

## **FORECLOSURE IN NEW MEXICO**

### ***GENERALLY:***

**QUESTION:** What happens if I go into foreclosure on my mortgage or trust deed?

**ANSWER:** You can lose your property in a forced sale and in some cases still owe the creditor money for the shortfall between the sale proceeds and the debt.

### ***JUDICIAL FORECLOSURE IN NEW MEXICO***

**QUESTION:** What is judicial foreclosure?

**ANSWER:** New Mexico permits both judicial (trust deeds and mortgages) foreclosures and (as to trust deeds) non-judicial foreclosures. In a judicial foreclosure, the creditor sues for foreclosure in District Court and the Court orders the property sold for the debt. In some cases, if the property is sold for less than the loan amount, the lender may also obtain a deficiency (judgment against the debtor) for the difference.

In New Mexico, a mortgage can be foreclosed in District Court by a judicial foreclosure proceeding. A judicial foreclosure proceeding is conducted as a court proceeding and is typically used to foreclose mortgages on real property that secure a debt on the underlying loan transaction. In a judicial foreclosure, the District Court will issue a final judgment of foreclosure. The property is then sold as part of a publicly noticed sale. The action is commenced by a complaint being filed in District Court along with a lis pendens. A lis pendens is a recorded document that provides the public notice that the property is being foreclosed upon.

Depending on the District Court's docket, it takes approximately 120-180 days to get to the point of judgment against the debtor in an uncontested foreclosure. This procedure may be delayed if the borrower contests the foreclosure action, seeks delays and adjournments of hearings, or files for bankruptcy. A notice of foreclosure sale must then be advertised at least four weeks prior to any sale and the sales typically take four months after the above final judgment for foreclosure has been granted.

The actual notice of sale must be at least thirty days before the date of sale. The Sheriff must have the property appraised prior to the sale, and no property may be sold for less than 2/3rds of the appraised value of the property (exclusive of liens and encumbrances).

### ***NON-JUDICIAL FORECLOSURE IN NEW MEXICO***

**QUESTION:** What is a non-judicial foreclosure?

**ANSWER:** The creditor does not sue in Court. It sets the property for sale by a Trustee.

After a borrower defaults on his loan, a trustee can conduct a non-judicial foreclosure on the property without the requirement of filing a lawsuit by the judicial process noted above. The

trustee can conduct a foreclosure sale of the property at the request of the creditor. The requirements for conducting a foreclosure sale include a 90 day waiting period after the notice of sale has been recorded before the actual trustee's sale is conducted.

### ***DEFICIENCY JUDGMENTS***

**QUESTION:** What is a "deficiency judgment" and what foreclosures generate them?

**ANSWER:** A "deficiency" is the difference between the auctioned price of the property and the amount owed on the loan. A deficiency judgment is obtained in a judicial foreclosure where deficiencies are permitted, but may also be obtained in a separate civil action after the property has been auctioned and sold.

A deficiency judgment may be obtained when a property in foreclosure is sold at a trustee's sale for less than the loan amount of the underlying deed of trust. Within 6 years after the date of a trustee's sale, a separate civil action may be commenced to recover a deficiency judgment. However, no deficiency judgment may be sought or obtained under any deed of trust securing a residential loan made to a "low-income household," measured by the borrower's status at the time the loan was first made. A household is low-income if it is at or below 80% of the area's median income adjusted for family size as determined by the U.S. Department of Housing and Urban Development ("HUD"). A residential loan is defined by the Act as a loan that the primary purpose of which was the purchase or finance of a permanent dwelling located in New Mexico which is primarily secured by a deed of trust encumbering the dwelling and its connected realty. The determination of whether a household is a low-income household and whether a loan is a residential loan is made *as of the time the loan is made* on the basis of information obtained during the loan application process. The borrower's status at the time of foreclosure (richer or poorer) is not relevant.

