

Residential Foreclosures (AZ)

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A Practice Note discussing residential foreclosure procedures and proceedings under Arizona law. This Note outlines the primary considerations, requirements, and processes for non-judicial and judicial foreclosures of real property secured by deeds of trust and mortgages. This Note also addresses the appointment of receivers, deficiency judgments, and the borrower's right to reinstate the loan and right of redemption.

Foreclosure is the legal process by which a lender (beneficiary or mortgagee) liquidates secured real property to obtain payment following the borrower's (trustor's or mortgagor's) default on the underlying debt.

This Note outlines Arizona law governing residential foreclosure proceedings including:

- Non-judicial foreclosures.
- Judicial foreclosures.
- Redemption rights.
- Deficiency judgments.

This Note also provides step-by-step guidance for conducting residential foreclosures under Arizona law. The procedures for serving the notice of sale and conducting the foreclosure sale are the same for residential and commercial foreclosures in Arizona.

For information on commercial foreclosures in Arizona, see Practice Note, Commercial Foreclosures (AZ) ([W-010-7622](#)).

AVAILABLE METHODS OF FORECLOSURE IN ARIZONA

Lenders in Arizona use the following instruments to secure loans against real property:

- Mortgages (A.R.S. §§ 33-701 to 33-715).
- Deeds of trust (A.R.S. §§ 33-801 to 33-821).
- Contracts for deed (A.R.S. §§ 33-741 to 33-750).

Under Arizona law, a lender may foreclose a loan secured by residential real property by either:

- **Non-judicial foreclosure.** Foreclosure is authorized under a deed of trust or other contract containing a power of sale clause and is conducted at a public auction without judicial assistance (A.R.S. § 33-810 and see Non-Judicial Foreclosure). Non-judicial foreclosures are the most commonly used form of foreclosure in Arizona, and are governed by Chapter 6.1 of Title 33 of the Arizona Revised Statutes (A.R.S. §§ 33-801 to 33-821).
- **Judicial foreclosure.** Foreclosure of a mortgage or other contract by court order after a judgment in a lawsuit (A.R.S. § 33-721 and see Judicial Foreclosure). Judicial foreclosure is rarely used with deeds of trust due to its lengthy and expensive nature, and is governed by Chapter 6 of Title 33 of the Arizona Revised Statutes (A.R.S. §§ 33-721 to 33-730).

Deeds of trust are the most common instrument. For more information on financing real property in Arizona, see State Q&A, Real Estate Finance: Arizona ([3-500-5703](#)).

PRE-FORECLOSURE REQUIREMENTS AND CONSIDERATIONS

Arizona law does not require lenders to deliver any type of written notice of default, demand letter, or similar communication to a borrower in default before proceeding with foreclosure of residential real property. However, counsel for the lender should review the terms of the note and deed of trust or mortgage for any contractually required notification requirements before foreclosure.

Most Arizona lenders provide defaulting borrowers with a demand letter before beginning the foreclosure process. The demand letter should state:

- The terms of the loan.
- A description of the default.
- That the loan documents will be strictly enforced if any default is not remedied.

RESTRICTIONS ON CONSUMER DEBT COLLECTION

Most institutional residential lenders are subject to the oversight of the Consumer Financial Protection Bureau (CFPB). The CFPB imposes additional limitations when seeking to foreclose a loan secured by residential real property. For guidance on the authority of the CFPB, see Practice Note, Summary of the Dodd-Frank Act: Consumer Financial Protection: Subtitle A: Consumer Financial Protection Bureau ([2-543-6265](#)).

The CFPB requires that subject lenders wait at least 120 days after a loan becomes delinquent before initiating the foreclosure process (12 C.F.R. § 1024.41(f)). Under the CFPB regulations, a lender cannot:

- Record a notice of sale before 120 days have passed in connection with non-judicial foreclosures.
- File a civil complaint for foreclosure before 120 days have passed in connection with judicial foreclosures.

Counsel for lenders should confirm the 120 day delinquency with the lender before taking any action to foreclose the secured loan.

In Arizona, an attorney conducting a foreclosure is not a “debt collector” subject to the federal Fair Debt Collection Practices Act (FDCPA) (15 U.S.C. §§ 1692 to 1692e; *Monsour v. Cal-Western Reconveyance Corp.*, 618 F. Supp. 2d 1178, 1182 (D. Ariz. 2009); *Diessner v. Mortgage Electronic Registration Systems*, 618 F. Supp. 2d 1184, 1189 (D. Ariz. 2009)).

For purposes of the FDCPA in Arizona, enforcing a security interest through non-judicial foreclosure is not the same as collecting funds from a debtor (*Ho v. ReconTrust Company, N.A.*, 2016 WL 9019610 (9th Cir.)). However, judicial foreclosures, especially when seeking a deficiency, may be subject to the FDCPA (see Deficiency Judgments).

Additionally, any pre-foreclosure notices or communications attempting to work out the default with the borrower could be construed as attempts to collect a debt, subjecting the matter to the FDCPA. Arizona courts are more likely to construe enforcing a homeowner’s association lien or a mechanic’s and materialman’s lien as attempts to collect a debt. (*McNair v. Maxwell & Morgan PC*, 893 F. 3d 680, 682-83 (9th Cir. 2018).)

