

Residential Foreclosure Checklist (AZ)

MARK S. BOSCO, LEONARD J. McDONALD AND MICHAEL F. BOSCO,
TIFFANY AND BOSCO P.A., WITH PRACTICAL LAW REAL ESTATE

Search the [Resource ID numbers in blue](#) on Westlaw for more.

A Checklist outlining important steps to consider when preparing for and conducting nonjudicial and judicial foreclosures of real property secured by deeds of trust and mortgages in Arizona involving residential properties. This Checklist covers the steps taken before starting both a nonjudicial residential foreclosure and a residential foreclosure action, including the steps necessary to obtain a judgment in the foreclosure action and best practices for conducting a foreclosure sale.

REVIEW THE UNDERLYING STATUTES AND RULES

Before beginning a residential foreclosure, lender's counsel should review:

- Chapter 6.1 of Title 33 of the Arizona Revised Statutes governing nonjudicial foreclosures (A.R.S. §§ 33-801 to 33-821).
- Chapter 6 of Title 33 of the Arizona Revised Statutes governing judicial foreclosures (A.R.S. §§ 33-721 to 33-730).
- Any Arizona Rules of Court governing judicial foreclosures.
- The federal Fair Debt Collection Practices Act (15 U.S.C. §§ 1692a to 1692p).
- Any case law governing the residential foreclosure process.

For a general discussion of residential foreclosure procedures in Arizona, see Practice Note, Residential Foreclosures (AZ).

For a checklist covering commercial foreclosures in Arizona, see Commercial Foreclosure Checklist (AZ). For a discussion of commercial foreclosure procedures in Arizona, see Practice Note, Commercial Foreclosures (AZ) ([W-009-7954](#)).

BEFORE BEGINNING FORECLOSURE

CONSIDER ALTERNATIVES TO FORECLOSURE

- Consider the following foreclosure alternatives:
 - conducting a loan workout conference;
 - exploring possible loan modification options;
 - offering a deed in lieu of foreclosure or other consent to foreclosure;
 - offering a short sale settlement;
 - offering a forbearance agreement;
 - allowing the borrower to refinance the deed of trust or mortgage loan; or
 - allowing the borrower to cure the default and retain the property by reinstatement or redemption.
- Evaluate and document any loss mitigation application or offer made by a borrower for:
 - modification;
 - short sale settlement;
 - forbearance;
 - refinance; or
 - any other proposed workout.
- (See Loss Mitigation During Foreclosure Checklist ([3-587-9525](#)),)

ASSESS POTENTIAL TITLE ISSUES

- Order a title search to:
 - obtain a copy of the recorded deed of trust or mortgage and any assignments from the county recording office;
 - identify any judgments, liens, or other encumbrances on the property; and
 - determine which parties to include in the statutorily required mailings (nonjudicial) or join as defendants (judicial) in the action (for example, a contractor with a mechanic's lien on the property or a condominium association with a lien).
- Conduct a search of the bankruptcy court records to determine if the borrower has filed for bankruptcy.

- Perform an active military service check on the borrower to determine if the borrower is in the military and afforded special protections in a foreclosure action (see Practice Note, *Complying with Consumer Protections for Military Servicemembers*) ([0-572-0565](#)).
- Consider paying off any superior lien holders, such as:
 - outstanding municipal liens;
 - real property taxes owed on the mortgage property; and
 - homeowner association liens.

ESTABLISH POSSESSION OF THE ORIGINAL LOAN DOCUMENTS

- Obtain the original loan documents (deed of trust or mortgage, promissory note or bond, and assignments, if any), including the loan application, survey, and lender's title insurance policy.
- Confirm the current lender's name and the date each deed of trust or mortgage document was issued or assigned, or both.
- If the original promissory note or any assignments of the deed of trust or mortgage were lost or destroyed, obtain copies of each document.
- Prepare a lost note affidavit for signature by the servicer if the promissory note has been lost or destroyed.
- Obtain certified copies of any assignment or other recorded document from the recorder's office certifying that the documents are true and accurate.
- Obtain an endorsement of the note and an assignment of the deed of trust or mortgage if the foreclosing party is not:
 - the original lender; or
 - the lender of record.

