rptr. 2d 24 (1996).....	8, 9
<i>Mahoney v. Maricopa Cnty.</i> , 49 Ariz. 479, 68 P.2d 694 (1937).....	2, 7

<i>Maricopa Cnty. v. Douglas,</i> 69 Ariz. 35, 208 P.2d 646 (1949).....	7
<i>McClellan Mortgage Co. v. Storey,</i> 146 Ariz. 185, 704 P.2d 826 (App. 1985).....	10
<i>Parkway Bank & Trust Co. v. Zivkovic,</i> 232 Ariz. 286, 304 P.3d 1109 (App. 2013).....	5
<i>Sharpe v. Ariz. Health Care Cost Containment Sys.,</i> 220 Ariz. 488, 207 P.3d 741 (App. 2009).....	11
<i>Staples v. Concord Equities, L.L.C.,</i> 221 Ariz. 27, 209 P.3d 163 (App. 2009).....	9
<i>State v. Capitol Castings, Inc.,</i> 193 Ariz. 89, 970 P.2d 443 (App. 1998).....	12
<i>Swanson v. Image Bank, Inc.,</i> 206 Ariz. 264, 268, 77 P.3d 439, 443 (2003).....	10
<i>United States v. Jones,</i> 204 F.2d 745 (7th Cir. 1953).....	7, 8
<i>Verma v. Stuhr,</i> 223 Ariz. 144, 221 P.3d 23 (App. 2009).....	1, 5, 6, 10
<i>Wood Motor Co. v. Nebel,</i> 150 Tex. 86, 238 S.W.2d 181 (1951).....	4
<u>Statutes</u>	
A.R.S. § 33-422.....	5
A.R.S. § 33-729(A).....	10

A.R.S. § 33-808.....11

A.R.S. § 33-809.....11

A.R.S. § 33-810.....11

A.R.S. § 33-811.....11

A.R.S. § 33-814..... passim

A.R.S. § 36-2907.....11

INTRODUCTION

“[I]f there is one thing which more than another public policy requires it is that [people] of full age and competent understanding shall have the utmost liberty of contracting.” *Consumers Int'l, Inc. v. Sysco Corp.*, 191 Ariz. 32, 34, 951 P.2d 897, 899 (App. 1997) (citations omitted). That liberty has meaning, however, only when contracting parties can be assured that their agreements will be enforced. Particularly in commercial contexts, Arizona law presumes that “private parties are best able to determine if particular contractual terms serve their interests.” *1800 Ocotillo, LLC v. WLB Grp., Inc.*, 219 Ariz. 200, 202, 196 P.3d 222, 224 (2008). Absent some common law defense (such as fraud or estoppel) relating to the parties’ own conduct, courts will refuse to enforce the voluntary agreements of competent parties only when public policy “clearly outweighs” any interest in enforcement of the agreement, *id.*, or where the agreement is rendered invalid “by the plain language” of applicable legislation. *Verma v. Stuhr*, 223 Ariz. 144, 157, 221 P.3d 23, 36 (App. 2009).

Appellees’ agreement to waive the fair market value provisions of A.R.S. § 33-814(A) arose in a commercial context involving sophisticated parties capable of protecting their own interests. In affirming the trial court’s refusal to enforce that agreement, however, the Court of Appeals expressly declined to even consider whether public policy “clearly outweighs” any interest in the term’s enforcement.

It also did not find anything in the “plain language” of the statute that would render the term invalid. Rather, it held that a prohibition against waiver was implied by “the statutory scheme.”

This mode of analysis conflicts with this Court’s precedent, which disfavors implication of unexpressed legislative intentions. This Court has held that it is appropriate for the judiciary to imply additional terms into legislation only when the implication is so *necessary* to construction of the statute that a contrary interpretation “cannot be supposed.” *Mahoney v. Maricopa Cnty.*, 49 Ariz. 479, 492, 68 P.2d 694, 700 (1937).