This Note assumes the lender is enforcing a security interest and is not subject to the FDCPA. For more information on the FDCPA, see Practice Note, Consumer Regulations Governing Debt Collection ([1-538-2786](#)).

ACCRUAL OF LIMITATIONS

In Arizona, a lender must foreclose its lien within six-years of the date of the borrower’s default (A.R.S. § 12-548). This six-year limitation applies to foreclosure actions as well as to actions on the underlying debt (*De Anza Land & Leisure Corp. v. Raineri*, 669 P.2d 1339, 1343 (App. 1983)).

The theory of continuous breach acts as an exception to the statute of limitations. Under the theory, a cause of action accrues each time a party fails to perform as required under the contract. (*Ancala Holdings, L.L.C. v. Price*, 220 Fed. Appx. 569, 572 (9th Cir. 2007).) Each time the debtor fails to make a payment when it becomes due, a separate breach occurs and a cause of action accrues, starting the clock (*Ortiz v. Trinity Fin. Servs. LLC*, 98 F. Supp. 3d 1037, 1042 (D. Ariz. 2015)).

However, where the lender demands full payment of the debt on a default (typically through an acceleration clause) the statute of

limitations begins to run as to future installment payments as of the date of that demand (*Navy Fed. Credit Union v. Jones*, 930 P.2d 1007, 1008–09 (App. 1996)).

CONSIDER APPOINTING A RECEIVER

In cases of both judicial and non-judicial foreclosure, to the extent a property is in danger of waste or deterioration, a lender may move for the appointment of a receiver to protect and preserve the property.

Lenders may seek a receiver to collect rents (in connection with residential rental property) or to protect and preserve the property.

A party seeking the appointment of a receiver must file an application, accompanied by an affidavit attesting to the facts supporting the application. The party should include facts supporting the conclusion that the property is in danger of waste or deterioration. Within ten days after being served, the adverse party (typically, the trustor or borrower) may file a response accompanied by one or more affidavits attesting to facts countering those set out by the party seeking a receiver.

The court sets an initial return hearing on the application. At the return hearing, the court:

- Determines if any issues are in dispute.
- Sets an expedited discovery schedule.
- Sets a final hearing.

At the final hearing, the court considers testimony and other evidence presented by the parties. (A.R.S. §§ 12-1241 and 12-1242; Ariz. R. Civ. P. 66(a).)

The court may appoint a receiver at the return hearing, and without a final hearing, if it finds either that:

- There are no material issues in dispute.
- The facts require the court to immediately appoint a receiver despite the existence of a dispute.

The court generally may not appoint a party, an officer or employee of a party, an attorney for a party, or any person interested in the action, unless:

- The court finds that the property has been abandoned or that the receiver’s duties are to consist primarily of:
 - physically preserving the property;
 - collecting rents; or
 - maturing, harvesting, and disposing of crops growing on it.
- Notice is provided in a manner the court finds adequate.
- No party objects.

(Ariz. R. Civ. P. 66(b)(1).)

Before performing the prescribed duties, a receiver must file a bond in the amount ordered by the court. The bond must be:

- In the amount set out in the receiver’s order of appointment.
- Conditioned on the receiver faithfully discharging its duties in the action and obeying the court’s orders.

The receiver also must make an oath to the same effect, which must be endorsed on the bond. On the court’s approval of the bond and the receiver making the required oath, the clerk must deliver a certificate of

appointment to the receiver. The certificate must contain a description of the property involved in the action. (Ariz. R. Civ. P. 66(b)(2).)

NON-JUDICIAL FORECLOSURE

Non-judicial foreclosure is a contractual right arising only where the borrower expressly grants the lender a power of sale in the subject deed of trust. The power of sale clause allows a lender to foreclose the security interest and sell the secured property if the borrower is in breach of a material obligation under the terms of the promissory note, the deed of trust, or another contract, without court proceedings. (*Patton v. First Fed. Sav. & Loan Ass'n of Phx.*, 578 P.2d 152, 156 (1978).)

Examples of material breaches that can lead to foreclosure include:

- Failure to make timely payments on the promissory note.
- Failure to keep the secured property insured.
- Failure to pay property taxes when due.
- Transfer of title or interest in the secured property without prior written consent of the lienholder.

In Arizona, deeds of trust typically contain a power of sale. Mortgages in Arizona do not contain a power of sale.

A beneficiary under a deed of trust has the right to simultaneously pursue a suit on the promissory note and foreclose non-judicially. The Arizona election of remedies statute applies only to mortgages and not to deeds of trust (A.R.S. § 33-722 and see Judicial Foreclosure). The election of remedies statute only prevents a lender from maintaining separate actions on the note and to foreclose a mortgage at the same time.

SUBSTITUTION OF TRUSTEE

The original trustee in a deed of trust is typically:

- A title company authorized to do business in Arizona.
- A servicing agent of the lender.
- An attorney.

