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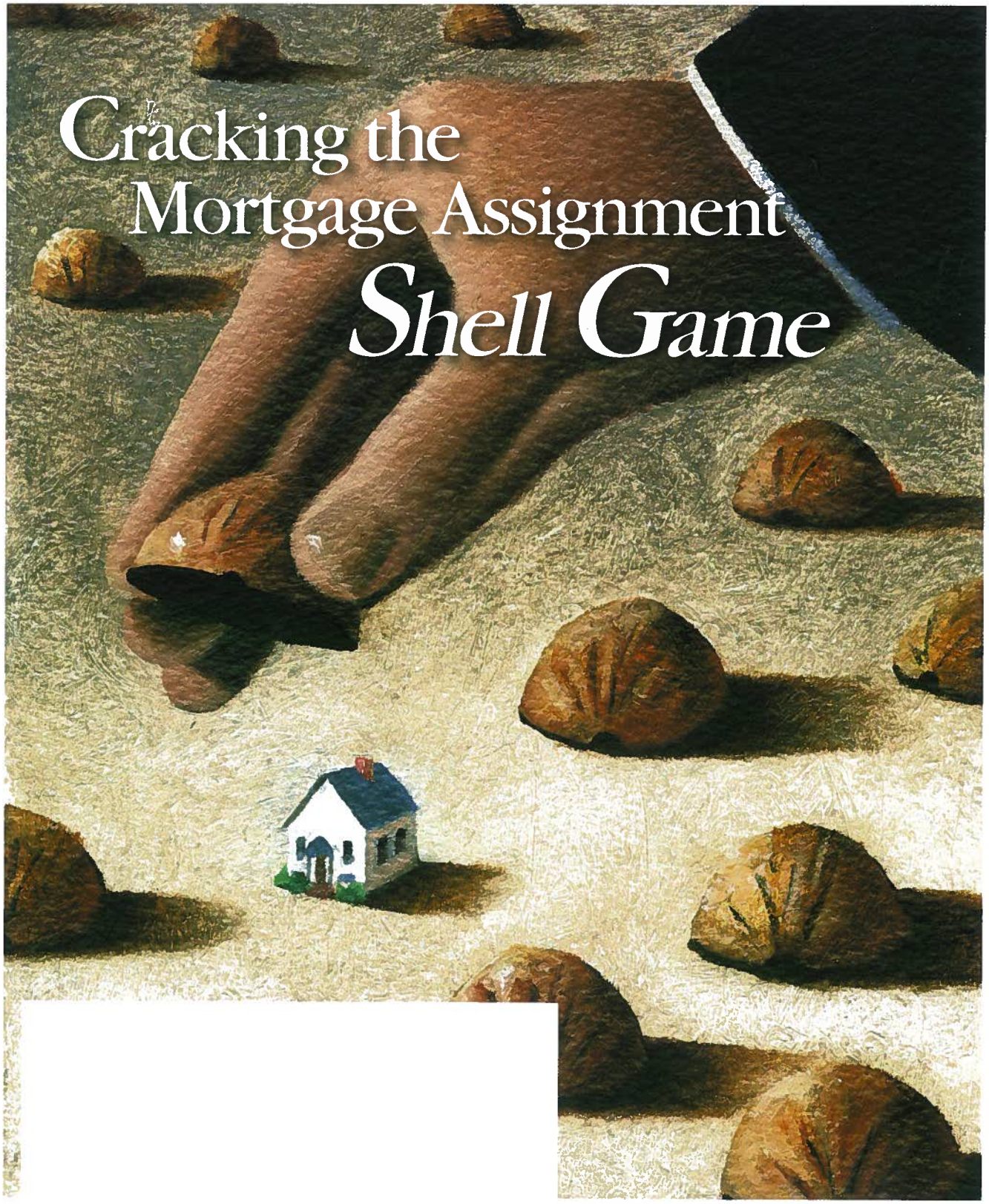

Cracking the Mortgage Assignment *Shell Game*

by Giselle Carson

Raising Arizona Law in Florida? *Part I*

During his election campaign, Florida Gov. Rick Scott vowed to bring the Arizona-style immigration law to Florida. In August, he said he believed Florida will pass an immigration bill in 2012 despite our legislature's failure to reach a consensus on the issue this year. The federal government's inaction on comprehensive immigration reform, the state and local governments' implementation of laws and enforcement measures, and a recent decision of the U.S. Supreme Court, all make this vow a more likely reality in 2012.