ASSESS THE STATUE OF LIMITATIONS

- Review the deed of trust or mortgage and promissory note to determine:
 - the maturity date; and
 - any written extensions for final payment provided in any written instrument.
- Consider that residential foreclosure actions must begin within six years of the borrower's default date if the loan has been accelerated (A.R.S. § 12-548).
- Carefully review the statute of limitations issues on a loan-by-loan basis, including:
 - a thorough review of the loan history to determine if the debt is still viable;
 - the various tolling events recognized in Arizona, including bankruptcy, deceleration and loss mitigation; and
 - the continuous breach theory, with each month being a new and independent default for the purposes of the statute of limitations if the lender has not accelerated the debt.
- A cancellation of trustee's sale by itself is however not sufficient to revoke a lender's prior acceleration of a loan and must contain express language revoking the prior acceleration.

CONSIDER MAILING A DEMAND LETTER

- Review the promissory note and deed of trust (or mortgage, as applicable) for any contractually required notice requirements.

- If no notice is contractually required, consider mailing a demand letter to the borrower, including:
 - the loan's terms;
 - a description of the default; and
 - a statement that the trustee intends to strictly enforce the loan's terms if the borrower does not cure the default.

CONFIRM COMPLIANCE WITH CONSUMER FINANCIAL PROTECTION BUREAU REGULATIONS

- Consider that the Consumer Financial Protection Bureau (CFPB) imposes additional limitations on most lenders when seeking to foreclose a loan secured by residential real property.
- If the lender is subject to the CFPB regulations, ensure that the lender waits at least 120 days after the residential loan becomes delinquent before:
 - beginning the nonjudicial foreclosure process by recording a notice of sale; or
 - filing a civil complaint to begin the judicial foreclosure process.

(12 C.F.R. § 1024.41(f).)

For more information on CFPB requirements during a foreclosure, see Practice Notes, *Summary of the Dodd-Frank Act: Consumer Financial Protection: Subtitle A: Consumer Financial Protection Bureau* ([2-543-6265](#)) and *Residential Foreclosures (AZ): Restrictions on Consumer Debt Collection* ([W-009-7954](#)).

NONJUDICIAL FORECLOSURE

RECORD A SUBSTITUTION OF TRUSTEE

- Appoint a substitute trustee if the trustee named in the deed of trust is unqualified, unwilling, or unable to conduct the foreclosure sale.
- Record the substitution of trustee in the county where the real property is located.

For more information on recording a substitution of trustee, see Practice Note, *Residential Foreclosures (AZ): Substitution of Trustee* ([W-009-7954](#)).

RECORD THE NOTICE OF SALE

- Prepare a notice of sale using the statutory form.
- Schedule the sale date at least 91 days after the date the trustee records the notice of sale.
- Include the following statement in the notice of sale's first paragraph, in bold-faced and capitalized type:
 - **“NOTICE! IF YOU BELIEVE THERE IS A DEFENSE TO THE TRUSTEE SALE OR IF YOU HAVE AN OBJECTION TO THE TRUSTEE SALE, YOU MUST FILE AN ACTION AND OBTAIN A COURT ORDER PURSUANT TO RULE 65, ARIZONA RULES OF CIVIL PROCEDURE, STOPPING THE SALE NO LATER THAN 5:00 P.M. MOUNTAIN STANDARD TIME OF THE LAST BUSINESS DAY BEFORE THE SCHEDULED DATE OF THE SALE, OR YOU MAY HAVE WAIVED ANY DEFENSES OR OBJECTIONS TO THE SALE. UNLESS YOU OBTAIN AN ORDER, THE SALE WILL BE FINAL.”**
- Record the notice of sale in the county where the real property is located.

(A.R.S. § 33-808(C), (D).)

For more information discussing the notice of sale requirements, see Practice Note, Residential Foreclosures (AZ): Record the Notice of Sale ([W-009-7954](#)).