The trustee named in the original deed of trust often is unqualified, unwilling, or unable to conduct the foreclosure sale. In these instances, the lender must record a substitution of trustee (SOT). In an SOT, the lender appoints a party authorized and willing to conduct the foreclosure sale as trustee. The SOT must be:

- Signed by the current beneficiary.
- Recorded in the county where the property is located.
- Sent by certified mail to the:
 - borrower;
 - former trustee; and
 - successor trustee.

The SOT must also identify how the person or entity appointed is legally qualified to conduct the sale (A.R.S. § 33-804).

A trustee is qualified to act as trustee if:

- It is an association or corporation doing business under the laws of Arizona as a:
 - bank;
 - trust company;

- savings and loan association;
- credit union;
- insurance company;
- escrow agent; or
- consumer lender.

- It is an association or corporation licensed, chartered, or regulated by the:

- Federal Deposit Insurance Corporation (FDIC);
- Office of the Comptroller of the Currency within the United States Department of Treasury;
- Federal Home Loan Banks;
- National Credit Union Administration;
- Farm Credit Administration; or
- Federal Reserve Board of Governors.

- It is the parent corporation of an association or corporation qualified to act as a trustee.

- It is a corporation wholly owned by an association or corporation qualified to act as a trustee.

- The trustee is an individual that is licensed by:

- the Arizona State Bar;
- the Arizona Department of Real Estate, as a real estate broker; or
- the Arizona Department of Insurance, as an insurance producer.

(A.R.S. § 33-803(A).)

An individual trustee may not be the beneficiary under the deed of trust (A.R.S. § 33-803(B)). A qualified entity may not extend its qualification to an otherwise unqualified entity or individual (A.R.S. § 33-803(C)).

A lender must complete the substitution of trustee process before triggering the foreclosure process.

RECORD THE NOTICE OF SALE

The first step to initiating a non-judicial foreclosure sale under a deed of trust is for the trustee to record a notice of sale. The recorded notice of sale must include:

- The date, time, and place of sale. The date of sale must be at least 91 days after the date the trustee records the notice of sale. For information on scheduling the sale, see *Conducting the Sale*.
- The purported street address, tax parcel ID, and legal description of the real property.
- The original principal balance as referenced in the deed of trust.
- The name and address of the current beneficiary (lender).
- The name and address of the original trustor (borrower).
- The name of the current trustee, along with:
 - the trustee's signature;
 - the trustee's address;
 - the trustee's telephone number; and
 - the name of the state or federal licensing or regulatory body or controlling agency of the trustee (A.R.S. § 33-803(A) and see *Substitution of Trustee*).

- The following statement contained in the first paragraph, printed 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.”**

(A.R.S. § 33-808(C).)

Arizona provides a statutory form for the notice of sale. The foreclosing counsel should use the statutory form to ensure that the notice of sale contains the details required and otherwise is deemed legally sufficient under Arizona law. (A.R.S. § 33-808(D).)

Common Errors in the Notice of Sale

Certain mistakes in the drafting of the notice of sale can lead to the cancellation of the sale. Those errors include:

- The wrong date, time, or place of sale.
- An incorrect legal description that makes it impossible to identify the property to be sold. If the property can still be identified despite errors in the legal description, the errors do not require the cancellation of the sale.

(A.R.S. § 33-808(E).)

If one of these errors appears in the notice of sale, the trustee must record a cancellation of notice of sale.

The trustee or other party responsible for the error is not liable for damages arising from the error except where the error is willful or intentional (A.R.S. § 33-808(E)). A faulty notice of sale cannot be re-recorded to correct the error. The trustee must cancel the erroneous notice of sale and then may record a new notice of sale, effectively restarting the clock and resetting all other requirements related to circulating the notice of sale. (A.R.S. § 33-808(F) and see Mail the Notice of Sale.)

The notice of sale should be recorded in the office of the recorder for each county where the real property is located (A.R.S. § 33-808(A)). Best practice is to contact the offices of the recorder for the counties where the real property is located for document format requirements. Most Arizona county recorders provide their format requirements online. For example, see the Maricopa County Recorder’s Form Requirements.

MAIL THE NOTICE OF SALE

Five Business Day Mailing to Deed of Trust Parties

In addition to recording the notice of sale, the trustee must mail the notice of sale, along with a statement of breach to all parties listed in the deed of trust, except the trustee. The copy of the notice of sale does not need to be record stamped (or otherwise indicate the date of recording).

These documents must be sent by certified mail to each party’s address as listed in the deed of trust within five business days of the

date on which the trustee recorded the notice of sale. (A.R.S. § 33-809(C) and see Mail a Statement of Breach.) The parties entitled to this mailing typically include the trustor (borrower), the beneficiary (lender), and other parties with a recorded interest in the property. The trustee should review the deed of trust and a trustee’s sale guarantee issued by a reputable title insurer to identify any additional parties entitled to this mailing.

30-Day Mailing to Parties with a Property Interest

The trustee also must mail the notice of sale, along with a statement of breach, to all parties with a recorded interest in the property, other than the deed of trust parties (see Mail a Statement of Breach).

