NOTICE:

THE "FREQUENTLY ASKED QUESTIONS," SECTION, BELOW, IS NOT THE RENDERING OF DIRECT LEGAL ADVICE AND IS PROVIDED AS A COURTESY TO THE PUBLIC FOR GENERAL EDUCATIONAL PURPOSES, ONLY. PROPER LEGAL ANSWERS VARY GREATLY FROM CASE TO CASE AND THUS REQUIRE SEPARATE AND DIRECT ANALYSES IN EVERY EVENT. ALL LEGAL ADVICE IN EVERY CASE SHOULD BE THEREFORE SOUGHT DIRECTLY FROM A LICENSED ATTORNEY. THE QUESTION AND ANSWER FORMAT BELOW IS SELECTED TO TRY TO MAKE THE MATERIAL EASIER FOR THE READER TO UNDERSTAND.

FREQUENTLY ASKED QUESTIONS ABOUT REAL PROPERTY FORECLOSURE FOR

CALIFORNIA – OREGON – ARIZONA – NEW MEXICO – NEVADA –HAWAII - COLORADO - WASHINGTON

FORECLOSURE IN CALIFORNIA

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 sale or promissory note shortfall.

California permits both judicial (a court lawsuit for foreclosure) and non-judicial (sale by trust deed trustee without a court suit) foreclosure. Sale by a trustee is only permitted in sales based upon the *trust deed* type of finance. For pure *mortgages*, the sale by a trustee is not available and the creditor must foreclose by suit, with the sale being conducted by the County Sheriff or Constable. In some cases (though these owner-finance instruments are not commonly seen in recent years due to the availability of bank finance, but may be seen more due to recent recession-generated bank finance scarcity) a sale by nominee (without a lawsuit) can be done under a *contract for deed* or *land sale contract*. Each of these sale/debt instruments, *trust deed, mortgage* and *land sale contract* are different. Only trust deeds, by far the more prevalent instrument, is covered here.

JUDICIAL FORECLOSURE:

QUESTION: What is "judicial foreclosure"?

ANSWER: The creditor sues you in the Superior Court and the Court orders the property sold

by the County Sheriff or Constable and the Court can, in some cases, lodge a judgment against you for any shortfall in the sale proceeds to satisfy the remaining debt. This judgment for the shortfall is called a "deficiency judgment" and is a remedy highly limited in most California residential real estate finance. See limits for deficiency judgments, below.

In this foreclosure type, a lawsuit is initiated in the Superior Court which accelerates the entire balance due under the promissory note and requests judgment for that balance (plus interest, attorneys' fees and costs). An execution order is also issued, permitting the property to be sold to the highest bidder on a given day, commonly by the Sheriff or Constable, to resolve at least part of the debt. The proceeds of sale are applied to the judgment and if there is any deficiency (the proceeds of sale are less than what was adjudged due), then, in some cases noted below, the balance of the creditor's judgment for money stands and can be further executed against the debtor's other non-exempt assets (other property, bank accounts, etc.) by levy, execution or garnishment. The borrower may have up to 1 year to redeem the property (buy it back for what it was sold for) after a judicial foreclosure. See the time involved and the challenges of a judicial foreclosure under OREGON FORECLOSURES, below all states are very similar in that respect). California processes are about the same but it can in some jurisdictions take even longer to get to a trial and ultimate sale due to the backlog of cases.

NON-JUDICIAL FORECLOSURE:

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

ANSWER: The creditor does not sue in a Court. It sets the property for sale by an appointee Trustee. No "judgment" is assessed against the debtor for any sale shortfall. (This remedy is not available for *mortgage* foreclosure.)

In this foreclosure type, the trustee appointed in the trust deed forecloses the property without a lawsuit. The trustee must give notice of Default and an Election to sell the property. These documents set a given date and place for the sale. Proceeds of the sale are applied to the balance due, plus interest and taxable trustees and attorneys' fees as set by statute. There is no true "deficiency judgment" in this type of foreclosure, as no court or judge is involved in the process at this stage. That is to say, whatever the creditor receives at the trustee's auction is all that the creditor will get and the balance of the debt, if any, is usually absolved in 1-4 unit residential trust deeds. The debtor has up until five days before the foreclosure sale to cure the default and halt the process. The cure is usually to pay those installments that would have been due had the default not occurred, plus interest and default penalties, attorneys and trustees fees as set by statute. The sale may be held on any business day between the hours of 9:00 am and 5:00 pm and must take place at the location specified in the notice of sale. The debtor has no rights of redemption after the sale. In some cases, trustee sale proceeds shortfalls to cover the debt can have further collection action initiated upon them. Generally, these are bare land or commercial property foreclosures or foreclosures on residential second trust deeds, such as Home Equity Lines of Credit ("HELOCS"), or on loans where the loan proceeds were not used to buy the property. There is an attempt in California to legislatively limit the enforcement of HELOCs.

DEFICIENCY JUDGMENTS:

QUESTION: What is a "deficiency judgment"?

ANSWER: A deficiency judgment is a legal judgment against the borrower for any shortfall in a judicial sale of the property to meet the total remaining debt plus taxable interest, fees and costs. To the extent the judicial foreclosure auction yields less than the judgment, a deficiency judgment could be available for judicial sales of the property, whether under a mortgage or deed of trust. See the limits on the creditor's right to seek deficiency judgments or initiate post-trustee sale judicial actions on note shortfalls under the "one action rule," below. Deficiency judgments are not allowed by California law on owner-carried trust deeds and mortgages and on third-party (usually Bank) finance secured by single family detached residences and buildings containing 1 to 4 residential units in which the borrower occupies at least one unit.

THE "ONE ACTION" AND "WORTHLESS SECURITY" RULES:

QUESTION: What is the "one action" rule?

ANSWER: As noted, above, in some cases, the creditor can ignore the lien of the debt on the property and sue in the Court on the promissory note that was signed along with the deed of trust or mortgage. This is an "action on the debt" and not a "property foreclosure." These actions are never available where the creditor would be barred on any deficiency had the creditor simply foreclosed (the creditor will not be permitted to circumvent the anti-deficiency rules—see those, above,) and even where there is a potential deficiency, these creditor actions may still be barred unless they met other criterion, such as being outside of the "one action" rule or the "fair sale" test or the "worthless security" defenses, below.

California's deficiency-judgment statutes were intended to work in tandem with the "one action" rule to avoid multiple collection actions against a debtor. Because the "one action" rule induces most creditors to foreclose on their security interests before seeking a personal judgment, these statutes protect debtors from a deficiency judgment if the property subject to foreclosure is a third-party (not seller-carried finance) loan upon dwelling intended to be occupied by four or fewer families—one of which includes the purchaser—and if the loan secured by the deed of trust or mortgage was used to pay all *or part of* the purchase price of the property being foreclosed. (Cal. Code of Civ. Proc. Code § 580b.)

The purposes behind the One Action Rule and the deficiency-judgment statutes are to prevent multiple actions, compel exhaustion of all security before a deficiency judgment is entered, and ensure that debtors are credited with the fair market value of the secured property before they are subjected to personal liability. (*See* In re: Prestige Ltd. Partnership-Concord v. East Bay Car Wash Partners, 234 F.3d 1108, 1115 [9th Cir. 2000].)

Mortgage and trust deed holders in subordinate title positions behind larger superior liens (where there is little or no equity left to realize upon) will often elect to wait until the superior debt is foreclosed, then take the position that their security position is "worthless" and sue on the note where the creditor thinks there are other assets the creditor might seek to realize from a separate

judgment. This right is very deeply restricted, however, on the "one action" and "first against the security" rules of CCP 929(a) and CCP 580(b).

The "one action" rule limits the creditors to a single ("one") action for debts related to a single property, that is to say, they cannot initiate both a foreclosure on the property and an action on the note and where there is the chance under the loans to do both, the creditor is directed to first realize against the security, compelling the creditor to first offset the debt with the property. Where the creditor holds both the first and second title position loans and both were for purchase of the property, it prohibits the creditor from foreclosing on the first loan against the property and waiving the security and suing for the second loan on the promissory note—essentially prohibiting the creditor from taking "two actions". The statute limits the creditor strictly to one collection action.

As to any foreclosure shortfall (proceeds less than the debt) on which a deficiency might actually lie, the debtor can defend by asking for a "fairness hearing," arguing that the sale was a below-market sale. This defense is more likely when either the lender or an affiliate was the "high bidder" at the property sale (called a "credit bid," since the lender only forgives part of the debt as the way of "paying the bid price" to itself). In this type of defense, the debtor usually employs appraisers to prove that a better price could have been obtained and often blames the lender of collusion.

WASTE:

QUESTION: What is "waste" and how does a borrower become liable for it?

ANSWER: "Waste" means the debtor had damaged the property or has allowed the property to become damaged. The debtor can be held accountable for the damages property even where there is no deficiency available from the foreclosure.

Irrespectively of the laws limiting a deficiency in a foreclosure, the debtor can still be liable to the lender for such things as waste (damaging the property beyond normal wear and tear or permitting it to be vandalized or to radically deteriorate before the sale). Waste can also be accomplished by failing to keep the property insured for casualty until the time of sale and a casualty event occurs.

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. Guarantees must be carefully read to determine what they cover and how extensively. See, limits under the "one action rule" and "fairness" proceedings, above, which California Courts have applied as an offset or defense for the Guarantor.

WAIVER OF FORECLOSURE FOR SUIT ON NOTE:

QUESTION: Is there any other way a creditor could claim against a debtor on a trust deed or mortgage?

ANSWER: Yes. In some cases such as commercial loans or loans on bare land, the creditor can ignore the lien of the debt on the property and sue on the promissory note that was signed with the deed of trust or mortgage in the Court. This is an "action on the debt" and not a "property foreclosure."

In some cases, a creditor may elect to waive a foreclosure action against the property and simply sue separately on the underlying promissory note by a lawsuit in the Superior Courts. Mortgage and trust deed holders in subordinate title positions behind larger superior liens (where there is little or no equity left to realize upon) will often elect to do this on those loans where direct action is possible and where there are other assets the creditor might seek to realize from with a judgment. See the "one action" rule limitations, above.

NEW PRO-CONSUMER CALIFORNIA FORECLOSURE LAW:

QUESTION: Are there any other rules affecting the creditor or debtor in foreclosure?

ANSWER: Yes, and more forthcoming all of the time as the state tries to sort out the financial havoc wreaked by the recent recession. Most favor the consumer.