That is not the case here. There is no logical connection between the level of detail contained in the procedural statutes governing the noticing and conduct of a non-judicial trustee’s sale and the substantive right to a judicial determination of fair market value. In light of the legislature’s presumed knowledge that most statutory rights may be waived, its express prohibition of waiver of *other* rights under Title 33, and its failure to expressly prohibit waiver of the fair market value provisions of A.R.S. § 33-814(A), the probability that the legislature intended to prohibit waiver *sub silentio* is hardly so strong that a contrary interpretation could not reasonably be supposed.

The Court of Appeals’ analysis has dangerous implications that extend far beyond the statute at issue here. It interferes with the freedom of contract by

injecting needless uncertainty as to whether voluntarily agreements may be invalidated by judicial implication based upon the level of detail contained in related statutes.

Such a standard would chill the free flow of commerce. Commercial contracts are typically the result of careful negotiations over the parties' respective rights and obligations. That is particularly true in the financial sector. Because prospective lenders could not reasonably be expected to divine whether a court may find critical provisions of a loan agreement to be unenforceable under the amorphous standard established by the Court of Appeals, lenders may chose not to make certain loans at all. The limitation on the availability of credit would lead to less development and slowed economic growth.

Accordingly, this Court should accept Appellant's petition for review, and vacate the Court of Appeals' opinion insofar as it holds that courts may refuse to enforce a sophisticated commercial actor's express waiver of a statutory right based solely upon the court's belief that the statutory scheme implies a prohibition against waiver.

I. EXPRESS WAIVERS OF STATUTORY PROTECTIONS ARE PRESUMED ENFORCEABLE.

A fundamental policy of contract law is that courts may not interfere with the freedom to contract. Public policy requires that competent adults "shall have

the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice.” *Consumers Int’l, Inc.*, 191 Ariz. at 34, 951 P.2d at 899 (quoting *Wood Motor Co. v. Nebel*, 150 Tex. 86, 238 S.W.2d 181, 185 (1951)).

In light of this principle, Arizona law strongly protects the expectation of contracting parties that their agreements will be enforced according to their terms. Accordingly, contractual provisions – including waivers of statutory protections – are presumed to be enforceable. *1800 Ocotillo, LLC*, 219 Ariz. at 202, 196 P.3d at 224. That is particularly true where, as here, both parties are sophisticated and a business transaction (rather than a consumer transaction) is involved.

In *1800 Ocotillo*, this Court held that “[o]ur law generally presumes, **especially in commercial contexts**, that private parties are best able to determine if particular contractual terms serve their interests.” *Id.* (emphasis added).¹ In general, courts will refuse to enforce an unambiguous contractual agreement on grounds other than the conduct of the parties only if the agreement is clearly prohibited by statute or contrary to public policy.

¹ Appellees’ argument that A.R.S. § 33-814(A) makes no distinction between commercial and consumer borrowers confuses the issue. The Association does not dispute that the statute applies by its terms to commercial borrowers. However, the holding in *1800 Ocotillo* makes clear that courts should presume that sophisticated parties may voluntarily *wave* statutory rights in a business transaction, even if the same presumption may not be afforded to an ordinary consumer.

But, this Court has cautioned, courts should be “hesitant to declare contractual provisions invalid on public policy grounds.” *Id.* The standard to be applied is that “absent legislation specifying that a contractual term is unenforceable, courts should rely on public policy to displace the private ordering of relationships only when the term is contrary to an otherwise identifiable public policy that **clearly outweighs** any interests in the term's enforcement.” *Id.* (emphasis added). This standard applies equally to contractual waivers of statutory rights and defenses. *Verma*, 223 Ariz. at 157-58, 221 P.3d at 36-37 (“We have permitted the waiver of statutory rights by their intended beneficiaries in many circumstances ... and we do not doubt that a buyer may waive the protection of [A.R.S. § 33-422] if it wishes to do so”); *cf. Parkway Bank & Trust Co. v. Zivkovic*, 232 Ariz. 286, 290, 304 P.3d 1109, 1113 (App. 2013) (prospective waiver of defense under A.R.S. § 33-814(G) invalid because it “would violate a policy choice made by the Arizona Legislature”).