The copy of the notice of sale must indicate the date on which it was recorded. This mailing must be sent by certified mail within 30 days of the date on which the trustee recorded the notice of sale. (A.R.S. § 33-809(B).)

If the property to be sold is a single-family residence, this same mailing must be sent to the property address, but may be sent by first-class mail (A.R.S. § 33-809(B)(3)).

Typical parties entitled to the 30-day mailing may include:

- Parties who have recorded a request for a copy of the notice of sale.
- Junior mortgage or deed of trust holders.
- Subordinate lien holders (for example, mechanics’ and materialmen’s liens).
- Benefitted parties under an easement agreement.

Counsel should engage a reputable title company to conduct a comprehensive title search and obtain a trustee’s sale guarantee to identify parties entitled to this mailing. Use the notice address contained in each recorded document. If no notice address is provided, direct the mailing to the party that requested recording of the recorded document (most often listed in the upper left corner of the recorded document) (A.R.S. § 33-809(B)(2)).

If the trustee receives the recorded stamped notice of sale in time, this 30-day mailing can be sent at the same time as the five business day mailing.

Give Notice to the IRS

If there is a federal tax lien attached to the property, the trustee must give notice of the foreclosure sale to the IRS at least 25 days before the sale date (26 U.S.C. § 7425(c)(1)). The foreclosure does not extinguish the tax lien if the trustee does not give notice of the sale to the IRS. The IRS has 120 days following the sale to redeem the property. (26 U.S.C. § 7425(a), (d).)

In practice, while it is rare for the IRS to redeem the property, an IRS right of redemption creates a post-foreclosure cloud on title delaying further conveyance of the foreclosed property acquired by the lender after foreclosure.

Counsel should use the trustee’s sale guarantee and title search completed for identifying notice parties for the 30-day mailing to identify federal tax liens and provide the IRS with a copy of the notice of sale at the same time (see 30-Day Mailing to Parties with a Property Interest).

MAIL A STATEMENT OF BREACH

The trustee must include a statement of breach in its mailings of the notice of sale to all persons who were a party to the deed of trust, other than the trustee (A.R.S. § 33-809(C) and see Five Business Day Mailing to Deed of Trust Parties).

A statement of breach is a document signed by the lender or its agent setting out the following information:

- A description of the breach or nonperformance (default).
- A direction to the trustee to exercise the power of sale.
- A notice to junior lienholders that their rights may be terminated by the foreclosure sale.

The statement of breach is not recorded with the recorded notice of sale.

PUBLISHING AND POSTING THE NOTICE OF SALE

The trustee must publish the notice of sale in a newspaper of general circulation in the county where the real property is located. The notice of sale must be published:

- At least once per week for at least four consecutive weeks.
- The final date of publishing may not be fewer than ten days before the date of sale.

(A.R.S. § 33-808(A)(4)).

The Arizona Corporation Commission maintains a list of qualified newspapers by county.

The trustee must also post a copy of the notice of sale:

- In a conspicuous place on the subject property at least 20 days before the sale date. If trustee cannot access the property due to a gate or other impediment, the posting may be made at the gate or other point of impediment.
- At the designated spot for such postings at the superior court for the county where the real property is located.

(A.R.S. § 33-808(A)(3)).

INTERESTED PARTY'S RIGHT TO REINSTATE THE LOAN

The borrower, or any party with a subordinate interest in the property, has until 5:00 p.m. on the business day before the scheduled sale to reinstate the loan (A.R.S. § 33-813(A) and see 30-Day Mailing to Parties with a Property Interest). To reinstate the loan, a party must pay:

- The entire amount then due, other than the accelerated portion of the principal due and owing after default (all installments past due without regard to acceleration of the loan balance).
- The costs and expenses incurred by the lender resulting from enforcing its rights under the deed of trust, including:
 - reasonable costs for mailing and photocopying;
 - actual expenses incurred for recording, publication, posting of notice of sale, auctioneer's fee, postponement fees, and title costs; and
 - other reasonable costs and expenses.
- The recording fee for recording a cancellation of notice of sale.
- The trustee's fees equal to the greater of:
 - \$600; or
 - 0.5% of the entire unpaid principal sum secured.

- Expenses and reasonable attorneys' fees and other costs that are not otherwise provided for by statute but are incurred in protecting and preserving the beneficiary's interest in the property. These other costs often include:

- insurance premiums;
- delinquent taxes;
- interest accrued to date of payment; and
- costs of service of process or notices.

(A.R.S. § 33-813(B).)

On written request, the trustee must provide a party entitled to reinstate the loan with the exact amount necessary for reinstatement. If a party other than the trustor (borrower) reinstates the loan, the trustee must provide the trustor with written notice identifying the reinstating party. (A.R.S. § 33-813(B), (D).)

Once a loan has been reinstated, the trustee must record a cancellation of notice of sale with the offices of the recorder for the counties where the notice of sale was recorded. The trustee should use the form of cancellation of notice of sale provided by statute. This form of cancellation of notice of sale should also be used if the debt secured by the deed of trust is paid in full before the sale date. (A.R.S. § 33-813(E) to (G).)

