FORECLOSURE IN WASHINGTON

WASHINGTON DEBT INSTRUMENTS, GENERALLY:

QUESTION: How are trust deeds or mortgage liens treated in the state of Washington?

ANSWER: In the state of Washington, the most common debt instrument for a real property purchase money loan or other form of loan secured by real property is a trust deed. A trust deed is composed of a promissory note which agrees to pay the debt and a security agreement which attaches the note to specific property as security. Washington law also permits mortgages to serve as liens upon real property, but mortgages must be judicially foreclosed, i.e. by a lawsuit in a court, whereas a deed of trust may be foreclosed either by a suit in court or by private advertisement and sale without a lawsuit or the intervention of a judge, at the election of the creditor. A mortgage foreclosure or a judicial foreclosure of a trust deed is initiated by the filing of a lawsuit by the creditor and results in a public auction by the sheriff. In the non-judicial foreclosure of a trust deed, the advertisement and sale is by the Trustee or the beneficiary's (creditor's) counsel under a deed of trust.

FORECLOSURE METHODS GENERALLY:

QUESTION: How are Washington mortgages/trust deeds commonly foreclosed?

ANSWER: To elaborate a bit more. By far, the primary method of foreclosure in Washington is a non-judicial foreclosure.

THE NON-JUDICIAL FORECLOSURE:

This type of foreclosure does not involve court action but requires notice commonly called a notice of sale. When the deed of trust is initially signed it will usually contain such a provision which upon default allows the lender to sell the property in order to satisfy the underlying defaulted loan. The trustee acts as a representative of the lender to effectuate the sale which typically occurs in the form of a public auction. Because this is a non-judicial remedy, there are very stringent notice requirements and the legal documents are required to contain power of sale language in order to use this type of foreclosure method.

The power of sale notice requirements?

The Trustee must give the borrower 90 days written Notice of Default not less than 90 days prior to the foreclosure sale; an additional notice of default to the borrower must issue at least 30 days before the proposed sale moves forward. This must be sent by certified or registered mail, and be sent to the attorney for the borrower, if any, and either posted on the subject property or personally served on borrower. The notice of default as described above must contain certain information, including a description of the default, lender's identification of the deed of trust and a breakdown of foreclosure costs and fees. At any time up until 11 days before the trustee's sale the loan may be reinstated. The loan may be fully paid off at any time prior to the sale. The lender has discretion to reinstate any loan later than 11 days before any sale. In the event the loan default is not cured during the initial 30-day period referenced in the notice of default, at least 90 days prior to the trustee's sale, the Trustee must mail a Notice of Trustee's Sale to the borrower, and all lien holders and any other parties of interest. This notice must also be recorded

with the auditor of the county in which the property is located and otherwise be posted and served in the same manner as the notice of default. The notice must also be published in an approved newspaper for legal notices at two specified time periods for the preceding month before the sale.

Foreclosure sales must take place between 9AM and 4PM on a Friday, unless the Friday is a legal holiday, then the sale will occur the following Monday. Sales must occur not earlier than 190 days after the date of first default (default is the date the last payment was due, but was not made) but may be extended up to 120 days at the trustee's discretion. In the event of a bankruptcy, a sale may be reinstated no more than 45 days from the dismissal of the bankruptcy or lifting of the automatic stay.

THE JUDICIAL FORECLOSURE:

In Washington, as noted, above, the creditor can also elect to go to court in what is known as a judicial foreclosure proceeding. In that, the court must issue a final judgment of foreclosure. If the deed of trust does not contain the power of sale language or where the instrument is not a trust deed, but a mortgage, the lender must seek judicial foreclosure only. The property is then sold as part of a publicly noticed sale. A complaint is filed in court along with what is known as a lis pendens. A lis pendens is a recorded document that provides public notice that the property is being foreclosed upon.

FORECLOSURE TIMING:

QUESTION: How long does it take to foreclose a property in Washington?

ANSWER: Depending on the timing of the various required notices, by statute it cannot take less than 190 days to effectuate an uncontested non-judicial foreclosure after the last payment was not made that generated the default. This process may be delayed if the borrower contests the action in court, seeks delays and postponements of sales, or files bankruptcy. Much of the ongoing delays in a foreclosure sales relate to the proper service of parties in interest, governmental agencies and junior lien holders. Difficulty is finding or serving these parties delays the process. Under recent law, the lender in a residential foreclosure on a deed of trust generated between January 1, 2003 and December 31, 2007 is required, not less than 30 days prior to initiating a Notice of Default to provide information to the borrower regarding modification and short sale programs for which the borrower may be eligible and must assist in trying to qualify the borrower before the lender will be permitted to notice and have a trustee's sale.

RIGHT OF BORROWER TO REDEMPTION:

QUESTION: Is there a right of redemption in Washington?

ANSWER: Washington has a no post-foreclosure right of redemption on trust deeds foreclosed non-judicially. For judicial foreclosures, there is a one-year right of redemption and a residential owner may remain in possession of the property during the redemption period.

DEFICIENCY JUDGMENTS:

QUESTION: Are deficiency judgments permitted in Washington?

ANSWER: Yes, if the creditor follows certain steps. These rules govern both residential and commercial or business loans secured by real property and bare land. Generally a deficiency judgment may not be obtained using the non-judicial foreclosure process when a property in foreclosure is sold at a public sale for less than the loan amount that the underlying mortgage or deed of trust secures. A deficiency judgment can be obtained in a judicial sale, unless the property is abandoned for the preceding six (6) months prior to the foreclosure judgment or decree in which event that abandonment would preclude any deficiency.

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-recourse debt, depending upon how the Guaranty is worded. 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, a borrower can become liable for waste to the property. The court may also issue an injunction to restrain waste during the foreclosure process.

MORE INFORMATION:

QUESTION: *What statutes govern Washington foreclosures?*

***ANSWER*:** The laws that govern Washington foreclosures are found in Title 61 Revised Code Washington (Mortgages, Deeds of Trust and Real Estate Contracts).

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

Now for some OTHER DEBT RAMIFICATIONS common to all states:

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 proprietarily 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. To be on his "Counselor's Corner" monthly hotline e-mail to 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!