The loan at issue in this case was not a consumer transaction. It was a \$15.6 million loan for the construction and development of a commercial office building adjacent to a major highway. In such a context, involving sophisticated commercial actors, the contracting parties are presumably entitled to the enforcement of their private agreements. That presumption may be overcome only by a clear legislative prohibition against waiver, or upon a finding that an

identifiable public policy clearly outweighs the interests favoring enforcement of contractual agreements.

While acknowledging that “borrowers subject to § 33–814(A) are not expressly prohibited from waiving the fair market value protection,” *CSA 13-101 Loop, LLC v. Loop 101, LLC*, 233 Ariz. 355, 360, 312 P.3d 1121, 1126 (App. 2013), the Court of Appeals declined to even *consider* whether there was any public policy interest that would justify the trial court’s refusal to enforce the parties’ express agreement. *Id.* at 360 n.4, 312 P.3d at 1126. Rather, the court held that a prohibition against waiver was implied by “the statutory scheme.” *Id.* at 360, 312 P.3d at 1126. In reaching this decision, the Court departed from decades of binding precedent, instead creating its own rule of statutory construction that has no support in Arizona precedent or the modern law of statutory interpretation.

II. A PROHIBITION AGAINST WAIVER MAY BE IMPLIED ONLY WHEN THE IMPLICATION IS SO STRONG THAT THE CONTRARY CANNOT REASONABLY BE SUPPOSED.

The Court of Appeals’ holding rests upon the premise that statutory rights may not be waived “where waiver is expressly or *impliedly* prohibited by the plain language of the statute.” *CSA 13-101 Loop, LLC*, 233 Ariz. at 360, 312 P.3d at 1126 (App. 2013) (emphasis added). That premise is supported only by *dicta* in the Court of Appeals’ opinion in *Verma*, 223 Ariz. at 157, 221 P.3d at 36 (holding

that regardless of whether the statute at issue prohibited waiver, the plaintiffs did *not* waive their rights).

However, this Court's precedent establishes that if waiver is not expressly prohibited by statute, prohibition is implied only if such implication is "necessary" to construction of the statute. *Mahoney*, 49 Ariz. at 491, 68 P.2d at 700 (1937) ("What is necessarily implied in a statute is as much a part of it as what is expressed."); *Maricopa Cnty. v. Douglas*, 69 Ariz. 35, 39, 208 P.2d 646, 648 (1949) ("we should abide by legislative intent and determine that intent from necessary implication as to what was intended").

In *Mahoney*, the Court explained that "A necessary implication means not natural necessity, but *so strong a probability of an intention that one contrary to that which is imputed to the party using the language cannot be supposed.*" 49 Ariz. at 492, 68 P.2d 694, 700 (1937) (emphasis added) (quoting Sutherland on Statutory Construction, § 336).

This standard is consistent with the body of case law from other jurisdictions. *See, e.g. United States v. Jones*, 204 F.2d 745, 754 (7th Cir. 1953) (necessary implication "results from so strong a probability of intention that an intention contrary to that imputed cannot be supported");² *Envirotest Sys. Corp. v.*

² The opinion in *Johnson* provides a good example of a necessary implication. In that case, the defendant argued that the regulation governing narcotics agents

Comm'r of Motor Vehicles, 293 Conn. 382, 396, 978 A.2d 49, 58 (Conn. 2009) (necessary implication “occurs when a particular meaning of the statutory language is the only reasonable interpretation of that language and is one that flows by logical necessity from the words of the statute”); *Lubner v. City of Los Angeles*, 53 Cal. Rptr. 2d 24, 27 (1996) (“A necessary implication within the meaning of the law is one that is so strong in its probability that the contrary thereof cannot reasonably be supposed.”).

Given this extraordinarily high standard, a court should find that the legislature *implied* that a statute be given a particular meaning only in rare and exceptional circumstances. “[C]ourts should not presume an intent to legislate by implication.” *Lubner*, 53 Cal. Rptr. 2d at 27. Modern rules of statutory construction disfavor such a practice. *Id.*; *see also Hawkins v. Freeman*, 195 F.3d 732, 741 (4th Cir. 1999) (“implication of an unexpressed legislative intention ...

did not confer any authority upon them to make arrests. The regulation provided that narcotics agents would have “all the rights, privileges, powers, and duties” conferred on internal revenue agents. 204 F.2d at 752. The statute concerning revenue agents, in turn, gave them authority to: “see that all laws and regulations ... are faithfully executed and complied with;” “aid in the prevention, detection, and punishment of any frauds;” and to enter, seize, and destroy certain property. Although the statute did not expressly permit agents to make arrests, the “obvious purpose of such unusually liberal powers ... was to promote enforcement of the laws.” Thus, the statute necessarily implied that agents would have such powers as are necessary to carry out to the purpose of the statute, including “the incidental power to arrest one found to be violating the law.” *Id.* at 753.