A cancellation of a trustee's sale, by itself, does not revoke a prior lender's acceleration of a loan. The cancellation must include specific language revoking the acceleration. (*Andra R Miller Designs LLC v. US Bank NA*, 2018 WL 828311, *6 (App. Feb. 13, 2018).)

CONDUCTING THE SALE

From 9:00 a.m. to 5:00 p.m. the last business day before the sale, the trustee must make available the actual bid or a good faith estimate of the credit bid the beneficiary is entitled to make at the sale (A.R.S. § 33-809(F)).

Foreclosure sales may be conducted between 9:00 a.m. and 5:00 p.m. and can be held on any day except for Saturday, Sunday, or a legal holiday. The foreclosure sale must take place at a specified place:

- On the subject property.
- At the superior court for the county where the property is located.
- At the offices of the trustee, if trustee's offices are located in the county where the trust property is located.

(A.R.S. § 33-808(B).)

The trustee or its agent conducts the sale and may schedule more than one sale for the same time and place.

On the date of sale, the trustee must offer the property for cash sale by public auction. To participate in the auction, bidders must deposit \$10,000 with the trustee before the sale. (A.R.S. § 33-810(A)).

The successful bidder at the foreclosure sale must pay the bid price in a form acceptable to the trustee before 5:00 p.m. on the following business day; however, the deadline for payment is within the discretion of the trustee. The beneficiary (lender) also may credit bid against the amount owed on the debt. (A.R.S. § 33-810(A).) A full credit bid is calculated as follows:

- The outstanding balance of the debt secured by the deed of trust.
- Less the value of any outstanding liens against the property which are superior to the deed of trust.
- Plus:
 - the amount of other obligations provided in or secured by the deed of trust; and
 - the costs and expenses of exercising the power of sale and conducting the sale, including the trustee's fees and reasonable attorney fees actually incurred.

(A.R.S. § 33-801(5).)

If the sum is not paid by the deadline, the bidder's \$10,000.00 deposit is forfeited and the funds are treated as additional sale proceeds. The trustee has discretion to either:

- Re-conduct the sale on a specific continued sale date that was announced at the sale. If no date is announced, the continued sale date is to be 28 days later or on the first business day after.
- Immediately offer the property for sale to the second highest bidder who may purchase the property at that bidder's price.

(A.R.S. § 33-811(A).)

If the trustee decides to continue the sale to another date, the trustee must provide notice by certified mail of any continued sale date to all bidders that provided their names and addresses at the original sale. At the continued sale, the trustee must reject the bid from any previous bidder who elected not to pay the highest bid at the original sale. (A.R.S. § 33-810(B).)

Additional Grounds for Rescheduling the Sale

A sale is not complete if the sale, as held, is contrary or in violation of any federal statute in effect because of an unknown or undisclosed bankruptcy. If this happens, the sale is treated as continued for 28 days. All parties attending the original sale (which was conducted in violation of federal law) are notified in writing of the updated sale date. (A.R.S. § 33-810(C).)

The trustee also has unilateral authority to postpone a sale that is in progress. The sale may be postponed by public declaration of a new date, time, and location at the then ongoing sale. There is no requirement to mail any notice of the postponement to any party. There is no limit to the number of times a sale can be postponed. Postponements may occur for periods as short as several minutes and for up to 90 days. (A.R.S. § 33-810(B).)

POST-SALE REQUIREMENTS

Trustee's Deed

After the foreclosure sale and payment of the bid amount, the trustee has seven business days to execute and deliver a trustee's deed to the successful bidder. The purchaser may request a copy of the executed but unrecorded deed from the trustee. (A.R.S. § 33-811(B).)

A purchaser acquiring property by a trustee's deed acquires title that is free and clear of:

- All liens junior to the deed of trust.
- Any title, interest, or claim of:
 - the trustee;
 - the trustor;

- the beneficiary; and
- their respective successors in interest.

(A.R.S. § 33-811(E).)

No affidavit of property value is required when recording a trustee's deed (A.R.S. § 11-3334(B)(1).)

There is no right of redemption in connection with a non-judicial foreclosure in Arizona (see Right of Redemption).

Taking Possession of the Property

If the property is abandoned at the time of the sale, the purchaser may take possession immediately. If the property remains occupied, the purchaser may take possession only after successfully completing a forcible entry and detainer action (eviction). Forcible entry and detainer actions are governed by Article 4 of Chapter 8 of the Arizona Revised Statutes (A.R.S. §§ 12-1171 to 12-1183).

Common practice for beneficiaries (lenders) that end up owning the property after the sale is to negotiate voluntary delivery of possession with the occupants of the property. This type of arrangement is typically referred to as a "cash for keys" arrangement and many lenders attempt this effort to avoid the time and expense of a forcible entry and detainer action.

Arizona did not adopt a state equivalent of the federal Protecting Tenants at Foreclosure Act. Arizona law does not provide tenants with any rights under the lease and the foreclosure extinguishes the lease at the time of the foreclosure sale.