Most recently, SB1069, signed into law on July 9, 2012, extends anti-deficiency protection to refinanced purchase-money debt, where the refinance was executed after January 1, 2013. See more, below.

Under the **California Foreclosure Prevention Act,** lenders foreclosing on certain loans are prohibited from giving a notice of sale until the lapse of at least 3 months plus 90 days after the filing of the notice of default. A loan servicer can obtain an exemption from this requirement by demonstrating that it has a comprehensive loan modification program. The purpose of this law is to try to stem the tide of foreclosures and their adverse consequences by providing additional time for lenders to work out loan modifications with borrowers as well as creating an incentive for lenders to establish comprehensive loan modification programs. This bill was enacted into law on February 20, 2009 along with the state budget. Its provisions took effect March 16, 2009 and will stay in effect only until January 1, 2011 at which time it will be repealed, unless it is deleted or extended by statute (Cal. Civil Code § 2923.52(d)).

Under preexisting law, a lender who files a notice of default in the foreclosure process must wait at least 3 months before giving a notice of sale (Cal. Civil Code § 2924). The new law extends

that 3-month period by an additional 90 days. Also under preexisting law, the general rule of thumb is that the entire foreclosure process takes a minimum of 4 months from the filing of a notice of default until the final trustee's sale. Under the new law, that general rule of thumb is extended by 90 more days for a total of about 7 months, unless the lender is exempt.

Unless otherwise exempt, the 90-day extension to the foreclosure process applies to loans that meet all of the following requirements: (1) The loan was recorded from January 1, 2003 to January 1, 2008, inclusive; (2) The loan is secured by a first deed of trust for residential real property; (3) The borrower occupied the property as a principal residence at the time the loan became delinquent; and; (4) A notice of default has been recorded on the property. (Cal. Civil Code § 2923.52(a).

A loan servicer is exempt from the 90-day extension to the foreclosure process if the loan servicer has obtained an order of exemption based on the implementation of a comprehensive loan modification program (Cal. Civil Code § 2923.53(a)) (see Questions 89 to 94). The order of exemption must be current and valid at the time the notice of sale is given (Cal. Civil Code § 2923.52(b)). Other exceptions to the 90-day extension include the following: (1) Certain state or local public housing agency loans (Cal. Civil Code § 2923.52(c)); (2) when a borrower has surrendered the property as evidenced by a letter confirming the surrender or delivery of the keys to the property to the lender or authorized agent (Cal. Civil Code § 2923.55(a)); (3) when a borrower has contracted with any person or entity whose primary business is advising people who have decided to leave their homes on how to extend the foreclosure process and avoid their contractual obligations to the lenders (Cal. Civil Code § 2923.55(b)); (4) when a borrower has filed a bankruptcy case and the court has not entered an order closing or dismissing the case or granting relief from a stay of foreclosure (Cal. Civil Code § 2923.55(c)).

A comprehensive loan modification program that may exempt the loan servicer from the 90-day extension to the foreclosure process includes all of the following features: (1) The loan modification program is intended to keep borrowers whose principal residences are located in California in those homes when the anticipated recovery under loan modification exceeds the anticipated recovery through foreclosure on a net present value basis (Cal. Civil Code § 2923.53(a)); (2) it targets a 38 percent or less ratio of the borrower's housing-related debt to the borrower's gross income (Cal. Civil Code § 2923.53(a)). Housing-related debt is debt that includes loan principal, interest, property taxes, hazard insurance, flood insurance, mortgage insurance and homeowner association fees (Cal. Civil Code § 2923.53(k)(2)); (3) it includes some combination of loan modifications terms as specified (Cal. Civil Code § 2923.53(a)); (4) The loan servicer seeks long-term sustainability for the borrower (Cal. Civil Code § 2923.53(a)).

A comprehensive loan modification program that may qualify for exemption from the new law extending the foreclosure process by 90 days must include some combination of the following features: (1) An interest rate reduction, as needed, for a fixed term of at least five years; (2) an extension of the amortization period for the loan term to no more than 40 years from the original date of the loan; (3) deferral of some portion of the unpaid principal balance until loan maturity; (4) principal reduction; (5) compliance with a federally mandated loan modification program; or (6) other factors that the appropriate commissioner determines. (Cal. Civil Code § 2923.53(a)(3).

A loan servicer is not required to modify a loan for a borrower who is not willing or able to pay under the modification. Furthermore, a loan servicer is not required to violate any contractor agreement for investor-owned loans. (Cal. Civil Code § 2923.53(i).)

A loan servicer may apply to the appropriate commissioner (see Question 94) for an order exempting loans that it services from the new law extending the foreclosure process by 90 days (Cal. Civil Code § 2923.53(b)(1)). The Secretary of Business, Transportation and Housing must maintain a publicly-available Internet website disclosing the final orders granting exemptions, the date of each order, and a link to Internet websites describing the loan modification programs (Cal. Civil Code § 2923.52(f)) (see also Question 96). The notice of sale must include a declaration from the loan servicer stating whether or not it is exempt and whether the 90-day extension is in effect.

MORE CALIFORNIA LEGISLATION:

Deficiencies After a Short Sale:

The California legislature passed and the Governor signed into law SB 931 which created Cal Cod. Civ. Pro. Sec. 580(e) which provided that there is no deficiency on a lender approved short sale as to the *first* mortgage that otherwise might have had one. The amendment was more of a codification of existing law than a major change, though it could have impacted loans that were refinances and loans and ones that were Home Equity Lines of Credit ("HELOCS"). It would also have likely stopped the unlawful lender practice of asserting a deficiency after the closing of a clearly non-deficiency loan, but this, too, was an unlawful lender practice even before this amendment. The one big change was that it applied to properties in which the owner/borrower was *not an occupant*, altering the general rule of CCP 580(b), the normal anti-deficiency statute, in which debtor-occupancy was mandatory for non-deficiency treatment.

On **July 15, 2011** the Governor signed into law Senate Bill 458, amending Cal. Cod. Civ. Pro. Sec. 580(e) to extend the above consumer protections against *junior* lien holders as well. *The law also prohibits lenders from requesting additional compensation in a short sale in order to obtain lender approval, and expressly makes any contractual provision waiving these protections void as against public polic*y. Like the earlier law, the new amendments are not expressly limited to owner-occupied homes as are other anti-deficiency protections found in Section 580(b).

The new amendments expressly *exclude* from the short sale deficiency protections borrowers who are LLCs or limited partnership**s** (the earlier protection excluded only corporations). Thus, an owner of an investment property who holds title in an LLC is not protected from lender demands for financial contribution to approve a short sale or either a senior or junior lender's attempts to obtain a deficiency judgment following the short sale. In those cases, since most of the properties ended up in these entities because the borrower transferred them there *after* the borrower obtained the loan, transferring the title back to the borrower *prior to engaging in the short sale* would seem the best step.

SECTION 1. Section 580e of the Code of Civil Procedure is amended to read:

580e. (a) (1) No deficiency shall be owed or collected, and no deficiency judgment shall be requested or rendered for any deficiency upon a note secured solely by a deed of trust or mortgage for a dwelling of not more than four units, in any case in which the trustor or mortgagor sells the dwelling for a sale price less than the remaining amount of the indebtedness outstanding at the time of sale, in accordance with the written consent of the holder of the deed of trust or mortgage, provided that both of the following have occurred:

(A) Title has been voluntarily transferred to a buyer by grant deed or by other document of conveyance that has been recorded in the county where all or part of the real property is located.

(B) The proceeds of the sale have been tendered to the mortgagee, beneficiary, or the agent of the mortgagee or beneficiary, in accordance with the parties' agreement.

(2) In circumstances not described in paragraph (1), when a note is not secured solely by a deed of trust or mortgage for a dwelling of not more than four units, no judgment shall be rendered for any deficiency upon a note secured by a deed of trust or mortgage for a dwelling of not more than four units, if the trustor or mortgagor sells the dwelling for a sale price less than the remaining amount of the indebtedness outstanding at the time of sale, in accordance with the written consent of the holder of the deed of trust or mortgage. Following the sale, in accordance with the holder's written consent, the voluntary transfer of title to a buyer by grant deed or by other document of conveyance recorded in the county where all or part of the real property is located, and the tender to the mortgagee, beneficiary, or the agent of the mortgagee or beneficiary of the sale proceeds, as agreed, the rights, remedies, and obligations of any holder, beneficiary, mortgagee, trustor, mortgagor, obligor, obligee, or guarantor of the note, deed of trust, or mortgage, and with respect to any other property that secures the note, shall be treated and determined as if the dwelling had been sold through foreclosure under a power of sale contained in the deed of trust or mortgage for a price equal to the sale proceeds received by the holder, in the manner contemplated by Section 580d.

(b) A holder of a note shall not require the trustor, mortgagor, or maker of the note to pay any additional compensation, aside from the proceeds of the sale, in exchange for the written consent to the sale.

(c) If the trustor or mortgagor commits either fraud with respect to the sale of, or waste with respect to, the real property that secures the deed of trust or mortgage, this section shall not limit the ability of the holder of the deed of trust or mortgage to seek damages and use existing rights and remedies against the trustor or mortgagor or any third party for fraud or waste.

(d) (1) This section shall not apply if the trustor or mortgagor is a corporation, limited liability company, limited partnership, or political subdivision of the state.

(2) This section shall not apply to any deed of trust, mortgage, or other lien given to secure the payment of bonds or other evidence of indebtedness authorized, or permitted to be issued, by the

Commissioner of Corporations, or that is made by a public utility subject to the Public Utilities Act (Part 1 (commencing with Section 201) of Division 1 of the Public Utilities Code).

(e) Any purported waiver of subdivision (a) or (b) shall be void and against public policy.

SEC. 2. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to mitigate the impact of the ongoing foreclosure crisis and to encourage the approval of short sales as an alternative to foreclosure, it is necessary that this act take effect immediately.

Deficiencies After a Refinance of a Non-Deficient Debt

SB 1069, signed by the Governor of California on July 9, 2012 and now law, substantially cuts back California lenders' former rights to collect deficiency judgment or ask for additional short sale money on residential purchase money loans refinanced after January 1, 2013. It does not affect those refinanced before that date. Existing California law provides that no deficiency judgment shall lie following a judicial foreclosure with respect to, among other things, a deed of trust or mortgage given to the vendor to secure payment of the balance of the purchase price of real property, or under a deed of trust or mortgage on a dwelling to secure repayment of a purchase money loan which was in fact used to pay all or part of the purchase price of that dwelling. Existing law does not extend that consumer protection to a refinance of a purchase money deed or trust or mortgage and that was a trap for many Californians who assumed that a refinanced debt had the same non-recourse or non-deficiency character as the loan it replaced.

