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5  
6 IN THE SUPREME COURT  
7 STATE OF ARIZONA

8  
9 PETITION TO AMEND RULE 31(d),  
ARIZONA RULES OF THE SUPREME  
10 COURT

Supreme Court No. R-11-0001

11 Comment by HOA Attorneys in Support of  
Petition to Amend Rule 31(d), Arizona  
12 Rules of the Supreme Court

13 On behalf of numerous attorneys who regularly represent planned community  
14 associations and condominium associations, I submit this comment in support of the  
15 Petition to Amend Rule 31(d) of the Arizona Rules of the Supreme Court to allow  
16 management companies to prepare, sign, and file notices of liens created pursuant to  
17 A.R.S. § 33-1256 and § 33-1807 on behalf of HOAs.

18 I have attached to this comment signed copies of a petition entitled “Attorney  
19 Petition In Support of Adding an Exemption to Rule 31(d) for Property Management  
20 Companies Preparing, Signing, and Filing Notices of Liens.” For the Court’s  
21 convenience, I have included the full text of the petition below:

22 We are attorneys who regularly represent planned community  
23 associations and condominium associations, collectively known as  
24 home owner associations or HOAs. We advise HOAs about their legal  
25 rights and obligations regarding broad-ranging topics, including  
26 enforcing CC&Rs, regular and special assessments, liens, directors’  
duties, open meetings, elections, record keeping and review, and vendor  
and developer disputes.

1 CC&Rs typically authorize HOAs to collect assessments from  
2 homeowners and to record notices of claims of lien for any unpaid  
3 assessments. Pursuant to A.R.S. §§ 33-1256 and 33-1807, HOAs  
4 automatically have statutory liens on units and homes for the late  
5 payment of assessments. These liens are perfected upon recording of  
6 the CC&Rs, but the associations that we work with regularly choose to  
7 record notices of the liens to encourage prompt payment of past due  
8 assessments and to put third parties on notice of the liens.

9 Most CC&Rs also authorize HOA boards to identify a “managing  
10 agent” to carry out the associations’ day-to-day activities. The majority  
11 of the HOAs that we advise contract with property management  
12 companies to serve as the “managing agent.” The management  
13 contracts between an HOA and a property management company  
14 typically establish a principal-agent relationship, with all state laws  
15 applicable to agency relationships becoming part of the agreement. As  
16 an agent, the property management company owes the HOA fiduciary  
17 duties and must act in the HOA's best interest in matters connected with  
18 the management of the property. Thus, in addition to being accountable  
19 for any breaches of the management contract, a property management  
20 company may also be held liable for breaches of its fiduciary duties.

21 One of the many duties that HOAs regularly delegate to property  
22 management companies as their managing agents is the responsibility  
23 for preparing, signing, and filing notices of liens for late payment of  
24 assessments. We believe that it is appropriate for HOAs to delegate  
25 these ministerial tasks to property management companies with which  
26 the HOAs have contracted to serve as the HOAs’ managing agents.  
Therefore, we support the proposed change to Rule 31(d) of the Arizona  
Rules of Supreme Court affirming the ability of management companies  
to prepare, sign, and record notices of assessment liens on behalf of  
associations.

RESPECTFULLY SUBMITTED this 24th day of June, 2011.

By: /s/ Curtis Ekmark  
Managing Director, Ekmark & Ekmark