Disbursement of Sale Proceeds

The trustee shall apply the proceeds of the trustee's sale in the following order of priority:

- 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 obligations 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 these obligations are satisfied, 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));
 - to pay any condominium association or planned community association having a subordinate lien; and
 - any remainder to any junior lienholders in the order of priority that existed at the time of the sale.
- (A.R.S. § 33-812(A).)
- Within 90 days from the sale date, the trustee may deposit the excess sale proceeds with the county treasurer for distribution, absolving the trustee of liability for the proper distribution of the proceeds. Parties must then seek an order from the superior court to receive a distribution from the sale proceeds. (A.R.S. § 33-812 (C), (G).)

To deposit the sale proceeds with the county treasurer, the trustee must file a complaint with the superior court naming the county treasurer as the defendant. The trustee must send, by certified or registered mail, a conformed copy of the complaint (displaying the filing stamp of the court clerk) to:

- The county treasurer.
- All persons entitled to the 30-day mailing of the notice of sale (parties known to have an interest of record in the property) (A.R.S. § 33-809 and see 30-Day Mailing to Parties with a Property Interest).

(A.R.S. § 33-812(D).)

Maricopa County provides forms and instructions for the release of the excess funds.

Private Mortgage Insurance

If a beneficiary receives payment under a private mortgage insurance policy after the date of sale, the beneficiary must report the mortgage insurance payment received by completing a declaration of additional funds received. The beneficiary must record the declaration form with the county recorder in the county where the real property is located not later than four months after the sale date. The beneficiary is required to complete and record this form even if it is not the new owner of the property after the sale. (A.R.S. § 11-1133(B).)

The Arizona Department of Revenue's form of Beneficiary's Declaration of Additional Funds Received (Form 82163) satisfies this requirement. At the close of the sale, the trustee must inform the beneficiary of its duty to report insurance proceeds received (A.R.S. § 33-811(F)).

JUDICIAL FORECLOSURE

Although rarely pursued for deeds of trust, Arizona law authorizes judicial foreclosures. Judicial foreclosure is the appropriate method when the lender holds:

- A mortgage rather than a deed of trust.
- A non-standard deed of trust, such as a deed of trust lacking a power of sale clause.

(A.R.S. § 33-721.)

A mortgagee (lender) may either:

- Foreclose the security interest in the real property.
- Sue directly on the debt (suit for breach of contract for failure to pay).

A lender may waive its security and seek only to enforce the note, or may sue to enforce both the note and to foreclose the mortgage in the same action (*Deming Nat. Bank v. Walraven*, 651 P.2d 1203, 1204 (App. 1982)). A lender may not simultaneously file separate actions on the note and to foreclose the mortgage (A.R.S. § 33-722.)

FILE A FORECLOSURE COMPLAINT

To initiate a judicial foreclosure, the foreclosing party must file a complaint with the superior court for the county where the real property is located (A.R.S. § 33-721). The complaint must name the following parties (and any additional party with an interest in the subject property) as defendants:

- The mortgagor (borrower).
- The borrower's successor and assigns, if any.
- The owner of the property, 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. Engage a reputable title company to run a title search to identify all such parties and issue a litigation guarantee.
- Junior lien holders, such as:
 - subordinate lenders;
 - judgment lien holders; and
 - mechanics' and materialmen's lien holders.

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

Counsel for the lender should consider obtaining a litigation report from a litigation support services company and a litigation guarantee from a reputable title company to provide the lender with all information regarding the necessary and indispensable parties to the judicial foreclosure.

Various counties in Arizona also provide online guides and forms for filing a judicial foreclosure suit. Counsel should review the Arizona Rules of Civil Procedure and local guidance for any format and content requirements. For example, Coconino County provides a judicial foreclosure packet for use in both Coconino County and Mohave County.

The foreclosing party must serve a copy of the complaint on the other named parties to the action (Ariz. R. Civ. P. 4.1 and 4.2; see State Q&A, Commencing an Action: Arizona: Question 12) ([6-567-2905](#)).

After filing the foreclosure complaint, the lender should immediately 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)). Recording the notice of lis pendens:

- Puts third parties on record (constructive) notice that pending litigation affects the title to the real property.
- Prevents third persons from acquiring an interest in the property during the foreclosure litigation which could prevent the court from granting suitable relief.

(*Warren v. Whitehall Income Fund* 86, 823 P.2d 689, 692 (App. 1991).)

Arizona grants junior lienholders the ability to take the foreclosing lender's place instead of having their junior liens extinguished by a foreclosure judgment. The junior lienholder may take the place of the foreclosing lender anytime between the filing of the civil action and the sheriff's sale by paying to lender:

- The amount secured by the lender's mortgage or deed of trust.
- All interest and costs accrued to the lender.

(A.R.S. § 33-723.)

On payment of the above amounts, the action is assigned to the paying junior lienholder (A.R.S. § 33-723).