[is] a generally disfavored judicial undertaking”); *Brown v. Jefferson*, 451 A.2d 74, 76 (D.C. 1982) (“Construction by implication is not favored”); *Greenlee Cnty. v. Laine*, 20 Ariz. 296, 299, 180 P. 151, 152 (1919) (“where no exception is made in terms, none will be made by mere implication or construction”). Thus, “*for a consequence to be implied from a statute there must be greater justification for its inclusion than a consistency or compatibility with the act from which it is implied.*” *Lubner*, 53 Cal. Rptr. 2d at 27 (emphasis added).

No such justification exists for implying a prohibition against waiver of the fair market value defense of A.R.S. § 33-814(A). Regardless of whether such an implied prohibition may be compatible with the deed of trust act in general, it is not necessary to a reasonable construction of the particular statute at issue here.

III. IT IS NOT NECESSARY TO A REASONABLE CONSTRUCTION OF A.R.S. § 33-814(A) TO IMPLY A PROHIBITION AGAINST WAIVER.

The unexpressed implication that a commercial actor is prohibited from making a knowing and voluntary waiver of the fair market value provisions of A.R.S. § 33-814(A) is not necessary to construction of the statute, such that the only rational reading is that the legislature must have intended such a prohibition under all circumstances. The legislature is presumed to be aware of existing case law when it passes a statute. *Staples v. Concord Equities, L.L.C.*, 221 Ariz. 27, 33, 209 P.3d 163, 169 (App. 2009). In Arizona, case law permits waiver of statutory

rights.³ Thus, typically when the legislature intends to preclude parties “from avoiding statutory rights or remedies with an express contractual provision, the statute either prohibits waiver or voids contractual provisions” contrary to the right. *Swanson*, 206 Ariz. at 268, 77 P.3d at 443.

As Appellant points out, the legislature expressly prohibited waiver of at least twelve statutory rights within Title 33. Pet. for Review, p.13 n.5. It also expressly voided contractual agreements for borrowers to waive anti-deficiency protection when residential property is judicially foreclosed. A.R.S. § 33-729(A) (“the judgment may not otherwise be satisfied out of other property of the judgment debtor, notwithstanding any agreement to the contrary”).

Thus, if the legislature intended to preclude waiver of the fair market value provisions of § 33-814(A), it knew how to do so. The fact that it chose to expressly prohibit waiver of some statutory rights in the context of real property foreclosures defeats the argument that it intended to prohibit waiver of other rights

³ See, e.g., *Swanson v. Image Bank, Inc.*, 206 Ariz. 264, 268, 77 P.3d 439, 443 (2003) (“Arizona statutory law does not preclude parties from agreeing by express contractual provision in a negotiated contract to surrender the right to a statutory remedy under § 23-355”); *McClellan Mortgage Co. v. Storey*, 146 Ariz. 185, 188, 704 P.2d 826, 829 (App. 1985) (permitting waiver of statute requiring creditor to proceed against borrower before suing guarantor); *In re Estate of King*, 228 Ariz. 565, 570, 269 P.3d 1189, 1194 (App. 2012) (“every court that has considered whether a person can waive the statutory protections afforded to life insurance proceeds has held that the protections can be waived”); *Verma*, 223 Ariz. at 157-58, 221 P.3d at 36-37 (App. 2009) (“we do not doubt that a buyer may waive the protection of the statute if it wishes to do so”).

through “necessary implication.” *See, e.g., Sharpe v. Ariz. Health Care Cost Containment Sys.*, 220 Ariz. 488, 496, 207 P.3d 741, 749 (App. 2009) (“that some subsections of A.R.S. § 36–2907(A) require the involvement of a physician or a primary care practitioner and some do not, makes it plain that the legislature knew how to add that requirement and intentionally chose not to do so in some circumstances”).