This new law will now provide that no deficiency judgment shall lie in any event on any loan, refinance, or other credit transaction that is used to refinance a purchase money loan, as defined, or subsequent refinances of a purchase money loan, except to the extent that the lender or creditor advances new money which is not applied to any obligation owed or to be owed under the purchase money loan, or to fees, costs, or related expenses of the refinance. The new law provides, for purposes of these provisions, that any payment of principal for a refinanced purchase money loan will be deemed to be applied first to the principal balance of the purchase money loan, and then to the remaining principal balance, as specified. That means in those cases where extra money was loaned in the refinance over and above the amount of the refinanced debt, even the refinance would have a deficiency portion to the extent of that extra money and that payments over the course of the loan would only be applied to the deficiency portion last. Obviously, the lesson seems to be that a consumer is still ill-advised to borrow any more take-out money than needed to meet the debt being financed, whether on a purchase money debt or a refinance of one.

The new law applies only to a loan, refinance, or other credit transaction used to refinance a purchase money loan which is executed on or after January 1, 2013. Those executed prior to that date will still fall under the old law permitting recourse and deficiencies.

See the law at
http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120SB1069

Mandatory Notice to Tenants in Foreclosures

The California Legislature also passed and the Governor signed SB 1149, which while providing various new rules in the civil procedure governing foreclosure proceedings and other matters, more importantly *provides a new statutorily-mandated form of notice to tenants after foreclosures.* Specifically, the law requires that any notice to quit regarding a housing unit served within one year after a foreclosure include a separate cover sheet that explains tenants rights. The procedural laws may be found at Cal.Rev.Stat. 1166 and 1161.2(a). The new law requiring notice to tenants is Cal.Rev.Stat. 1161c and reads as follows, with italics here for identification:

1161c. (a) In the case of any foreclosure on a residential property, the immediate successor in interest in the property pursuant to the foreclosure shall attach a cover sheet, in the form as set forth in subdivision (b), to any notice of termination of tenancy served on a tenant of that property within the first year after the foreclosure sale. This notice shall not be required if any of the following apply:

(1) The tenancy is terminated pursuant to Section 1161.
(2) The successor in interest and the tenant have executed a written rental agreement or lease or a written acknowledgment of a preexisting rental agreement or lease.
(3) The tenant receiving the notice was not a tenant at the time of the foreclosure.
(b) The cover sheet shall consist of the following notice, in at least 12-point type:

'Notice to Any Renters Living At:

[street address of the unit]

The attached notice means that your home was recently sold in foreclosure and the new owner plans to evict you. You should talk to a lawyer NOW to see what your rights are. You may receive court papers in a few days. If your name is on the papers it may hurt your credit if you do not respond and simply move out. Also, if you do not respond within five days of receiving the papers, even if you are not named in the papers, you will likely lose any rights you may have. In some cases, you can respond without hurting your credit. You should ask a lawyer about it.

You may have the right to stay in your home for 90 days or longer, regardless of any deadlines stated on any attached papers. In some cases and in some cities with a "just cause for eviction law," you may not have to move at all. But you must take the proper legal steps in order to protect your rights. How to Get Legal Help If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association.

(c) If the notice to quit specifies an effective date of at least 90 days after the notice is served,

without qualification, no cover sheet shall be required, provided that the notice incorporates the text of the cover sheet, as set forth in subdivision (b) in at least 10-point type. The incorporated text shall omit the caption and the first paragraph of the cover sheet and the fourth paragraph of the cover sheet shall be replaced by the following language:

You may have the right to stay in your home for longer than 90 days. If you have a lease that ends more than 90 days from now, the new owner must honor the lease under many circumstances. Also, in some cases and in some cities with a "just cause for eviction law," you may not have to move at all. But you must take the proper legal steps in order to protect your rights.

(d) This section shall remain in effect only until January 1, 2013, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2013, deletes or extends that date. '

There are also some mandatory federal rights granted tenants during and after a foreclosure. Under California law, alone, however, if notices worded exactly like this one are not served on the tenant, the tenant has certain rights to remain and/or actions against those who have failed to serve the notice imposed upon them and, as to the original owner who allowed the loan to go into default if not also the foreclosing lender, a failure to give notice could also be a violation of the California Landlord-Tenant Act which requires "obedience to law". It also still remains "rent-skimming" or "theft of collateral" for a landlord/owner to collect rents while allowing the loan (which usually includes rents as collateral) to go into default. For the most part, this new notice will heavily impact banks' duties, who commonly take back these properties as REOs. RealtyTrac reports that those constitute 80% of the average current foreclosure market.

Even when there is no deficiency, there can be IRS and credit ramifications, of course, as explained below.

CHANGES MADE BY THE CALIFORNIA HOMEOWNER BILL OF RIGHTS OF 2012:

The so-called California Homeowner Bills of Rights was signed into law July 2, 2012. The laws will go into effect on January 1, 2013, and borrowers can access courts to enforce their rights under this legislation. The Homeowner Bill of Rights builds upon and extends reforms first negotiated in the recent national mortgage settlement between 49 states and leading lenders. Attorney General Harris secured up to $18 billion for California homeowners in that agreement, and has also built a Mortgage Fraud Strike Force to investigate crime and fraud associated with mortgages and foreclosures.

The Homeowner Bill of Rights consists of a series of related bills, including two identical bills that were passed on July 2, 2012, by the state Senate and Assembly: AB 278 (Eng, Feuer, Pérez, Mitchell) and SB 900 (Leno, Evans, Corbett, DeSaulnier, Pavley, Steinberg). The California Homeowner Bill of Rights also contains a variety of provisions that will enhance law enforcement against mortgage and foreclosure-related crime, in part by empowering the Attorney General to call a grand jury in response to financial crimes spanning multiple jurisdictions.

More details about the California Homeowner Bill of Rights are found on the attached fact sheet. To learn more about how the bills impact California homeowners, review the slideshow at: www.oag.ca.gov.

For homeowners, here are key provisions in California's homeowner protection bill, which writes into state law the national mortgage settlement reached with five top lenders, and expands it to all mortgages:

The Bill of Rights:

— Lets homeowners sue mortgage providers if they violate state law, but only if there is a significant violation. Homeowners could ask judges to halt pending foreclosures but could collect monetary damages only if the foreclosure took place.

— Requires lenders to provide a single point of contact for borrowers who want to discuss foreclosures or refinancing, with an exemption for lenders that process fewer than 175 foreclosures per year.

— Bans what are known as "dual-track foreclosures" by barring lenders from filing notices of default, notices of sale, or conducting trustees' sales while they are also considering alternatives to foreclosures like loan modifications or short sales.

— Increases penalties for banks that sign off on foreclosures without properly reviewing the documentation, a process known as robo-signing.

The protections will benefit all California homeowners, not just those whose mortgages are with the five banks that signed the national settlement in February. And many of the restrictions would become permanent, while those in the nationwide agreement will end after five years.

It applies to all owner-occupied residences, but not to the owners or occupants of commercial or rental properties.

The Bill of Rights runs for three years, sun-setting in 2016.

OTHER MATTERS

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

FORECLOSURE IN OREGON

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.

Real property foreclosures in Oregon are by many of the same processes as for California, above and for Arizona, below, i.e. either through a non-judicial sale by a trustee's auction, or a sheriff's or constable's sale by order of a court in a judicial foreclosure processed as a lawsuit through a court. The consumer's notice rights, foreclosure timelines and the creditor's rights for deficiencies change. So also does the court for judicial foreclosures as in Oregon the Circuit Court has jurisdiction and there is no court entitled the "Superior Court" as there is in California and Arizona. As in both California and Arizona, in certain circumstances, a creditor may elect to waive the security against the land and sue the borrower strictly on the promissory note. A Guarantor (one who stands liable for the loss of the creditor by operation of a written agreement to do so) can have the same liability as in California, above, even where the debt is a non-deficiency debt. ORS 86.770 (4).

ADDITIONAL NOTES ON JUDICIAL FORECLOSURES:

QUESTION: What is "judicial foreclosure"?

ANSWER: The creditor sues you in the Circuit Court and the Court orders the property sold and can, in some cases, lodge a judgment against you for any shortfall in the sale proceeds to satisfy the remaining debt.

Judicial foreclosures in all states often take more time than non-judicial trust deed foreclosures. In a judicial foreclosure, the creditor must file a lawsuit in the Circuit Court, serve the defendant debtor, the debtor has the right to answer the complaint with any defenses the debtor may have and perhaps the debtor may even counterclaim against the lender and, absent a summary judgment at some point by the judge (a judge's decision that the case does not merit a jury trial and is so clear that a judgment ought to be allowed as a matter of law) may evenresult in a trial. If all of that happens, a trial could be a year after the filing. If judgment for the creditor is granted, it still tends to take 60-90 days to even go to a sheriff's or constable's sale of the property to satisfy the judgment. A property sold at judicial foreclosure can be redeemed by the borrower or others who have purchased the borrower's position for up to 180 days after the date of sale for the price of sale plus statutorily-permitted costs

DEFICIENCIES AND LIMITS:

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

ANSWER: A deficiency judgment (for any shortfall between the auctioned price and the amount owed) can only be obtained through a judicial foreclosure. None is permitted in a trustee's non-judicial foreclosure by trustee's sale. No subsequent collection action is

permitted for any shortfall in the sale proceeds to cover the debt.

There are other limits to deficiencies, however, as follows:

Foreclosure On Pure Mortgage: When real property is sold pursuant to a judgment foreclosing a true mortgage (not a judicial foreclosure of a trust deed) and the proceeds of the sale are not adequate to satisfy the amounts secured by the mortgage, all judgment remedies for collection of the unsatisfied amounts expire when the sale is made if: (1) The mortgage was given to a seller to secure the unpaid balance of the purchase price of real property (an "owner-carry" has no deficiency judgment); or (2) The mortgage was given after September 13, 1975, to a person other than a seller to secure not more than $50,000 of the unpaid balance of the purchase price of real property used by the purchaser as the primary or secondary single family residence of the purchaser. [ORS 88.070, Amended by 2003 c.576 §349; 2007 c.166 §15] (the original mortgage was not more than $50,000). There have been many efforts in Oregon to raise this cut-off amount.