Minimum Facts for the Foreclosure Complaint

The foreclosure complaint must include the following information, at a minimum:

- Identify the parties.
- Describe each party's interest in the real property.
- Describe the mortgage or deed of trust and the secured obligation.
- Describe the default.
- Include any facts establishing the lender's compliance with statutory or contractual pre-foreclosure requirements, if any.
- Request foreclosure of the mortgage or deed of trust.
- Request that the court establish the redemption period (see Right of Redemption).
- Request authorization to credit bid at the sale.
- Include facts supporting any requests for special relief. For example:
 - to reform or amend the loan documents;
 - to subrogate another lien or to determine priority; or
 - to obtain a deficiency judgment against the residential borrower.

Attach Exhibits to the Foreclosure Complaint

The lender should attach legible copies of the following instruments as exhibits to the foreclosure complaint:

- The vesting deed.
- The signed promissory note.
- The recorded deed of trust or mortgage.
- Any recorded assignments of mortgage or deed of trust (or substitution of trustee), if applicable.
- Any other recorded liens or interests in the real property.

JUDGMENT

The lender often prevails without a trial:

- If the defendant borrower does not respond to the foreclosure complaint, the lender should seek judgment through an entry of default (Ariz. R. Civ. P. 55).
- If defendant debtor does file a response to the complaint, the lender may be able to prevail by moving for summary judgment. If no material facts are contested, the court will issue summary judgment in favor of lender. (Ariz. R. Civ. P. 56.)

Judgment in favor of lender includes:

- An order for the entire amount due to plaintiff lender, including costs and disbursements.
- A determination of attorneys' fees owed (A.R.S. § 12-341.01(A), (C)).
- A direction to issue a special writ of execution to the county sheriff to seize the property and sell it in satisfaction of the debt.
- A determination of the priority of liens, as applicable.

(A.R.S. § 33-725.)

Judgment by Default

If the defendant borrower does not respond or appear, the lender may file a motion for default judgment including:

- An application for default.
- Any supporting affidavits, including:
 - affidavit in support of application for entry of default;
 - affidavit of non-military status;

- affidavit of counsel in support of request for attorneys' fees and expenses;
- sum certain affidavit; and
- affidavit of service of the summons and complaint.
- A motion for entry of default judgment.
- A statement of the costs and notice of taxation.
- A proposed entry of default judgment.

EXECUTING ON THE FORECLOSURE SALE

The foreclosing lender enforces a judgment in foreclosure by a writ of execution (writ). The writ directs the sheriff to levy on and sell the real property. (A.R.S. § 12-1551(A).)

Superior courts in Arizona provide guidance on securing a writ. For example, see Mohave County's writ of execution packet.

On receipt of the writ, the county sheriff:

- Posts a notice of the 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 date of sale.
- Endorses the writ and records it with the recorder (A.R.S. § 12-1559(1)).

(A.R.S. § 12-1621(A)(3).)

The sheriff's notice of sale must contain:

- The details of the foreclosure judgment, including:
 - the parties;
 - the amount awarded the plaintiff; and
 - the court in which the judgment was granted.
- The property to be sold, including:
 - the legal description; and
 - the street address or other identifiable location of the property.
- A notice in the following form:
 - **"Notice to Judgment Debtor**
 - Title 33, chapter 8, article 11 of the Arizona Revised Statutes, may permit you to protect your residence from certain types of legal process through the homestead exemption.
 - If you are in doubt as to your rights, you should obtain legal advice."

(A.R.S. § 12-1621(B).)

The sheriff must conduct 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.
- As an auction of the property to the highest bidder (A.R.S. § 12-1622(A) and see Conducting the Sale).

DISBURSEMENT OF SALE PROCEEDS

After the judicial foreclosure sale concludes, the sheriff must disburse the proceeds as follows:

- 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.
- Any remainder to the debtor.

(A.R.S. § 33-727(A).)

RIGHT OF REDEMPTION

A right of redemption allows a borrower to retain the property after a foreclosure sale.

Judicial foreclosure offers debtors the following timelines to redeem:

- 30 days from the date of sale if the property was:
 - abandoned at the time of the sheriff's sale; and
 - not primarily used before being abandoned for grazing or agricultural purposes.
- Six months from the date of sale if the property was:
 - occupied at the time of the sheriff's sale; or
 - used primarily for grazing or agricultural purposes.

(A.R.S. § 12-1282.)

The owner remains in possession until the redemption period expires (*Dart v. W. Sav. & Loan Ass'n.*, 438 P.2d 407, 410 (1968)).

To redeem, the judgment debtor must pay:

- The purchase price.
- An additional fee equal to 8% of the purchase price.
- The amount of any assessments or taxes paid by the purchaser.
- Interest on amounts paid by the purchaser.

(A.R.S. § 12-1285.)

Counsel should be aware that the IRS maintains a 120-day redemption period on properties subject to a federal tax lien (see Give Notice to the IRS).

SHERIFF'S DEED

At the conclusion of the applicable period of redemption, the sheriff must execute a deed granting title to the purchaser or the redemptioner, as applicable. Within 30 days, the sheriff must:

- Record the deed with the recorder's office for the county where the real property is located.
- Execute a duplicate deed for delivery to the purchaser or redemptioner, as applicable.

(A.R.S. § 12-1286.)

DEFICIENCY JUDGMENTS

Deficiency judgments are available for non-judicial foreclosures and judicial foreclosures on a limited basis.