Contrary to the Court of Appeals’ holding, nothing in the statutory trustee’s sale scheme requires that courts judicially infer a prohibition against waiver of the fair market value credit. While the court was correct that “Every step of the non-judicial foreclosure process is set forth in detail,” *CSA 13-101 Loop, LLC*, 233 Ariz. at 360, 312 P.3d at 1126, the statute is concerned primarily with establishing *non-judicial procedures* for the noticing, conduct, and consummation of the trustee’s sale. *See* A.R.S. § 33-808 (governing notice of trustee’s sale); § 33-809 (procedure for requesting copies of notice); § 33-810 (auction procedures); § 33-811 (procedure for payment of bid price and recording of deed).

Because the trustee’s sale process takes place entirely outside of court, it is not surprising that the legislature prescribed detailed procedures for the conduct of a trustee’s sale. However, there is no logical connection between the level of detail in the procedural statutes and the inference that the legislature must have intended to prohibit any waiver of the *substantive* right to a *judicial* determination

of value. Even if such a connection could be made, it would be inappropriate for a court to assume the legislature intended to add additional words to an unambiguous statute based solely on the structure of other statutes. The Court of Appeals has itself held that “*Where statutory language is unambiguous, we will not infer legislative intent by induction from related provisions.*” *State v. Capitol Castings, Inc.*, 193 Ariz. 89, 95, 970 P.2d 443, 449 (App. 1998) (emphasis added).

A.R.S. § 33-814(A) is straightforward and unambiguous. It does not prohibit waiver of the fair market value protections expressly or by necessary implication. The Court of Appeals’ inference that the legislature must have silently intended such a prohibition was based upon nothing more than induction from provisions in other statutes within the deed of trust act that have little relationship to the statute at issue. Thus, the Court of Appeals’ analysis conflicts even with its own precedent.

IV. THE VAGUE STANDARD ESTABLISHED BY THE COURT OF APPEALS WOULD CHILL THE FREEDOM OF CONTRACT.

By creating a vague and unpredictable standard for judicial invalidation of voluntary agreements among sophisticated parties, the Court of Appeals’ opinion needlessly interferes with the freedom of contract. Nobody could be certain that their agreements will be enforced if such agreements may be disregarded when they are found to violate an unstated law, implied not out of necessity, but out of

the court's inference that the "statutory scheme" voids such agreements. The free flow of commerce is sustainable only if contracting parties can have confidence that their agreements will be upheld, absent a clear statutory prohibition or identifiable public policy to the contrary. Such confidence is unattainable if the parties are forced to speculate about whether a court may imply language into an unambiguous statute that would trump the parties' private agreement.

The Court of Appeals' opinion has implications far beyond the statute at issue in this case. Most commercial contracts are the product of negotiation, whereby one party's willingness to enter the agreement is conditioned upon the other's agreement to make certain concessions. Often, those concessions include the waiver of certain rights to which the party may be entitled under common law or legislative enactments. In the face of the uncertainty as to the enforceability of such agreements that the Court of Appeals' opinion would produce, businesses will be less likely to enter into certain contracts at all. The freedom of contract, and with it the free flow of commerce, would be chilled. Such a result would needlessly impair economic growth and development, at a time when such growth is vital to the recovery of this State.

CONCLUSION

For the foregoing reasons, the Arizona Bankers Association respectfully requests that this Court grant Appellant's petition for review, and vacate the Court of Appeals' opinion to the extent it holds that courts may imply prohibitions against waiver of statutory rights based solely upon their construction of the "statutory scheme" in general.

RESPECTFULLY SUBMITTED this 30th day of May 2014.

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CERTIFICATE OF COMPLIANCE

Pursuant to ARCAP 23(c), I certify that the foregoing brief uses proportionately spaced type of 14 points or more, is double-spaced using a roman font and contains 3,360 words, excluding the cover, table of contents, and table of authorities.

DATED this 30th day of May 2014.

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