Judicial Foreclosure of Trust Deed: When the property foreclosed upon was residential property (a single-family, owner-occupied dwelling and appurtenances), there can be no deficiency following the judicial foreclosure of the trust deed. On all other types of trust deeds, a deficiency is possible and the judgment will usually so direct.

ADDITIONAL NOTES ON NON-JUDICIAL FORECLOSURES:

A Trustee's non-judicial foreclosure requires that the creditor file with the county recorder a notice of the breach, foreclosure and election to sell not less than 120 days prior to the scheduled sale date. The statute further provides that the notice must be published in the newspaper and served upon the debtor and property occupants in the manner set forth. Like California and Arizona, there is no right of redemption by the borrower after the trustee's sale. Redemption of a trust deed in breach by reason of missing ongoing payment installments can only be redeemed by remitting all of the missed payments plus interest, penalties and statutory fees prior to the date of sale. As noted, there is no deficiency judgment possible after a non-judicial trustee's sale.

WASTE, OTHER CLAIMS:

QUESTION: What is "waste" and how does a borrower become liable for it?

ANSWER: "Waste" means the debtor damaged the property or allowed it to become damaged and the debtor can be held accountable for that even where there is no deficiency available for the foreclosure.

As in California and Arizona (see above and below), the debtor can be held liable for damages done by casualty or neglect while he or she was in title to the property which occurred prior to the foreclosure under the common law of "waste" (destruction). All persons, including the debtor are always accountable for wasting the collateral or property of another.

SPECIAL CONSUMER RIGHTS IN OREGON:

QUESTION: Are there any other rules affecting the creditor or debtor in foreclosure?

ANSWER: Yes, and more forthcoming all of the time as Oregon, like California, above, tries to sort out the financial havoc wreaked by the recent recession. Most favor the consumer.

Some of the consumer protections are above in the form of limits against deficiency judgments. The legislature is working on more.

Oregonians facing foreclosure often have difficulty contacting their lender to discuss their options, such as a possible loan modification. At the time of this article, bills are pending in the Oregon Legislature which substantially softens the harsher remedies of foreclosure upon the residential borrower. SB 628 requires that the lender or loan servicer notify a homeowner facing foreclosure of the right to a meeting (either face-to-face or by phone) and that the lender/loan servicer assess whether the borrower is eligible for a loan modification. This is a little like the law in California, see above, except harder for the lenders to "exempt" themselves as in California, see above.

Tenants in foreclosure. There are Oregon bills and a new national law protecting renters living in foreclosed homes by requiring advance notice of the foreclosure proceedings and providing protections related to leases and security deposits. The notice will provide information about tenant's rights and where they can go for assistance. The national law allows tenants to remain for the period of a pre-existing lease or 90 days, as long as they continue to pay rents.

Deficiency judgments after foreclosure: See HB 3004. Prior to the mortgage lending crisis, many homebuyers financed 80 percent of the purchase price with a mortgage and trust deed and the remaining 20 percent with second mortgage financed from the same lender. The second was commonly called a "HELOC" ("home equity line of credit) but were not in fact truly used as a line of credit for home equity but in fact were used to actually purchase the property. These consumers did not have the same protections under Oregon's foreclosure laws as borrowers with a single mortgage loan. HB 3004 closes that loophole by precluding lenders that foreclosure on borrower with an 80/20 loan from collecting from the second loan if the home sells for less than what the borrower owes.

Bills in prohibition against negative loans: Protects Oregon mortgage borrowers against abusive lending practices by restricting the sale of negative amortization loans and by requiring lenders to provide translated disclosures when loans are marketed and negotiated in languages other than English.

Bills in enforcement of new federal mortgage lending standards protect mortgage borrowers by allowing the department to enforce new federal laws that require additional disclosures to borrowers and restrict loan servicing abuses and misleading advertising. The bill also increases surety bond requirements and enables Oregon to participate in a national licensing system for loan originators, to ensure they have met education requirements, passed

background checks, and followed the laws in other states.

Bills to protect consumers at risk of foreclosure from both consultants who offer to help homeowners avoid foreclosure and equity purchasers who acquire a financial interest in the property. The bill requires consultants and equity purchasers to provide a written contract with clear disclosures to the homeowners and other safeguards. It also gives the homeowner rights to cancel the contract. The bill also requires a trustee acting for the lender to send the homeowner facing foreclosure a clearly written notice at least 120 days before the sale, with helpful information about the homeowner's options. Much like that in California, see above.

Bills to enhance loan originator enforcement expand enforcement over loan originators, the individual salespeople who work for mortgage lenders and interact directly with borrowers. The Department of Consumer and Business Services can ban or suspend loan originators from the industry for fraudulent practices, negligence or incompetence, or violating industry rules.

Debt management services HB 2191. Protects financially vulnerable Oregonians who are increasingly turning to consumer debt management services for assistance, by prohibiting misleading advertising, requiring specific disclosures, and requiring all providers of debt management services to be registered with the state, including debt settlement companies and loan modifiers.

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

There is usually IRS and credit ramifications, of course, as explained below.

FORECLOSURE IN ARIZONA

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.

THE REMEDIES GENERALLY, FOR DEFAULT:

QUESTION: Explain the different remedies for a loan default, please?

ANSWER: In general law and just as in the other states, above, the loan secured by real estate may be enforced by the lender or holder of the instrument either by suing the debtor directly on the promissory note the debtor signed, or by conducting either a judicial foreclosure (in a court) or a non-judicial trustee sale (the latter on trust deed loans, only). Under the law (UNLESS THE DEBT INSTRUMENT WAS A NON-DEFICIENCY

INSTRUMENT--SEE BELOW) the creditor sells the property either for enough to get the entire loan paid off (and the creditor keeps the payoff up to the amount of the remaining loan and expenses to foreclose it) or it sells short of that debt amount (very common, recently, due to adverse market conditions) and if there is a shortfall, the creditor can (unless, as noted, it is a non-deficiency instrument explained below) collect the shortfall from the debtor even after the property has been sold on the foreclosure sale.

BUT THE CREDITOR CANNOT do this if the instrument is one that falls under the "ANTI-DEFICIENCY" STATUTES, BELOW. MOST HOME MORTGAGES DO FALL UNDER THE PROTECTION OF THE ANTI-DEFICIENCY STATUTES AND THAT MEANS NO "DEFICIENCY" AGAINST THE DEBTOR IN A FORECLOSURE. See below for what qualifies. But even when there is no deficiency, there can be IRS and credit ramifications, of course, as explained below.

ANTI-DEFICIENCY STATUTES:

QUESTION: What is a "deficiency judgment"?

ANSWER: It is a legal judgment against the borrower for any shortfall in a judicial sale of the property to meet the total remaining debt plus taxable interest, fees and costs.

To the extent the judicial or trustee's foreclosure auction yields less than the judgment, a deficiency judgment could be available, provided the loan is not a qualifying "purchase money loan" on a residential property (a "non-deficiency" loan), as explained more, below. If it is not such a loan, in judicial sales of the property, whether under a mortgage or deed of trust, the Court lodges judgment for any loan balance, costs, fees and other expenses set forth by statute not meet by the proceeds from the auction. In a non-judicial foreclosure of a loan not qualifying for "non-deficiency" treatment, the creditor has 90 days to file for any shortfall after the date of sale. As noted, in the case of purchase money mortgages and trust deeds on qualifying residential properties and trust deeds, there is NO DEFICIENCY. See "qualifications" for that non-deficiency treatment, below.

QUALIFYING LOANS FOR NON-DEFICIENCY PROTECTION:

QUESTION: What loans qualify for non-deficiency treatment?

ANSWER: Arizona law has two "anti-deficiency" statutes that will often apply to loans secured by single residential real estate and whether or not the home is occupied by the borrower.

Where these statutes apply, a lender's remedy will be ONLY a foreclosure, with NO RIGHT TO SUE FOR MONEY beyond the amount received from the foreclosure sale. These two "safe harbors" are as follows:

One statute applies to mortgages, which must be foreclosed judicially, or deeds of trust if foreclosed judicially (that means by the creditor suing the debtor in a court). A.R.S. ' 33-

729(A). It limits the claim to the proceeds of a sale of the property.

The other "anti-deficiency" statute applies only to deeds of trust when foreclosed via a trustee sale (through a suit in the court). It is A.R.S. ' 33-814(G). Same rule: The creditor only gets the amount from the sale of the property and no more. Recent law (2014) has required also that the home be used as a "dwelling," i.e. actual residential tenancy, though it can be by someone other than the borrower. This only means in practice that builder's inventory or a home type property used solely as a business place will not qualify for non-deficiency treatment.

THE TEST FOR WHETHER THESE EXCEPTIONS APPLY:

For either of the anti-deficiency statutes to apply, the mortgage or deed of trust must be secured by real property that: (1) Consists of 2 1/2 acres or less; (2) and is restricted to and utilized for a single-family or dual-family dwelling ; (3) all of the proceeds of the loan had to be used to pay against the purchase price of the property. If all three of the foregoing apply (and the property is a "dwelling" as noted above), a deficiency on a normal foreclosure is unlikely.

REFINANCES:

QUESTION: What about refinances of a loan that was originally a non-deficiency loan? Do they get the same non-deficiency treatment, though, technically, they were not the actual loan used to "purchase the property?"

ANSWER: In most cases, yes.

If the loan is not the original one that purchased the house, but a refinance of one that purchased the house? A "refi" will also often be covered by the same non-deficiency rule. In Bank One v. Beauvais, 188 Ariz. 245, 937 P.2d 809 (App. 1997), in which the court held that an extension, renewal, and/or refinancing of a purchase-money loan retained the character as a purchase-money loan, and therefore was subject to the same general qualification as a purchase money loan. This also applies to second trust deeds or mortgages if they were "purchase money" and were for residential property as noted above. See Mid-Kansas Federal Savings and Loan Ass'n v. Dynamic Development Corp., 167 Ariz. 122, 804 P.2d 1310 (1991).

EXCEPTIONS THAT COULD STILL MAKE ONE LIABLE:

This rule will not apply if the debtor has allowed the property to be wasted by such things as his own bad maintenance, by vandalism of him or others or uninsured losses before the foreclosure sale (voluntary waste). See A.R.S. ' 33-729(A). Also: If money was taken out of the loan for other purposes than purchase of the property (lines of credit, home equity loans and even purchase money loans where there was cash-back that was itemized as such), these anti-deficiency rules do not apply and the lender could see that cash directly from the borrower as a result of or in addition to the foreclosure. Id. Beauvais. The anti-deficiency rules also do not apply to a loan guarantee executed separately. As to the Guarantor, they are

liable.