### ***REDEMPTION***

**QUESTION:** Is there a right of redemption in New Mexico?

**ANSWER:** Yes, the former property owner may redeem the property within 9 months of the sale.

After a property is foreclosed either judicially or by trustee's sale, the property can be redeemed by the former owner or assignee (called a "right of redemption") by paying to the purchaser at anytime within nine months from the date of sale, the sale price plus 10 percent interest since the sale, including costs and taxes, and all payments made to satisfy in whole or in part any prior lien or mortgage not foreclosed, paid by the purchaser after the date of sale, with interest on the taxes, interest, penalties and payments made on liens or mortgages at the rate of ten percent a year from the date of payment. The former owner (or assignee of the owner) has the first priority to redeem the real estate. If the former owner does not redeem the real estate, each junior encumbrance or junior lien holder has a right to step up and redeem the real estate. This rule is an attempt to assure that properties are sold for fair prices at the original sale. If they are undersold, the debtor can "get even" by paying the "low ball auction price" and get the property back! In reality, though, due to current low market values, few redemption rights are exercised. Most of these rights are now

simply sold at low prices to the new owner so that the new owner can simply move on with the property without waiting 9 months for the redemption to expire.

### ***PERSONAL GUARANTYS***

**QUESTION:** What if I have signed a “Guaranty” for someone on the debt or they have signed one for my debt

**ANSWER:** You or they could be liable for the debt or judgment to the extent it falls short of paying off the lender, even on a non-deficiency debt, depending upon how the Guaranty is worded.

Under certain circumstances, it is possible for one who guaranteed a non-recourse debt or judgment to be held liable for the deficiency of the borrower guaranteed, not as a matter of judgment, mortgage or trust deed law, but under the law of guaranty. Guarantys must be carefully read to determine what they cover and how extensively.

### ***WASTE, OTHER CLAIMS***

**QUESTION:** Can a borrower become liable for waste to the property?

**ANSWER:** Yes, in New Mexico any concurrent non-possessory holders of an interest in land, including the owner of a lien against a specific piece of property, can maintain a waste action against the owner of that property.

Thus, the debtor can be held liable for destruction to the property by misuse, alteration or neglect of the premises while he or she was in legal possession of the property which occurred prior to the foreclosure under the common law of “waste”. All persons, including the debtor are always accountable for wasting the collateral or property of another.

As in other states, all adverse creditor actions can have IRS and credit ramifications for the defaulted borrower.

*See other consumer defenses to debts under “General Defenses Common to All States,” below. See also other debtor ramifications of a foreclosure, below.*

### **RAMIFICATIONS OF FORECLOSURE OR DEBT RESOLUTIONS COMMON TO ALL STATES**

**QUESTION:** Are there other ramifications for a failure to pay a debt?

**ANSWER:** Yes, and they must all be considered.

Most any foreclosure or debt reduction in the form of a loan modification, short sale, deed in lieu or other change of a pre-existing debt will have tax, credit eligibility, insurance, professional, licensure eligibility, immigration, employment, security clearances and other impacting affects. These must be analyzed in each case by a competent, licensed professional. In addition,

the debtor has a separate liability for “rent-skimming,” which is the taking of rents from a tenant at the secured property while not paying the loans against the property. A claim for rent recovery is the recourse in most states, and, in some states, this is also a crime. In all states it is a violation of the residential landlord-tenant acts if it is a residential property and most always a landlord violation of the lease agreement, whether residential or commercial. Real estate agents facilitating such skimming activity by a landlord or owner are in licensure violation in all states. Under current federal law, tenants in good stead with lease that predate the foreclosure will be permitted to remain for the period of their lease or 90 days.

***Now how about some DEFENSES COMMON TO ALL STATES?***

**DEFENSES TO DEBT CLAIMS COMMON TO ALL STATES**

**QUESTION:** Are there more defenses for the debtor in debt-collection actions or is the debtor (residential or commercial loan) strictly limited to what is in the foreclosure statutes?

**ANSWER:** There are many, many more debtor defenses than were mentioned in discussing the debt enforcements, above. Some defenses have nothing to do with foreclosure rules and are governed by criminal law, laws for general consumer protection, bank regulation, underwriting and appraisal rules and laws, bankruptcy and others.