DEFICIENCY JUDGMENT AFTER NON-JUDICIAL SALE

In a non-judicial foreclosure, the existence of either of the following facts prohibits the beneficiary from seeking a deficiency judgment:

- The deed of trust under which the property was sold forbids recovery of any deficiency (A.R.S. § 33-814(F)).
- The property sold is:
 - 2.5 acres or less in total size; and
 - used only for a single one-family or single-two family dwelling.
- (A.R.S. § 33-814(G).)

The party seeking to recover the deficiency must file an action with the superior court for the county where the real property is located within 90 days of the sale date (A.R.S. § 33-814(A)).

To establish the appropriate deficiency amount, Arizona law grants the judgment debtor the right to request a determination of the fair market value of the property. In a deficiency determination proceeding, both sides may present whatever evidence the court, in its discretion, allows.

Fair market value is the likeliest price (as of the date of the foreclosure sale) after deducting any prior liens and encumbrances. If the foreclosure purchase price is lower than the fair market value amount, the judgment debtor is entitled to offset the amount of the deficiency by the difference between the sale amount and the fair market value amount. (A.R.S. § 33-814(A).)

If no deficiency judgment is sought within the 90-day limit, the sale price paid is deemed a complete satisfaction of the debt secured (A.R.S. § 33-814(D)).

To create a judgment lien, record the deficiency judgment in any and all counties where the judgment debtor may have assets subject to seizure. The judgment lien, expires ten years after the date of the judgment, after which time the judgment cannot be enforced (A.R.S. § 33-964(A)). The judgment creditor must renew the deficiency judgment within ten years from the date of the original entry by the clerk of the court, not ten years from the date of recording. The judgment may be renewed by filing an affidavit of renewal with the clerk of the court (A.R.S. §§ 12-1611 and 1612(A)). File and record the affidavit of renewal at least 90 days before the ten year period expires (A.R.S. § 12-1612(B)).

DEFICIENCY JUDGMENT AFTER JUDICIAL SALE

Deficiency judgments are generally available to lenders following a judicial foreclosure. However, no deficiency judgment is available if:

- The foreclosed mortgage was a purchase money mortgage (A.R.S. § 33-729(A)).
- The action for deficiency was not personally served on the debtor and the debtor did not appear in the deficiency action.

(A.R.S. § 33-727(A).)

Unlike with deficiency judgments following non-judicial foreclosure, Arizona does not provide the debtor with an option to request a fair market value determination for the property. The deficiency amount is the difference between the sale amount and the foreclosure judgment award. (A.R.S. §§ 33-727(B) and 12-566.)

FORECLOSURE COMPARISON

	Non-Judicial Foreclosure	Judicial Foreclosure
Costs	Typically less expensive	Typically more expensive.
Timeline	91 day minimum (A.R.S. § 33-808 (C)(1)).	Approximately six months for default judgment. Up to two years or more if the defendant contests the foreclosure complaint or if delays in service of process are encountered.
Any notice requirements before commencing foreclosure	There is no statutory requirement for a pre-foreclosure demand letter. The lender must comply with any notice requirements contained within the loan documents.	There is no statutory requirement for a pre-foreclosure demand letter. The lender must comply with any notice requirements contained within the loan documents.
Publication requirements	The trustee must publish the notice of sale for four weeks in a newspaper of general circulation in the county where the real property is located. The final date of publication must occur at least ten days before the date of sale. (A.R.S. § 33-808 (A)(4).)	Counsel for the trustee must publish the summons and complaint only if alternative service is needed to provide notice of the lawsuit to a defendant (see State Q&A, Commencing an Action: Arizona: Question 12) (6-567-2905).
Declaratory Judgment for Loan or Title Defects	N/A	The lender may include a count for a declaratory judgment to clear a title defect in a foreclosure complaint
Deficiency Judgment	<p>No deficiency judgment is available if the subject loan is secured by a residential property that is both:</p> <ul style="list-style-type: none"> ■ 2.5 acres or less. ■ Used for either a single-family family or two-family dwelling. <p>The lender must commence the deficiency judgment lawsuit within 90 days after the date of the non-judicial sale. (A.R.S. § 33-814(A), (G).)</p>	<p>A lender may include a count for a deficiency judgment in the foreclosure complain only if the subject property is not secured by:</p> <ul style="list-style-type: none"> ■ A residential property of 2.5 acres or less. ■ Either a single-family or two-family dwelling. <p>(A.R.S. § 33-729(A).)</p>
Redemption Period	N/A	Thirty days if the subject property is vacant. Six months if the property was occupied at the time of sale. (A.R.S. § 12-1282.)
Requirement to Confirm Foreclosure Sale	N/A	N/A
One Action Rule	A beneficiary (lender) under a deed of trust has the right to simultaneously pursue a suit on the promissory note and foreclose non-judicially. While a lender may pursue these actions simultaneously, the completion of one of the actions results in a waiver of the other remedy.	Under Arizona law, a lender may sue directly on the promissory note, but waives the right to foreclose on the residential mortgage (A.R.S. § 33-722).

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