NON-RESIDENTIAL PROPERTIES:

QUESTION: So unless the loan meets the above qualifications, a deficiency is possible?

ANSWER: Yes.

Bare land, office buildings, tri-plexes and larger, commercial offices, builder's unsold inventory and the like ARE NOT NON-DEFICIENCY instruments. On those, the lender can sue for money, go to a sale and collect for a deficiency. The defenses in these situations are narrower. There are defenses in foreclosure law, itself, such as that the property was not sold at a reasonable value or that a claim for deficiency was not instituted in a timely fashion and other defenses. In some cases there can also be the defense of a wrongful appraisal and underwriting failures that could arise to a regulatory violation in addition to being actionable by the borrower or guarantors as misleading lending practices.

GUARANTEES AND LINES OF CREDIT:

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.

Guaranty's are enforceable even if for a debt which was purchase money, as the actual is on the separate written Guaranty and not the debt and even where there is no deficiency for the primary borrower. Pure lines of credit (for any use such as a credit card or for cash or for home improvement but not used as part of the purchase price of the property) all pull out money and so they are not purchase money debt and can be claimed upon independently and are not limited by the anti-deficiency statutes. A so-called pure "HELOC" is a line of credit-type loan when not used to purchase the home, though some HELOCs have been used in full for part or the entire purchase price. Under the <u>Beauvais</u> theory (above), if the HELOC was actually used to buy the home it is "purchase money" in fact and no deficiency on it can be had or, at the very least, as to the amount used to buy the home, it is purchase money if it was spent that way the moment it was generated, but the balance taken out and not used to purchase the home may be collectible in an action on the debt. There is no clear authority on the effect of a "blended" (purchase and non-purchase in the same note) HELOCs and any other debt instrument, but there are some very logical questions that would cloud enforcement, such as "what part of each payment on a 'blend' goes to the "sub-non-deficiency" part of the debt and which to the "sub-deficiency"; what part of the foreclosure sale proceeds to which "sub-balance"? What part of the remaining debt is which "sub-balance?" A great deal of confusion is possible here and there is no legal authority to resolve that on a single note which, itself, does not even mention, let alone divide the "sub-balances".

RADIO PROGRAM AND ARTICLES:

This section was refreshed to current law after the popular KTAR interview between Mr. Eckley and commentator Bruce St. James found on the Home page at www.eckleylaw.com and after some of the Articles there were written—it amends the statements about "blends" made on that show and in the previous articles, which covered the law at the time of broadcast and when those articles were written, which is now slightly changed.

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.

FORECLOSURE IN NEVADA

GENERALLY:

QUESTION: How are foreclosures handled in Nevada?

ANSWER: Trust deed and mortgage foreclosures are conducted in Nevada much like they are in the other states (California, Oregon, Arizona, New Mexico) above. That is to say that foreclosure on trust deeds can be privately by a trustee's sale or by judicial order through a Court, in which the Sheriff or Constable then conducts the sale. This is where comparisons with the other states ends, though. Nevada law allows for deficiency claims on almost all debts (most of the other states have limitations), that is to say in most cases the law allows the creditor to pursue any shortfall in the sale proceeds to pay the borrower's debt. See "Deficiency Judgment" below.

JUDICIAL FORECLOSURE IN NEVADA

QUESTION: What is judicial foreclosure?

ANSWER: In a judicial foreclosure the lenders files a lawsuit in a Court and a lis pendens against the property and, if the borrower loses the lawsuit, the Court enters a judgment on the debt and orders it executed against the secured property through a foreclosure sale. The property is then sold as part of a publicly noticed sale by the Sheriff or Constable as noted above. After a judicial sale, the borrower has one year (12 months) after the foreclosure sale to redeem the property; that is to say, the borrower (or assignee of the borrower) has one year to come back and pay the price paid by the purchaser at the foreclosure sale (plus interest and some statutory processing fees) and the borrower (or assignee) will get the property back. This is intended to discourage buyers from underbidding the property, as if they do, the borrower (or assignee or even a minority lien holder) can get it back for the same price. See the "Deficiency Judgments" section, below.

NON-JUDICIAL FORECLOSURE IN NEVADA

QUESTION: What is a non-judicial foreclosure?

ANSWER: The non-judicial process of foreclosure is used when a power of sale clause exists in a mortgage or deed of trust. A "power of sale" clause is the clause in a deed of trust or mortgage, in which the borrower pre-authorizes the sale of property to pay off the balance on a loan in the event of their default. In deeds of trust or mortgages where a power of sale exists, the power given to the lender to sell the property may be executed by the lender or their representative, typically referred to as the trustee. Regulations for this type of foreclosure

process are outlined below in the "Power of Sale Foreclosure Guidelines". Nevada has statutorily required language to be included in all deeds of trust (Nevada Revised statutes Chapter 107.030).

If the deed of trust or mortgage contains a power of sale clause then the property may be sold by a private trustee without the intervention or use of a Court. If the instrument sets out how the sale is to be conducted that needs to be followed, but absent that the non-judicial power of sale foreclosure is carried out as follows:

A copy of the notice of default and election to sell must be mailed certified, return receipt requested, to the borrower, at their last known address, on the date the notice is recorded in the county where the property is located. Any additional postings and advertisements must be done in the same manner as for an execution sale in Nevada.

Beginning on the day after the notice of default and election was recorded with the county and mailed to the borrower, the borrower has 15 days if the date of the original deed of trust was on or after July 1, 1949, and before July 1, 1957 and 35 days if the original deed of trust was on or after July 1, 1957, to cure the default by paying the delinquent amount on the loan. The owner of the property may stop the foreclosure proceedings by filing an "Intent to Cure" with the Public Trustee's office at least 15 days prior to the foreclosure sale and then paying the necessary amount (usually being the total of missed payments and statutory fees and costs) to bring the loan current by noon the day before the foreclosure sale is scheduled.

The foreclosure sale itself will be held at the place, the time and on the date stated in the notice of default and election and must be conducted in the same manner as for an execution sale of real property. In a trustee's sale, there is no right of redemption AFTER the sale.

If the non-judicial trustee's sale netted insufficient money form the sale price to pay the debt, then the lender has three 3 months after the sale to sue the borrower for the shortfall to seek a "deficiency judgment." See below.

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. If there is a deficiency after the trustee's sale type of foreclosure, then the lender may sue for a deficiency within 3 months after the foreclosure sale. A hearing will be held to determine the market value of the property to assure that it was fairly sold and not at a "fire sale" price. Notice of the hearing must be served at least 15 days prior to the hearing.

REDEMPTION

QUESTION: Is there a right of redemption in Nevada?

ANSWER: Nevada does not have a post-sale statutory right of redemption with respect to trustee-type non-judicial foreclosures. After the sale, the debtor is completely divested. Nevada does has a 1 year right of redemption if it was a judicial (Court filed) foreclosure.

ONE ACTION RULE

QUESTION: What is the "one action" rule and does Nevada follow it?

ANSWER: In a nutshell, the "one action" rule requires the lender to elect whether it is going to enforce a defaulted trust deed or mortgage by waiving the collateral and suing strictly on the debt (the promissory note) or whether it is going to foreclose (trustee's sale or judicial foreclosure) and the doing of one then eliminates the legal right to do the other. It prohibits the creditor from doing both, i.e. requires the creditor to take only "one action" on the debt. This rule is to encourage the creditors to first seek to reduce the debt by foreclosure against the property that is the collateral for the debt and thus to eliminate or reduce deficiencies. NRS 40.430. See further explanation of the "one action" rule for California, above and "Deficiency Judgments" in this Nevada section, above. Bonicamp v. Vazquez 120 Nev.Adv.Op. 41 (2004).

PERSONAL GUARANTY'S:

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. Guaranty law in Nevada with respect to mortgages and deeds of trusts are governed by Nevada Revised Statutes 40.465, 40.475, 40.485 and 40.495.

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.

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.

FORECLOSURE IN HAWAII

GENERALLY:

QUESTION: What are the most common debt instruments for residential finance in Hawaii?

ANSWER: The most common instruments in Hawaii for home purchases, residential equity finance or lines of credit is a mortgage with a power of private sale.

JUDICIAL FORECLOSURE ACTION BY THE LENDER:

QUESTION: What are the creditor's remedies if the mortgage with a power of sale is in default?

ANSWER: In general law, <u>except for certain residential non-deficiency mortgages set forth, below,</u> the loan secured by real estate may be enforced by the lender or holder of the instrument either by suing the debtor directly on the debt (usually the promissory note the debtor signed), or by a foreclosure against the property, conducting either a judicial foreclosure (in a court) or a non-judicial trustee sale (the latter on loans containing that power, only, which are most of those in Hawaii). See more about what a trustee's or sheriff's sale is, generally, under the heading for Oregon, above. Hawaii laws regarding the method of giving a default notice and the rights after that vary between states, but the sale is always the final event that terminates the debtor's title to the property and the debtor's right to occupy the property.

QUESTION: What happens at and after the foreclosure sale?

ANSWER: Under the foreclosure law the creditor sells the house either for enough to get the entire loan paid off (and the creditor keeps the payoff up to the amount of the remaining loan and expenses to foreclose it) or it sells for less than the unpaid debt amount (very common, recently, due to adverse market conditions) . If there is a foreclosure by a suit in the Circuit Court, the creditor is also awarded a judgment for that short fall against the debtor which the creditor can further pursue by levy and attachment against all of the debtor's non-exempt properties under the debt is paid in full.

FORECLOSURE ACTION BY NON-JUDICIAL SALE:

QUESTION: What happens if the foreclosure sale is a non-judicial foreclosure, i.e. NOT by a suit before the Court, but by private notice and private sale?