MAIL THE NOTICE OF SALE

- Within five days after recording the notice of sale, mail a plain copy of the notice to all parties listed in the deed of trust other than the trustee, by certified or registered mail with postage prepaid (A.R.S. § 33-809(C)).
- Mail a copy of the notice of sale, including the recording date, within 30 days after recording:
 - to all parties with a recorded interest in the property, by certified or registered mail, with postage prepaid; and
 - to the property, by first-class mail, if the property includes a single-family residence.

(A.R.S. § 33-809(B).)

- Include a statement of breach with the notice of sale mailing (A.R.S. § 33-809(C)).
- Mail a copy of the notice of sale to the IRS at least 25 days before the sale date if the title review reveals a federal tax lien (26 U.S.C. § 7425(c)(1)).

For more information on the mailing requirements, see Practice Note, Residential Foreclosures (AZ): Mail the Notice of Sale ([W-009-7954](#)) and Mail a Statement of Breach ([W-009-7954](#)).

PUBLISH AND POST THE NOTICE OF SALE

- Publish the notice of sale in a newspaper of general circulation in the county where the real property is located:
 - at least once per week for at least four consecutive weeks; and
 - with the final publication date not fewer than ten days before the sale date.
- Post a copy of the notice of sale:
 - in a conspicuous place on the real property (or at a gate or other impediment if the trustee cannot access the property) at least 20 days before the sale date; and
 - at the designated spot for postings in the superior court for the county where the real property is located.

(A.R.S. § 33-808(A)(3-4).)

CONSIDER APPOINTING A RECEIVER

- Determine if the property is in need of protection or preservation.
- Apply for the court to appoint a receiver with the superior court for the county where the real property is located.

For more information on appointing a receiver, see Practice Note, Residential Foreclosures (AZ): Consider Appointing a Receiver ([W-009-7954](#)).

CONDUCT THE TRUSTEE'S SALE

- Make the trustee's actual bid amount or good faith estimate of the credit bid amount available between 9:00 a.m. and 5:00 p.m. on the last business day before the sale (A.R.S. § 33-809(F)).
- Hold the sale between 9:00 a.m. and 5:00 p.m. on a business day at:
 - the subject property;

- the superior court for the county where the property is located; or
- the trustee's office, if the office is located in the county where the property is located.

(A.R.S. § 33-808(B).)

- Offer the property for cash sale by public auction.
- Ensure that bidders deposit \$10,000 with the trustee before the sale (A.R.S. § 33-810(A)).
- Ensure that the successful bidder pays the balance of the successful bid amount in cash or other form acceptable to the trustee by 5:00 p.m. on the first business day following the sale date.
- If the successful bidder is the beneficiary, the property reverts to the beneficiary with the full credit bid amount.

For more information on conducting the sale, see Practice Note, Residential Foreclosures (AZ): Conducting the Sale ([W-009-7954](#)).

COMPLETE THE POST-SALE REQUIREMENTS

- Execute and deliver the trustee's deed to the successful bidder within seven days of payment of the full bid amount (A.R.S. § 33-811(B)).
- Take possession of the real property:
 - immediately, if the property is vacant; or
 - after completing a forcible entry and detainer action (eviction), if the property is occupied.
- Consider negotiating voluntary delivery of possession if the property is occupied (a so-called cash-for-keys delivery).
- Distribute the sale proceeds in the following order of priority:
 - to reimburse the costs and expenses of exercising the power of sale, including paying the trustee's fees and reasonable attorneys' fees;
 - to pay the loan balance;
 - to pay all other indebtedness secured by the deed of trust and actually paid by the beneficiary before the sale. It is at this level of payment that it is determined whether a surplus or deficiency exists. If there are funds remaining after satisfying the indebtedness, a surplus exists. If there is a surplus, the trustee must send written notice of the surplus to the trustor at each of the trustor's known addresses via certified mail, the cost of which may be deducted from the surplus (A.R.S. § 33-812(B));
 - the trustee at its discretion may directly pay any condominium association or planned community association having a subordinate lien; and
 - the trustee at its discretion may directly pay any remainder to junior lienholders in the order of priority that existed at the time of the sale.