The Recently Upheld Legal Arizona Workers Act

In July 2007, former Arizona Governor Janet Napolitano signed into law the controversial Legal Arizona Workers Act (LAWA),[1] which prohibits Arizona employers from knowingly or intentionally employing an "unauthorized alien," defined as an individual who lacks the right or authorization under federal law to work in the United States.

LAWA authorizes the Arizona attorney general (AG) or a county attorney to investigate a complaint alleging that an employer has hired an unauthorized alien. The AG or county attorney must inquire about the status of the alleged unauthorized alien with the federal government pursuant to 8 U.S.C. §1373(c).[2]

If the §1373(c) inquiry reveals that the worker is unauthorized — by showing, for example, that the worker is in removal proceedings — the AG or county attorney must notify U.S. Immigration and Customs Enforcement (ICE) and local law enforcement. The county attorney must file an action against the employer in the superior court in the county where the unauthorized alien is employed.

If the employer is found to have knowingly or intentionally employed an unauthorized alien, LAWA authorizes Arizona courts to impose various harsh penalties on employers, including suspension or revocation of the employer's Arizona business license. The act defines a license very broadly to include any agency permit, certificate, approval, registration, charter, or similar form of authorization, foundational documents, articles of incorporation, and certificates of partnership.

LAWA also requires that as of January 1, 2008, all employers doing business in the state use the federal E-Verify program to verify the work authorization of all new hires.[3] Furthermore, "proof of verifying the employment authorization of an employee through the E-Verify program creates a rebuttable presumption that an employer did not knowingly employ an unauthorized alien."[4]

U.S. Chamber of Commerce v. Whiting Background and Decision

The U.S. Chamber of Commerce and others filed a complaint in federal court challenging LAWA on the grounds that it was expressly preempted by federal law.[5]

The plaintiffs alleged that the Immigration Reform and Control Act (IRCA)[6] preempted Arizona's authority to impose sanctions on businesses, including suspension or revocation of business licenses.[7] They also argued that IRCA preempted the mandatory use of E-Verify.[8] The district court held that LAWA was not preempted. The Ninth Circuit Court of Appeals affirmed in all respects,[9] holding that the Arizona law was a "licensing and similar law" falling within IRCA's savings clause and that none of the challenged provisions were "expressly or impliedly preempted by federal policy."[10] The U.S. Supreme Court granted certiorari.[11]

Congress enacted IRCA to create a uniform federal law to combat the employment of illegal aliens. IRCA made it "unlawful for a person or other entity . . . to hire, or to recruit or refer for a fee, for employment in the U.S. an alien knowing the alien is an unauthorized alien."[12] IRCA restricted the ability of states to combat the employment of unauthorized workers and required all employers to verify the work authorization of employees hired since November 6, 1986, through the I-9 process and provided federal, civil, and criminal penalties for violators.

In a 5-3 decision, the U.S. Supreme Court upheld LAWA in *Chamber of Commerce of the United States of America et al. v. Whiting et al.*, 131 S. Ct. 1968 (May 26, 2011). Chief Justice Roberts, writing the majority opinion, said that "Arizona's licensing law falls within the confines of the authority Congress chose to leave to the [s]tates and therefore is not expressly preempted." He noted that IRCA preserved state authority over a particular category of sanctions — "those imposed through licensing and similar laws."

Justice Roberts further noted that all employers were to refrain from knowingly or intentionally hiring unauthorized workers and, in order to avoid sanctions under LAWA, employ-

ers enjoyed safe harbors from liability when they used the I-9 process and E-Verify — as Arizona law required them to do.

However, it is important to note that under LAWA many foreign nationals could be wrongly accused of being unauthorized to work and prosecuted as a result of the LAWA inquiry revealing that a worker was in removal proceedings. Many foreign workers are authorized to work pursuant to sections of the implementing regulations[13] even though they might have been ordered removed from the United States. Disclosure that a person has been ordered removed does not always equate with lack of legal work authorization. As noted by Justices Breyer and Sotomayor in their dissents, 8 U.S.C. §1373(c) says nothing about employment authorization.