ANSWER: THERE IS A LITTLE BETTER NEWS FOR MOST DEFAULTING HOME-MORTGAGE BORROWERS IN HAWAII WHO HAVE LOST THEIR HOME BY PRIVATE FORECLOSURE SALE. Foreclosures done by the power of sale—those in which a lawsuit for enforcement and the Court was not involved—will not produce a deficiency judgment against the borrower. Under Hawaii law, provided that the sale is done without Court intervention and further provided that the lender and borrower convey title to the property to the buyer at the sale properly after the foreclosure sale, there is NO DEFICIENCY. It is deemed to satisfy the debt in full, even if the foreclosure was not enough to pay the debt. MOST HAWAII HOME MORTGAGES ARE FORECLOSED BY THE PRIVATE POWER OF SALE AND NOT JUDICIALLY AND THAT MEANS THERE CAN BE "NO DEFICIENCY" AGAINST THE DEBTOR IN A FORECLOSURE. For one thing, the lenders have usually figured it out that the borrower has no money—hence why the mortgage is even in default--so a deficiency judgment against the borrower would be worthless to the lender. Most lenders have also figured out that faced with a large deficiency, most borrowers will simply seek bankruptcy protection if a deficiency is pressed, anyway. Last, a judicial foreclosure can be long and expensive and invites the files of defenses and counterclaims by the borrower, something the lender usually wishes to avoid. But even when there is no deficiency, there can be IRS, credit, employment and other ramifications.

CAUTION: Note that in order to protect himself against a deficiency after a foreclosure by non-judicial sale, the borrower must voluntarily convey whatever title he has to the buyer at the foreclosure sale to be allowed that protection. If the borrower fails to do that, he can still be exposed to money judgments against him.

EXCEPTIONS THAT COULD STILL MAKE THE CONSUMER OR SOMEONE ELSE LIABLE:

The non-deficiency rule will not apply if the debtor has allowed the property to be wasted by such things as his own bad maintenance, by vandalism of him or others or uninsured losses before the foreclosure sale ("voluntary waste"). Both the mortgage obligation and the law, generally, allows a creditor to recover for damages done by the borrower or borrower's failure to protect the property from damages by other people or events.

GUARANTYS:

Persons who sign a separate document as "Guarantors" of the debt can also be liable for the debt and in some cases can even be liable for a debts of the primary borrower whom they are guaranteeing that are non-deficiency debts for the primary borrower. Guarantors are usually joined (and are in some cases required to be joined) in the initial foreclosure process.

OTHER SECURED DEBTS:

Mortgages secured by bare land, multiple units and commercial and business mortgages and lines of credit (where the property was used as collateral to borrow money to be used

elsewhere) all allow deficiencies if the sale proceeds do not equal the unpaid debt, unless they contain a clause which specifically states that the debt is "non-recourse" or that remedies are "limited to a forfeiture of the property and not a monetary judgment" or like language.

OTHER DEBTOR DEFENSES:

The debtor has all of the normal contract and, where applicable in residential financing, all consumer defenses against the lender available in almost every state. See "DEFENSES" under this FAQs column, generally.

FORECLOSURE IN COLORADO

FORCLOSURE GENERALLY:

QUESTION: How are trust deeds and mortgages foreclosed in Colorado?

ANSWER: In much the same way as noted for other states, above, but with some local variations. The trust deed can be foreclosed judicially (by suit and sheriff's sale) or non-judicially (by advertisement and sale). The process typically takes about 4 months from the date the creditor initiates it.

DEFICIENCY JUDGMENTS:

QUESTION: Does Colorado allow deficiency judgments?

ANSWER: Yes, in all foreclosure categories: residential, commercial and business unless the loan itself contains a clause limiting remedies strictly to foreclosure, but deficiencies can only be obtained by a lawsuit by the creditor. A deficiency is available to the creditor by foreclosing in one of two methods:
(1) it is available as a remaining judgment in a judicial foreclosure if the sheriff's sale produces insufficient proceeds to satisfy the debt or (2) it is available if the credit files a lawsuit for the shortfall between the sale proceeds and the debt after a non-judicial foreclosure.
The borrower may present evidence that the lenders bid is less than a good faith estimate of the value of the property and if successful avoid a deficiency judgment. See "judicial" and "nonjudicial" foreclosure methods, below.

TYPES OF FORECLOSURES:

QUESTION: How does a "judicial" foreclosure work?

ANSWER: The judicial process of foreclosure involves the creditor filing a lawsuit to obtain a court order to foreclose. It is used when no power of sale is present in the mortgage or deed of trust and is an option for the creditor to use in the foreclosure of a deed of trust, but most creditors resort to judicial foreclosures of deeds of trust only when a deficiency judgment against the borrower is sought. Generally, after the court in a judicial foreclosure declares a foreclosure, the home will be auctioned off to the highest bidder and the proceeds will be applied to the cost of sale (fees and costs) and then to the loan, with any balance remaining unpaid thereafter being the "deficiency," which the creditor may then seek by attaching, levying, garnishing and otherwise executing on other non-exempt assets of the debtor.

QUESTION: How does a non-judicial foreclosure work?

ANSWER: Most Colorado trust deeds are foreclosed non-judicially. The ability to foreclose non-judicially (without a lawsuit for foreclosure) requires that a specific "power of sale clause" exist in a mortgage or deed of trust. A "power of salerdquo; clause is the clause in a deed of trust or mortgage, in which the borrower pre-authorizes the sale of property without a lawsuit in the event of default. In deeds of trust or mortgages where a power of sale exists, the power given to the lender to sell the property may be executed by the lender or their representative, typically referred to as the trustee. Regulations for this type of foreclosure process are outlined below.

THE STEPS AND PROCESS FOR A NON-JUDICIAL FORECLOSURE:

QUESTION: What is the process for non-judicial foreclosures?

ANSWER: The foreclosure process in Colorado is quite a bit different than in other states because in Colorado, the Governor appoints a "Public Trustee" for each county in the state. The trustee must act as an impartial party when handling a power of sale foreclosure. In Colorado, the non-judicial power of sale foreclosure is carried out as follows:

The process begins when the attorney representing the lender files the required documents with the Office of the Public Trustee of the county where the property is located. The Public Trustee then files a "Notice of Election and Demand" with the county clerk and recorder of the county. Once recorded, the notice must be published in a newspaper of general circulation within the county where the property is located for a period of five (5) consecutive weeks. The Public Trustee must also mail, within ten (10) days after the publication of the notice of election and demand for sale, a copy of the same and a notice of sale as published in the newspaper, to the borrower and any owner or claimant of record, at the address given in the recorded instrument. The Public Trustee must also mail, at lease twenty-one (21) days before the foreclosure sale, a notice to the borrower describing how to redeem the property. Foreclosure sales must take place no less than 110 and no more than 125 days of the initial filing of the Notice of Election and Demand. After the sale is scheduled, the lender still has to obtain a separate court order allowing the sale. The court schedules what is known as a Rule 120 Hearing to consider if the foreclosure is legally sufficient, and all affected parties are notified. If no one contests that the borrower is in default, the court allows the sale without a hearing The public trustee typically conducts the sale at the courthouse. At the sale, the public

trustee reads the written bid submitted by the lender, and any party may bid. If anyone other than the lender is the winning bidder, that person must deliver the bid amount in cash or cashier's check to the public trustee. The winning bidder is given a certificate of purchase. The owner of the property may stop the foreclosure proceedings by filing an "Intent to Cure" with the Public Trustee's office at least fifteen (15) days prior to the foreclosure sale and then paying the necessary amount to bring the loan current by noon the day before the foreclosure sale is scheduled.

NO REDEMPTION RIGHTS, ONLY CURE PERIODS:

QUESTION: Are there "redemption rights" for the borrower?

ANSWER: Other than the time periods in advance of the sale for the borrower to "cure" the default as set out above, there are no longer any redemption rights for the borrower after a foreclosure sale in Colorado. There are redemption rights after the foreclosure sale only for junior lienors, such as holders of second trust deeds or mortgages or other liens.

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.

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WASTE, OTHER CLAIMS:

QUESTION: What statutes govern Colorado foreclosures if the borrower wants to know more?

ANSWER: The laws that govern Colorado foreclosures can be found in Title 38, Colorado Revised Statutes (Property Real and Personal) and Article 37 (Office of Public Trustee), Article 38 (Foreclosure Sales), Article 39 (Mortgages, Deed of Trust).

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

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 statutes at:***
Title 61 ***Title 61.24***

See other consumer defenses to debts under "General Defenses Common to All States", below. Also see 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.

DEFENSES TO DEBT CLAIMS COMMON TO ALL STATES AND TAXES

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?***

YES: ***No, there are many more debtor defenses than were mentioned in discussing the debt enforcements, above.***

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, 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 EFFECTS.

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. 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. There are other exemptions. The debtor should contact a licensed professional for advice and applicability in this area.

FREQUENTLY ASKED QUESTIONS ABOUT NEW CONSTRUCTION DEFECT CLAIMS

BUILDERS' WORKMANSHIP WARRANTIES (FOR ARIZONA)

QUESTION: Is it a fact that the builder owes warranties to me against construction defects or failure even if these are NOT stated in the contract I have with him?

ANSWER: Yes. The builder owes you a lot more than is stated in the contract.

DISCUSSION: In Arizona, the builder is both "seller" and "builder" in the sale of a new home. As such, his exposure to liability must be measured from both perspectives.

SELLER'S LIABILITY: Arizona law requires sellers of homes to tell potential purchasers about any material defects they are aware of. Hill v. Jones, 151 Ariz. 81, 85, 725 P.2d 1119 (Ct. App. 1986).

Even if there was a mistake as to the defects, a case where neither buyer nor seller knew of the defects, the buyer may seek a rescission of the entire agreement and a return to the status quo ante. Renner v. Kehl, 150 Ariz. 94, 722 P.2d 262 (1996).

BUILDER'S LIABILITY GENERALLY: It is also well settled in Arizona that the builder owes an implied warranty of workmanship and materials and habitability with respect to the home. Kubby v. Crescent Steel, 105 Ariz. 459, 466 P.2d 753 (1970), (habitability) Nastri v. Wood Brothers Homes, Inc. 142 Ariz. 439, 690 P.2d 158 (1984), and cannot even be disclaimed by the builder even in writing, Hembree v. Broadway Realty & Trust Co., 151 Ariz. 418, 729 P.2d 288 (1986) and applies even if the builder was not building the house originally for resale, such as a model or for himself, Dilling v. Fisher, 142 Ariz. 47, 688 P.2d 693 (1984), as the purpose of the warranty is strictly to protect ALL home purchasers by holding home builders accountable for their work, Richards v. Powercraft Homes, Inc., 139 Ariz. 242, 678 P.2d 427 (1984). Even a disclaimer against the very item that is defective contained in the original builder's agreement with the first buyer will not affect a successor buyer's rights against the builder, Nastri, id.