(A.R.S. § 33-812(A).)

- The trustee at its discretion may choose to deposit any remaining proceeds with the county treasurer within 90 days following the sale date by:
 - filing a complaint with the superior court, naming the county treasurer as the defendant; and
 - mailing a certified copy of the complaint to the county treasurer and all persons who received the notice of sale.

(A.R.S. § 33-812 (C), (D), and (G) and see Mail the Notice of Sale ([W-011-4312](#)).

- Complete a declaration of additional funds received to report any payments made under a private mortgage insurance policy received after the sale date.

For more information on the post-sale requirements, see Practice Note, Residential Foreclosures (AZ): Post-Sale Requirements ([W-009-7954](#)).

JUDICIAL FORECLOSURE

PREPARE THE FORECLOSURE COMPLAINT

- Prepare the foreclosure complaint, identifying the necessary parties, including:
 - the mortgagor (borrower);
 - the mortgagor's successors and assigns, if any;
 - the real property's owner, if different from the borrower (for example, a guarantor who pledged the property as collateral for a loan);
 - any party with a recorded interest in the real property; and
 - any junior lien holders.

(Ariz. R. Civ. P. 19(a).)

- To assist in identifying the necessary parties, consider obtaining:
 - a litigation report from a litigation support services company; and
 - a litigation guarantee from a reputable title company.

Allege the Minimum Facts and Request the Appropriate Relief

- Describe each party's interest in the real property.
- Describe the mortgage or deed of trust and the secured indebtedness.
- Describe the default.
- Include facts establishing the lender's compliance with statutory or contractual pre-foreclosure requirements, if any.
- Request relief from the court that:
 - forecloses the mortgage or deed of trust;
 - establishes the redemption period; and
 - authorizes a credit bid at the foreclosure sale.
- Ensure that all requests for relief include facts supporting each special relief.

Attach the Exhibits to the Complaint

- Attach exhibits to the complaint, including copies of:
 - the vesting deed;
 - the signed promissory note;
 - the recorded deed of trust or mortgage;
 - any recorded assignments of the mortgage or deed of trust;
 - any substitution of trustee; and
 - any other recorded liens or interests in the real property.
- Review the Arizona Rules of Civil Procedure and local guidance for any format and content requirements.

For more information on preparing the foreclosure complaint, see Practice Note, Residential Foreclosures (AZ): File a Foreclosure Complaint ([W-009-7954](#)).

FILE AND SERVE THE FORECLOSURE COMPLAINT

- File the foreclosure complaint with the superior court for the county where the real property is located (A.R.S. § 33-721).
- Serve a copy of the complaint on the other named parties to the action (Ariz. R. Civ. P. 4.1 and 4.2 and see State Q&A, Commencing an Action: Arizona: Question 12 ([6-567-2905](#))).
- Record a notice of lis pendens with the recorder's office in the county where the real property is located (A.R.S. § 12-1191(A)).

FILE AN ANSWER: DEFENDANT (OPTIONAL)

- Determine whether the defendant has a valid defense to foreclosure, including:
 - the full payment of the mortgage;
 - the mortgage's release or satisfaction;
 - challenging the lien's validity; and
 - the inability to fulfill a condition of the mortgage due to accident, mistake, or fraud.
- File the answer within 20 days after receiving service of the summons and complaint, if served in Arizona.

For a more detailed discussion of the steps for filing pleadings in Arizona, see State Q&As, Commencing an Action: Arizona ([6-567-2905](#)) and Responding to a Complaint: Arizona ([W-000-6712](#)).

FILE FOR A DEFAULT JUDGMENT OR MOTION FOR SUMMARY JUDGMENT

- File a motion for default judgment if the borrower fails to respond or appear (Ariz. R. Civ. P. 55).
- File a motion for summary judgment if the borrower files a response but does not dispute the material facts (Ariz. R. Civ. P. 56).