In every state there are valid defenses to debt claims and these must be raised in any debt analyses or debt dispute by a competent, licensed attorney. Defenses common to bare land, residential and commercial debts incurred within the last 5-7 years are violations of the myriad of Federal and state law related to consumer protection, wrong or false appraisals, national or international subdivision application or subdivision sales defects, defective underwriting and reselling, holder-in-due-course failures by the lenders and their assignees and their collection arms, bait-and-switch, loan-slamming, 100% loans lender-disguised and booked as “equity transactions” through 80/20 and 70/30 dual loans in violation of both warehousing and secondary market underwriting rules, contractual and tortuous bad faith, violation of a lender’s own internal or Regulator-required standards, process and rules, dealings with the primary borrowers that void Guarantys, loan terms and Guarantys with terms so onerous they will be stricken as violations of public policy, and, especially in commercial settings, the debt being secured by a defective property or proforma for the property, inappropriate or negligent proprietary involvement by the lender or its agents in the property, waste by the lender in possession, failure to follow mitigation duties or laws and other defenses among the multiple other contract and tort defenses such as outright statutory or consumer fraud, common law fraud, unlawful collection practices, racketeering and others. The parties need to consult their attorneys for these as they vary with each fact and transaction pattern.

***TAX AFFECTS?***

## TAX AFFECTS COMMON TO ALL SHORT SALES AND FORECLOSURES

**QUESTION:** Is it true that a borrower can get taxed for the debt forgiven through loan write-offs, write-downs and foreclosures?

**ANSWER:** Yes.

IRS Section 108 governs the taxability to borrowers of losses, write-offs and write-downs by lenders, i.e. “phantom gain.” Borrowers can be liable for income taxes for these excused debts. At the federal level, IRC 108 should be consulted for each application, but, in general, debts for which the only recourse is the property are not considered “phantom gain” when defaulted and written off. Debts which maybe pursued personally against the borrower are eligible for “phantom gain” treatment. Currently, “phantom gains” on purchase money debts against residential property which the debtor occupies—whether or not recourse—are exempt from taxation under a federal law up to \$2 million in gain, but this law will “sunset” unless renewed soon. Some states do not recognize the same federal tax rules, so state treatments can vary. On the flip side, there are also losses that the debtor can write down for business or investment property lost in foreclosure or short sales or modified and these can have tax benefits, though often ones that must be spread over long periods of time or tax-planned to trigger along with gains. There are other ramifications. Some of these ramifications can be avoided by an artfully raised and effectuated claims and defense-tradeoffs between creditor and borrower. The debtor should contact a licensed professional for advice and applicability for the particular debtor.

There you have a thumbnail. Aside from Mark Twain’s “issue” with the legal system, the judges and the lawyers—with whom he had frequent personal interaction due to his many patent, copyright and investor lawsuits, most of which he lost to his great resultant impoverishment *if the 22nd Century has taught us anything, it is that knowledge is power.* Knowing and using the law for one’s protection from the ravages of the Bad Guys is now probably one of the most important forms of modern literacy. Especially when there are so many more Bad Guys round these days than was once the case. “Smart” is not only knowing the law, but also knowing when to get help with it and that sometimes means getting a....(gulp!)...lawyer. But another “Head’s Up” here: *Not all good lawyers—including those that know both the judge and the law—want to work for the Bank.* Some favor the “Davids” of the world.

‘Nuff said.

## BIO FOR J. ROBERT ECKLEY

J. Robert Eckley is a multi-state real estate and banking attorney, successful litigator, popular writer, educator and national speaker with an immense personal and professional involvement in forefront issues over the past three decades. He has been a keynote speaker at NAR® National Conventions (receiving a perfect presentation score) and many state Association conventions which have honored him with top ratings. He has established precedent at the Supreme Court and co-founded transactional laws, rules and forms that guide practitioners today. He has been a licensee and/or Realtor® or Realtor® Affiliate for three decades, 5 years of which were with the Beverly Hills Board, 10 with the Phoenix, Scottsdale and Portland Associations, now a member of the North San Diego County Association of Realtors®, was named to numerous Commissioner's Advisory Committees, received a host of leadership and instructor awards, is a CCIM® Affiliate, testified in Congress against the due-on-sale clauses in 1982, successfully fought the clause in state and federal courts, fought against all and defended a half dozen state and nationally chartered banks and thrifts, and has received leadership awards and honors from former California Governor and U.S. President Reagan and former Arizona Governor and now head of U.S. Homeland Security Janet Napolitano, to cover just a few of the miles he has gone. He is a "been there, done that" type who is often as entertaining as he is practical and enlightening! See more at [www.eckleylaw.com](http://www.eckleylaw.com). To be on his "Counselor's Corner" monthly hotline e-mail to [education@eckleylaw.com](mailto:education@eckleylaw.com) or call (602) 952-1177 or out of the Phoenix free dialing region 1-800-999-4LAW and ask to get on the hotline!