THE WARRANTIES RUN WITH THE PROPERTY, NOT JUST THE OWNER (FOR ARIZONA)

Such warranties run with the property such that direct contractual privity is not required to maintain an action against a builder vendor of a home for a breach of implied warranty of workmanship and habitability in a claim for defective, latent conditions. Richards, id. Accord: Donnelly Construction Co. v. Oberg/Hunt/Gilleland, 139 Ariz. 184, 677 P.2d 1292 (1984). Richards held that homeowners, whether or not they were in privity with the builder were entitled to recover damages for breach of implied warranty that the home was habitable and constructed in a workmanlike manner, in that there was no indication that the original owner substantially changed the structure of the home where the defective workmanship could not have been determined from reasonable inspection prior to purchase. The implied warranties were assured for residential properties in the recent Arizona Supreme Court case The Lofts at Fillmore v. Reliance Commercial Construction, CV-07-0416-PR, (Ariz. S. Ct., 2009). Implied workmanship warranties are also owed in commercial construction, but in all safety they should be expressly stated in the contract and expressly assigned when sold. As most Arizona claims involve residential properties, the balance of the information, below, applies mostly to residential property (any designed for personal habitation, whether single-family or congregate such as apartments or condos).

WORKMANSHIP WARRANTY DURATION (FOR ARIZONA)

QUESTION: Is it true that the builder who builds a new home or remodels or repairs a home only has to stand behind his or her work for only two years in Arizona?

ANSWER: No. The builder in Arizona must stand behind his or her product for a minimum of 6 years, but no more than 8 years if first discovered after the 6th year, or else he or she is in breach of the implied warranties in contract set forth, above. He or she is also liable in a joint claim of negligence for 2 years AFTER DISCOVERY.

DISCUSSION: There are three relevant statutes of limitations. The first, torts, like negligence, is governed by ARS §12-542, and is a two year statute.

The second, contract, is six years pursuant to ARS §12-548, but subject to discovery and the ultimate repose statutes above, which has yet to be totally tested.

The third statute is ARS §12-552, which provides a limitation of eight years after substantial completion of improvement to real property. However, if the injury occurs in the eighth year (or was not discovered until then), an action may be brought within one year after the date of the injury or discovery of the latent defect. The cases above seem to extend that to be from the time the cause of action accrued by the failure of the component, though this is still not entirely clear in Arizona. This section covers implied warranties in contract.

RIGHT TO HAVE NEW HOME INDEPENDENTLY INSPECTED (FOR ARIZONA)

QUESTION: Can a Builder, after entering into a sale contract by which he agrees to build and deliver a specific home to a Buyer (for which the Buyer is bound by the contract to pay) bar a registered Home Inspector engaged by the Buyer to inspect the property from coming upon the property unless the Home Inspector provides financial assurances to the Builder in excess in amount of coverage of that required of the Inspector by state law or Arizona Board of Technical Registration ("BOTR") can the Homebuilder bar the Home Inspector by the use of the threat to void warranties otherwise protecting the Buyer or a threat to suspend performance upon or terminate the construction contract or any warranty on it, implied by law or express, owed to the Buyer?

ANSWER: No.

Here's the problem:

Builders are telling Homebuyers and Home Inspectors: (1) that neither the Homebuyer nor his Inspector may examine a home already sold to the Buyer and at that time under construction for that Buyer; or, (2) that the inspection may only be done if the Home Inspector provides extensive financial guarantees and relationships directly to the Builder that exceed those required by state law for Home Inspectors; and/or, (3) that the Builder's warranties of workmanship owed to the Homebuyer are void or avoidable as to any component the Home Inspector might access inspect; and/or (4) the Builder will refuse to perform his warranties or terminate the contract or construction progress if the Homebuyer or Home Inspector contests any of the foregoing. Part or all of these contentions and acts are wrong in whole or part. I

will address that here only as a matter of licensure law.

The Builder, in addition to the authority set forth, below owes the Homebuyer certain performances as set forth under the licensure laws and rules of the Registrar of Contractors. The Builder owes the Buyer a workmanship like product under R4-9-108, owes the implied warranty of workmanship and habitability under the case law interpreting "sound workmanship" as set forth in Kubby v. Crescent Steel, 105 Ariz. 459, 466 P.2d 753 (1970), Nastri v. Wood Brothers Homes, Inc. 142 Ariz. 439, 690 P.2d 158 (1984), Richards v. Powercraft Homes, Inc., 139 Ariz. 242, 678 P.2d 427 (1984), and the implied covenant of good faith and fair dealing (the consumer's unharassed right to assure receipt of comporting product and to receive lawful treatment) as set forth in Wagonseller v. Scottsdale Mem. Hosp., 147 Ariz. 370, 383, 710 P.2d 1025 (1985). In addition, the law and rules of the Arizona Board of Technical Registration ("BOTR") regulating home inspection have the status of law and are "codes of the state." The BOTR rules regulate what a Home Inspector is required to have for proof of financial responsibility to inspect in the state of Arizona, mandates loyalty to the customer and prohibits financial or business connections with the party whose work is to be inspected (the Builder) which would impair the impartiality of the Home Inspector inspecting him. Lombardo v. Albu, 199 Ariz. 97, 14 P.3d 288 (2000) provides that licensure rules are standards of care and that violations of rules are "failures per se." Arizona State Real Estate Department v. American Standard Gas & Oil Leasing Service, 580 P.2d 15, 119 Ariz. 183 (Ariz.App., 1978) holds the same for violations of licensure statutes.

The long and short of it is that there is a good argument that the Builder cannot make the above demands under his own licensure and to do so is a licensure violation. The Builder is bound to obey his contract, the licensure law and regulations and cannot threaten to breach his contract with the Buyer through contract suspension, performance suspension, warranty termination or avoidance that is prohibited. I will briefly discuss this:

FROM THE REGULATORY PERSPECTIVE (FOR ARIZONA)

ARS §32-1154 (the licensing statute for builders) states that a construction licensee "shall not commit" any of an enumerated series of acts or omissions. One enumerated "act or omissions" is at "1. Abandonment of a contract or refusal to perform after submitting a bid without legal excuse for the abandonment or refusal (see the only legal excuses set forth by statute below). Others of relevance are "7. The doing of a wrongful or fraudulent act...resulting in another person [Buyer, Home Inspector] being substantially injured.."; "12. Failure to comply with any...codes [the statutory and regulatory law of the ROC and BOTR, et al.] of the federal government, state or political subdivisions of the state; "13. Failure...to comply with this Chapter"[see below statutes form this Chapter]; "16. False, misleading or deceptive advertising whereby any member of the public may be misled or injured"; "17. Knowingly contracting beyond the scope of the license … of the licensee." In addition and as will be shown as relevant later, there is "3.Violation of any rule adopted by the registrar." [See relevant rules, below.]

ARS §32-1159 A. provides that a "covenant, clause or understanding in, collateral to or

affecting a construction contract ...that purports to indemnify, to hold harmless or to defend the promisee from or against liability of loss or damage resulting from the sole negligence of the promisee or the promisee's agents, employees or indemnitees is against public policy of this state and is void. [Thus, any clause of a construction agreement or a side agreement which tries to excuse the Builder from his lawful duties is void.]

ARS §32-1129.03 A. provides those circumstances under which a Builder can interrupt his performance [fail to give warranties, discontinue with the job, the project or fulfillment of his obligations under the contract] without penalty or liability of breach of contract and it permits interruption only because of encountering hazardous material or substances. ARS §32-1129.04 allows suspension only for non-payment by the Buyer or a refusal to approve a billing or job estimate. Nowhere does either statute provide for "ceasing performance of any obligation--a warranty for workmanship or obligation or progress on the job--because the other party in contract (the Buyer) wants to inspect, himself or through a Registered Inspector in full compliance with the BOTR and working for him, what he is buying." If the contractor refuses warranties or to continue with the whole or any part of the job under contract for ANY OTHER REASON, he is in violation of licensure and liable for breach, damages, attorneys' fees and costs both to the Buyer and the Inspector ("any person", see the regulation, below). There is no exception allowing suspension or termination of the Builder's duties "because the other contract party wants and will pay for a home inspection by a lawfully registered and insured Inspector" or because the "other contract party wants the warranties required by law." To do so is itself a breach of licensure regulations.

R4-9-131 especially prohibits as having special "gravity" the following acts or omissions: The Builder "2. Failed to perform work for which money was received" [terminates performance because of a home inspection or terminates a warranty he unconditionally owes by law]; "3. Executed or used any false or misleading documents for the purpose of inducing a person to enter into a contract or pay money for work to be performed" [threatening to suspend performance or void warranties that cannot lawfully suspect or void after the purchase contract is signed]; "4. Made false or misleading statements for the purpose of inducing a person to enter into a contract or to pay money for work to be performed" [ditto as to section 3., immediately foregoing]; "11. Performed work that has caused loss or damage to the structure, its appurtenances or property being worked upon or which has caused loss or injury to any person" [unlawful voiding of warranties or termination or slowdown of performance--here there would be damages and liability to the Buyer and the Home Inspector].

In sum, a contractor owes the warranties and contract performance as agreed to and as required by law to the consumer, whether or not expressly set forth by the contractor and even if the contract contains a disclaimer against it. To threaten to void warranties (or voiding them) or to threaten to suspend or terminate performance (or to do so) for any reason OTHER than encountering dangerous substances or materials at the site or by reason of non-payment by the Buyer is a violation of regulation and law. An agreement even contending it can be done is a violation of regulation and law and a regulatory misrepresentation.

Not discussed here but certainly an issue are the Builder's liabilities for intentional or negligent interference with the Inspector/client contract; regulatory and common law trade

liability for restraint of the Inspector's registered trade; anti-trust; liability for fraudulent schemes under ARS 13-2310, et. seq., and 44-1522(A), et. seq., all of which are applicable. No Builder can attempt on a broad spectrum to actively restrict or interfere with the Home Inspection trade and void a consumer's right in violation of its own licensure without violating other public and common laws regarding unlawful schemes or restraints of trade.

Notably, all Builder contracts state in them "this is the final agreement and supersedes all others and the only terms between Builder and Homebuyer are those contained in this agreement" and none of them contain any clauses in which the consumer has agreed to void warranties or inhibit the home inspector as in the above. The Builder drafted his own contract and omitted any such terms. It therefore cannot be argued that the Homebuyer somehow agreed to this (assuming any buyer can be asked to agree to anything that violates the Builder's licensure in the first place).