Good faith compliance with the federal I-9 process provides employers prosecuted under LAWA with an affirmative defense.[14] However, gathering evidence for this defense can be difficult if the employer has not been proactive. This defense needs to be established through policies and testimony, and not with the I-9 form and related documents. As noted by Justice Breyer in his dissent, IRCA says that neither the I-9 form, nor "any information contained in or appended to" the form, "may . . . be used for purposes other than for enforcement of this" federal act.[15]

As to the mandatory use of E-Verify, the Court found that the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA), which provides the authority for E-Verify, contained no language circumscribing state action. In fact, Congress had consistently expanded and encouraged its use. The Court held that Arizona's use of E-Verify did not conflict with the federal scheme. The Court noted that "the Arizona law required that 'every employer, after hiring an employee, shall verify the employment eligibility of the employee' through E-Verify."[16] That requirement was entirely consistent with the federal law. And the consequences of not using E-Verify under the Arizona law were the same as the consequences of not using the system under federal law. In both instances, the employer forfeited the otherwise available rebuttable presumption that it complied with the law.[17]

Aftermath of *Whiting*

After the *Whiting* decision, there has been a continued expansion of state and local laws sanctioning the employment of unauthorized workers and mandating the use of E-Verify.

E-Verify for public and/or private employers is now required by 18 states.[18] At least two states, Pennsylvania and Tennessee, encourage employers to use E-Verify by providing a safe harbor from state penalties. Interestingly, all of the states surrounding Florida have passed legislation requiring the use of E-Verify for all or most employers.

In June 9, 2011, Alabama passed the Beason-Hammond Alabama Taxpayer and Citizen Protection Act,[19] widely regarded as the toughest immigration law in the nation. The bill makes it a state crime to be an undocumented alien in the state and allows law enforcement officers to detain those they have "reasonable suspicion" of being in the United States illegally. The law also requires school districts to compile information on undocumented students; makes it a crime to give a ride to a work place to an undocumented alien; allows for the revocation of business licenses for employers that knowingly employ undocumented aliens; and requires all businesses in the state to enroll in E-Verify by April 1, 2012. The U.S. Department of Justice and other organizations successfully obtained a temporary injunction blocking the implementation of the act. Countries, including Mexico and 15 others, have filed briefs expressing concern with the bill and its potential violations of civil and human rights.

In August, Arizona petitioned the U.S. Supreme Court to overturn the injunction that bars the enforcement of sections of Arizona's "Support Our Law Enforcement and Safe Neighborhoods Act" (S.B. 1070). This bill requires that a law enforcement officer question a person's immigration status if the officer has reasonable suspicion that the person is in the U.S. illegally. Certain sections of S.B. 1070 were blocked from implementation by a federal district court judge and affirmed by the Ninth Circuit.[20] S.B. 1070 is likely to be considered by the court in its next term.

In order to avoid or reduce the risk of an enforcement action or liability, employers and their attorneys need to stay informed as to the requirements of the various states relating to immigration enforcement and the use of E-Verify. The second part of this article will address the provisions of E-Verify and answer some common questions regarding it.❑

[1] ARIZ. REV. STAT. ANN. §23–212.

[2] 8 C.F.R. §1373(c) provides that "the Immigration and Naturalization Service shall respond to an inquiry by a [f]ederal, [s]tate, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information."

[3] ARIZ. REV. STAT. ANN. §23-214(A).

[4] ARIZ. REV. STAT. ANN. §23–212(I).

[5] *Arizona Contractors Ass'n, Inc. v. Candelaria*, 534 F. Supp. 2d 1036 (D. Ariz. 2008).

[6] Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986).

[7] 8 U.S.C. §1324a(h)(2).

[8] 8 U.S.C. §1324a.

[9] *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856 (9th Cir. 2009).

[10] *Id.* at 860, 861, 866.

[11] *Chamber of Commerce of U.S. v. Candelaria*, 130 S. Ct. 3498 (2010).

[12] 8 U.S.C. §1324a(a)(1)(A).

[13] *See* 8 C.F.R.§274a.12(a)-(c) (providing for 62 different categories for authorized employment).

[14] ARIZ. REV. STAT. ANN. §23–212(J).

[15] 8 U.S.C. §1324a(b)(5).

[16] ARIZ. REV. STAT. ANN. §23–214(A).

[17] *Compare* IIRAIRA §402(b)(1) *with* ARIZ. REV. STAT. ANN. §23–212(I).

[18] Alabama, Arizona, Colorado, Florida, Georgia, Idaho, Indiana, Louisiana, Minnesota, Mississippi, Missouri, Nebraska, North Carolina, Oklahoma, South Carolina, Tennessee, Utah, and Virginia.

[19] H.B. 56.

[20] *U.S. v. Arizona*, 2011 WL 1346945 (9th Cir. 2011); *U.S. v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010).

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This column is submitted on behalf of the Labor and Employment Law Section, Gregory Alan Hearing, chair, and Frank E. Brown, editor.