

## I.

## A. IS FORECLOSURE YOUR BEST AND ONLY OPTION?

## 1. Choosing Between Workouts and Liquidation.

a. Forbearance Agreements/Repayment Plans. The Trustor is allowed to make partial payments, in an amount which is less than the total amount to reinstate. The Agreement must expressly provide that acceptance of partial payment does not operate as a waiver of the right to enforce the existing default. If a trustee's sale has been commenced, the agreement should state that the pending sale will be postponed, not cancelled, and that payments made and applied are the consideration for the extension of time to pay. The trustor must be able to pay in excess of the current monthly payment amount, to cover new payments, and to allow for reduction of the prior existing default amount.

b. Loan Modifications. The entire delinquent amount, or such remainder after payment of a agreed upon lesser amount, is added to the principal balance, then the loan is reamortized to require payment of an amount which approximates the prior payment amount. This is usually accomplished by extending the maturity date. This is used most frequently when the delinquency was caused by a short term situation which no longer exists. Trustors have a greater likelihood of success of performing because the monthly payment amount is generally about the same as before. It is important to examine title, and obtain consent to the modification by junior lienholders, because increasing the principal balance affects the equity available for junior lienholders. Failure to obtain a consent may result in a loss of priority, as to the additional amount added to the debt.

c. Preforeclosure sale. Under this scenerio, the beneficiary allows the trustor to market and sell the property, rather than commencing or completing a pending trustee's sale. The beneficiary may agree to release their lien for less than the total debt if the sales price is not sufficient to pay the note in full, plus pay commissions and costs associated with the sale. A sale by a homeowner will often sell at a higher price than a sale by a beneficiary after a foreclosure sale.

d. Liquidation. Institution mortgage lenders are aware of the risks associated with taking back a property and attempting to liquidate it. If the property is occupied a the time of the sale, the occupants must be evicted. If the property is vacant during the foreclosure process, it is subject to vandalism and deterioration. There are many other factors which discourage lenders from taking the property back if other options are available.

## B. Deed In Lieu of Foreclosure

1. Historical Perspective. All the requirements of a proper Deed in Lieu of Foreclosure are a direct result of the practice of the ancient secured party taking a deed

from the owner as security for payment. In the event of default, the secured party would merely record the deed. As should not be a surprise, there were a significant number of cases in which the deed was recorded prematurely or improperly. The courts uniformly held that the recorded deed was in fact an equitable mortgage which had to be foreclosed by judicial action. Today, a deed in lieu of foreclosure which is improperly obtained or is not well drafted will similarly be defined as an equitable mortgage.

2. Rational. Potential grantors generally desire to give a deed in lieu because there is no equity in the property and to avoid continuing liabilities. Grantees want to accept the deed in lieu in order to save the time and expense of conducting a trustee's sale.

3. Liens of Record. Because title passes by deed, the grantee will acquire title subject to all liens and matters of record. As a result, it is imperative that the grantee obtain a title report to verify that there are no junior liens or encumbrances they are unwilling to assume, all matters with a priority senior to the deed of trust they were not aware of. As a general rule, title must be free and clear of all junior liens and encumbrances. If there is a recorded homeowners association lien, many CC&Rs expressly subordinate the lien of unpaid assessments to one or more lienholders even in the case of a deed in lieu of foreclosure. A release of the lien must be obtained based on this provision of the CC&RS.

4. Possessory Rights. The grantee of a deed in lieu takes title subject to all tenancies or possessory rights of those occupying the premises conveyed. As a result, it is critical that a property inspection be performed to verify that the property is vacant. If the grantee wants to accept title subject to a tenancy, it is critical that they verify and approve all terms and the duration of the tenancy.

5. Duress, undue Influence or Fraud A deed in lieu of foreclosure must be given voluntarily by the grantor and cannot be obtained as a result of duress, undue influence, fraud or unfairness. A judicial finding of any of these elements existed would likely result in a holding that the deed in lieu is an equitable mortgage.

6. Equity in the Property. There must be fair consideration given for a deed in lieu of foreclosure. In the case of property in which there is no equity, fair consideration is found in the release of liability. In the case in which a grantor has significant equity in the property, the court may find that the release of liability was not fair compensation for the equity obtained.

7. Release of Liability. A deed of release or similar document is generally recorded along with the deed in lieu of foreclosure, because by operation of law, acceptance of a deed of lieu operates as a full satisfaction and accord.

## II.

### **ANTI-DEFICIENCY STATUTE**

#### A. Fair Market Value in Deficiency Judgment Action.

Deficiency Judgment actions are controlled by A.R.S. §33-814. Fair Market Value is defined in ARS §33-814(A) as: "...the most probable price, as of the date of the execution sale, in cash, or in terms equivalent to cash, or in other precisely revealed terms, after deduction of prior liens and encumbrances with interest to the date of sale, for which the real property or interest therein would sell after reasonable exposure in the market under conditions requisite to fair sale, with the buyer and seller each acting prudently, knowledgeably and for self-interest, and assuming that neither is under duress".

#### B. Deficiency Actions.

1. The action must be filed within 90 days after the trustee's sale. ARS §33814(A).
2. Can not file a deficiency action if the property is a single one family or single two family dwelling, on two and one half acres or less.
3. The deficiency amount is the difference between the total debt on the day of the sale and the amount of the fair market value or partial bid amount, whichever is higher. In other words, the former trustor will get the highest credit available under the circumstances.
4. The valuation hearing is entitled to an accelerated hearing, ARS §33-814(A), and if that occurs, it merely becomes a battle of the appraisals.
5. Be careful of multiple collateral situations. ARS §33-814(B) contemplates foreclosing on different pieces of real property at different time, and that for purposes of calculating the 90 day limitation period, the last of the properties to be foreclosed will be the event from which the 90 day period commences. It does not address the multiple collateral problem which could arise if there was a commercial property and a single family dwelling which was additional collateral for the debt. A foreclosure on the single family dwelling first could trigger the anti-deficiency statute. When in doubt, foreclose on the commercial property first.

## C. Arizona's Anti-Deficiency Reference Chart.

TRUSTEE SALE PROCESS	JUDICIAL FORECLOSURE PROCESS AN ACTUAL LAWSUIT
1. Deed of Trust only	1. Any encumbrance on real property, including a Deed of Trust.
<p>1. Does the mortgage or deed of trust secure property that is located on two and one-half acres or less?</p> <p>2. Is the property a single one-family or a single two-family dwelling actually used as a residence by someone (including rental property)?</p>	<p>1. Does the mortgage or deed of trust secure property that is located on two and one-half acres or less?</p> <p>2. Is the property a single one-family or a single two-family dwelling actually used as a residence by someone (including rental property)?</p> <p>3. Is the loan secured by the mortgage or deed of trust a "purchase money" loan?</p>
If the answer to each the above is yes, then the lender can not sue the borrower for any additional funds.	If the answer to each the above is yes, then the lender can not sue the borrower for any additional funds.