There is more. If the Inspector has to provide all of these huge financial assurances to the Builder (some even asking that the Inspector co-insure the Builder for $1 million on his AUTO INSURANCE!), why is the Realtor, appraiser, bank-loan construction progress inspector, city inspectors and owner not also asked to do so? Why just the private home inspector? In addition, through thousands of litigations, this office has leaned that the Builder is NOT ASKING FOR THESE FROM HIS SUBS, either! Thus, this is targeted strictly at Home Inspectors and for very obvious reasons. Last year they did thousands more inspections than any other vendor, including city and county, and found thousands more defects than all of the foregoing other inspectors put together! It's all about the Builder wanting to hide his sins. It's all about getting his hands on the money.

ABOUT EXPANSIVE SOILS

QUESTION: What are "expansive soils"?

GENERAL ANSWER: Expansive soils are composed of clays that are usually generated over centuries as settlement to the bottom of bodies of water. They are usually high in salt and calcium contents. This was nature's way of "sealing" the earthen bottom of a body of water to prevent it from leaking. Clay, in nature, is a sort of "grout".

QUESTION: What damages do "expansive soils" cause when not properly accommodated or remedied before building?

ANSWER: Microscopically, these clays are made up of plate-like particles that absorb moisture and can expand to more than 100 percent of the original size. This "swell pressure" between particles can push up and crack concrete slabs, driveways and walls that have less weight than the soil pressure. When these soils dry out, the reverse process occurs and shrinkage results. Damage to the improvements can be done as readily by the lifting as the collapsing.

QUESTION: How can I tell when this is happening?

ANSWER: A moving slab or foundation usually manifests itself as cracks in the floor and/or walls and/or ceiling, delamination or cracking of floor tiles; rising, settling of floor surfaces; doors and windows that "stick" or do not open, close or fit, water or soil emitting from the floor or expansion joints in the floor, differential elevations between floor plates; creaking and cracking noises in the home.

QUESTION: How severe can the damages be?

ANSWER: A moving slab can cause structural damage as well as flatwork damage. It can cause plumbing leaks (generating bacterial issues when it is a black water leak) and allow environmental water interdictions leading to mold colonizations and termite infestations.

Building and floor slabs are most often affected by soil expansion from the outside. As soils around the edge of the structure become wet, they heave relative to the middle of the structure.

QUESTON: Will a post-tensioned slab prevent this?

ANSWER: No. This process is called "edge curling" and you will hear this term both with post-tensioned and conventional slabs. With post-tension slabs ("PTS") it refers to the tendency of PTS to curl on the edges due to the over-compression of the over-torqued tendons. Though not due to tendon stressing, curling due to subslab moisture also cause movement for conventional (non-PST) slabs, as well, though with them it is usually because moisture tends to migrate from the perimeter of the slab (thus raising it earlier) to the center (then affecting it, too). . With time, the underside of floor slabs draw in water from the soil, like blotting paper, and cause a heaving effect in the middle of the slab called "doming." This can take years to develop depending upon moisture level added by irrigation, rains and other environmental factors. In some cases, concrete mixed too wet can cause the same effect through shrinkage. PTS slabs are no better protection against expansion or collapsing of under-engineered sub-soils and poor drainage than the 3-pour, floating or so-called "conventional" ground-level slabs. The PTS –even when properly laid, is still no "fix" when used over moderate/high expansive or collapsible soils left under the pad and when neither are properly buffered from the soils by generous (up to 1 foot) overlain barriers of aggregate base coarse gravels ("ABC"). Local MAG 1 is not a true ABC, the latter being a carefully metered mix of .50 inch, .75 inch and 1.25-inch gavel for maximum compressive support and integrated capillary voids for water percolation and soils expansion and contraction). Whap passes as the local "MAG 1" is often little more than half or 1-minus and if often lain in thin and thus almost completely ineffective wafers.

QUESTION: What are some of the building solutions with expansive soil?

ANSWER: The first solution is not to have any expansive or collapsible soils under the slab footprint in the first place! This means pre-pour soil testing and geotechnical assistance to amend or abate the soil, subsoil, site grading and drainage issues, with above-level structural engineering to accommodate the subsoil remediation. If the challenged soils are already there (a defect, but in trying to cope with them) a provisional solution is to keep soils at constant,

stable, optimum moisture content, but this is for most applications too precarious of balance to avoid failure or miscalculation over the long term. Intervening weather and casualty incidents have to be assumed on the 30 to 40 year integrity basis. Sudden increases in rainfall and landscape irrigation can be harmful, as can drying due to lack of rainfall or irrigation. Water casualties such as subslab plumbing leaks or other water dispensations have to be assumed. Before construction, if proper protocols are followed, soil samples are tested in the lab to determine how much "swell" is possible when the particular soil is saturated. Engineers then must assume the worst-case soil moisture conditions when they design against expansion and shrinkage.

Solutions are limited, however when this pre-construction engineering has not been done. The obvious preventive measure is to over-excavate and evacuate any such soils. The second is to assure a foundation and slab substrate, underlayment or under-composition that has the compressive strength and depth to hold the building weights stable, but is porous enough to permit water and soil fluctuations to infiltrate and defiltrate without weakening or moving the underlayment or the building component atop it. Thereafter, the site and structure must nonetheless be engineered to make sure water does not pool next to buildings. Many are usually graded to slope to the street. However, builders can change drainage patterns during construction or landscaping. Builders often fail to provide proper roof gutters and surface drainage control such as sloping away from structures, such that water can sheet off roofs into the soils around the building and pond or infiltrate under the foundation.

Another pre-construction solution consists of replacing expansive soils with non-expansive, sandy or gravelly soils to a depth of several feet. Although effective as a remedy, this solution is not always practical because of the cost and availability of non-expansive materials. But with the costs of damages so high for the defect, the pre-construction expense is actually negligible.

QUESTION: These all appear to be before-the-fact control methods. What happens when these were not done and the slab or foundations fail or of flexations and deflections there damage the improvements after the structure is built?

ANSWER: When the project was not done correctly during the pre-build, post-build failure-repair options are limited and none of them as are acceptable as merely "doing It right in the first place". Expansive-soil properties can be modified by adding chemicals such as lime or cement as a pre-pour treatment, in addition to engineering subsoil drains, drain fields away from the slab footprint and subsoil moisture curtains. Studies have suggested that these are modest measures and usually have a useful life of three years or less before failure or exhaustion, with subsequent damages continuing.

Polyurethane liquid can be injected into the soil, which hardens it to a plastic-like material and cementacious injection grouts can then be inserted between the bottom of the slab and the subsoils to fill voids. This is effective with soil collapses, but it troublesome with swells which have already distended and disrupted the slab surface. In those cases, opening the slab and refusing the offending soils substrate, replacing or amending it with ABC, concrete slurry or non-expansive soils is the only more reliable fix. Some experimentation is being done now

with "deflating the soils" by use of long term forced-air subslab dehydration accompanied by injected condensate lines for weep and these have had favorable early results, gently "deflating the soils" and "settling down the slab," but these are still experimental.

However, this kind of post-construction fix is not as reliable as doing the pre-construction site work that prevents its need entirely and it often fails or lasts only a few years before failure. In addition, these types of materials are not always inert and might be harmful to occupants and landscaping, but often they are the better solution in the trade-off.

Another more widely used approach is to support buildings on stiff, heavily reinforced PST foundations. With this method, steel tendons built into the floor slabs and footings are tightened after the concrete sets to make foundation systems more rigid. Other remedies include "pile foundations," which hold the building down like large anchors. As noted, above, these slabs have their own issues, will also be adversely affected by expansive and collapsing soils over time and are no substitute at all for simply doing the pre-construction geotechnical treatments noted, above.

Helical or push-piers are another post-construction abatement for failing (typically collapsing) slabs. They can also be used (coupled with subslab injection grouts) to raise a low portion of a slab to an inflated portion. Piers are long steel pinions deeply inserted into the ground, anchored to the slab or foundation, and then elevated to support and level the component. They are permanently bonded to the component and left in the ground as a permanent "pier" for the component.

QUESTION: So what is the best scenario to avoid these issues?

ANSWER: Simple. Good pre-construction pre-testing and pre-engineering and structure design are the keys. The soils on the lot must be analyzed PER LOT by the recognized ASTM methods to determine compaction, optimum moisture, composition, mix. Fills must be done in stage-tested lifts, certified by an engineer; cuts must also be shot and certified. Grading must be away from the pad site; water is to be vented well away from the site; adjacent properties must not drain to the subject lot on or below the surface; the home must be designed to vent water AWAY from it (gutters, downspouts that drop to piping away from the footprint of the home); pond-points, irrigation and valve boxes must be away from the footprint. The roof and flatwork must not generate more run off than the disposal area away from the footprint can safely dispense or percolate.

WARNING SIGNS OF FOUNDATION AND/OR STRUCTURAL MOVEMENT

Sinking foundations, cracked and buckled walls and uneven floors are serious problems commonly faced by millions of homeowners who have homes situated on unstable soils which settle when their foundations are subjected to extreme moisture conditions, lack proper

drainage are improperly engineered or installed and other causes. A shifting foundation may result in structural damage to a home and a loss of the investment.

One does not always need to be a specialist to determine that foundation problems exist. Foundation problems can be revealed, even by the untrained observer, by examining the house carefully for the following. When any two of these are seen, it is time to call in an expert for a complete audit of the site and home.

FOUNDATION/STRUCTURAL FAILURE WARNINGS (ALL STATES):

- ***Doors that stick and squeak***
- ***Separation of door sills from frames***
- ***Windows that stick. Raise and lower the windows in each room, open and close all doors. Do they fit squarely without binding?***
- ***Cracks in interior walls near corners of doors or windows. Look at all the corners of windows and doors, and at joints where walls meet walls, ceilings or doors for signs that they are pulling away from each other. Also look for cracks in a brick fireplace wall.***
- ***Nails popping out of sheetrock or gypsum board. Examine walls and ceilings for evidence that nails may be working themselves loose.***
- ***Wallpaper that curls and separates***
- ***Curling and tearing of existing sheetrock repairs***
- ***Leaks and cracks in and around the fireplace***
- ***Cracks in the exposed concrete grade beam of the house. Check the exposed concrete at the base of the house for cracks. If there are only small cracks, they may also be nonstructural, but they may also be the first indication of trouble to come***
- ***Caulking that pulls away from exterior surfaces. Outside the house, check the bottom corners of windows and doors. Do cracks run diagonally, along mortar joints in the brick veneer? Are the caulked joints pulling apart?***
- ***Nails popping out of corner frames***
- ***Obvious cracks in brick and mortar***
- ***Cracks and uneven elevations in structures attached to adjoining patios.***

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