EXECUTE ON THE FORECLOSURE SALE AFTER JUDGMENT

- Obtain a writ of execution (writ) directing the county sheriff to levy on and sell the real property (A.R.S. § 12-1551(A)).
- Ensure that the county sheriff:
 - posts a notice of sale in at least three public places, including at or near the door of the superior court for the county where the real property is located;
 - publishes the notice of sale in a newspaper for three consecutive weeks before the sale date; and
 - endorses the writ and records it with the county recorder (A.R.S. § 12-1559(1)).

(A.R.S. § 12-1621(A)(3).)

- Ensure that the county sheriff conducts the foreclosure sale:
 - at or near the courthouse door of the superior court for the county where the real property is located (A.R.S. § 12-1621(C));
 - between the hours of 10:00 a.m. and 4:00 p.m.; and

- as an auction of the property to the highest bidder (A.R.S. § 12-1622(A)).

DISBURSE THE SALE PROCEEDS

- Ensure the sheriff disburses the sale proceeds in the following order:
 - to reimburse the costs incurred in conducting the sale;
 - to the foreclosing lender until its award in the court judgment is satisfied;
 - to other amounts secured by the mortgage or deed of trust foreclosed;
 - to the junior lienholders in order of priority; and
 - any remainder to the debtor.

(A.R.S. § 33-727(A).)

DETERMINE THE RIGHT OF REDEMPTION

- Consider that the borrower has a right of redemption allowing the borrower to retain the property after a foreclosure sale. The borrower's applicable redemption period is either:
 - 30 days from the date of the sale if the property was abandoned and not primarily used for grazing or agricultural purposes; or
 - six months from the sale date if the property was occupied or used primarily for grazing or agricultural purposes.

(A.R.S. § 12-1282.)

Redeem the Property: Borrower

- Pay the following to redeem the property:
 - the purchase price;
 - an additional fee equal to 8% of the purchase price;
 - the amount of any assessments or taxes paid by the purchaser; and
 - interest on the amounts paid by the purchaser.

(A.R.S. § 12-1285.)

CLEAR TITLE AND OBTAIN POSSESSION OF THE PROPERTY

- Within 30 days following the end of the applicable redemption period, ensure that the county sheriff:
 - records the sheriff's deed with the county recorder;
 - executes a duplicate sheriff's deed; and
 - delivers the duplicate sheriff's deed to the purchaser or redemptioner, as applicable.

(A.R.S. § 12-1286.)

- Start and complete a forcible entry and detainer action to obtain possession if the property is occupied (see Complete the Post-Sale Requirements).

FILE FOR A DEFICIENCY JUDGMENT (OPTIONAL)

- In a nonjudicial foreclosure, file an action with the superior court within 90 days following the sale date unless a deficiency judgment is prohibited because:
 - the deed of trust forbids recovery of any deficiency (A.R.S. § 33-814(F)); or
 - the property is 2.5 acres or less in total size and used only for a single-family or single two-family dwelling (A.R.S. § 33-814(G)).
- In a judicial foreclosure, file a motion for a deficiency judgment unless the deficiency is prohibited because:
 - the foreclosed mortgage was a purchase money mortgage (A.R.S. § 33-729(A)); or
 - the action for the deficiency was not personally served on the debtor and the debtor did not appear in the deficiency action (A.R.S. § 33-727(A)).

For more information on deficiency judgments in Arizona, see Practice Note, Residential Foreclosures (AZ): Deficiency Judgments ([W-009-7954](#)).

ABOUT PRACTICAL LAW

Practical Law provides legal know-how that gives lawyers a better starting point. Our expert team of attorney editors creates and maintains thousands of up-to-date, practical resources across all major practice areas. We go beyond primary law and traditional legal research to give you the resources needed to practice more efficiently, improve client service and add more value.

If you are not currently a subscriber, we invite you to take a trial of our online services at legalsolutions.com/practical-law. For more information or to schedule training, call **1-800-733-2889** or e-mail referenceattorneys@tr.com.