

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 even result 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.

RAMIFICATIONS OF FORECLOSURE OR DEBT RESOLUTIONS COMMON TO ALL STATES

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

ANSWER: Yes, and they must all be considered.

Most any foreclosure or debt reduction in the form of a loan modification, short sale, deed in lieu or other change of a pre-existing debt will have tax, credit eligibility, insurance, professional, licensure eligibility, immigration, employment, security clearances and other impacting affects. These must be analyzed in each case by a competent, licensed professional. In addition, the debtor has a separate liability for "rent-skimming," which is the taking of rents from a tenant at the secured property while not paying the loans against the property. A claim for rent recovery is the recourse in most states, and, in some states, this is also a crime. In all states it is a violation of the residential landlord-tenant acts if it is a residential property and most always a landlord violation of the lease agreement, whether residential or commercial. Real estate agents facilitating such skimming activity by a landlord or owner are in licensure violation in all states. Under current federal law, tenants in good stead with lease that predate the foreclosure will be permitted to remain for the period of their lease or 90 days.

Now how about some DEFENSES COMMON TO ALL STATES?

DEFENSES TO DEBT CLAIMS COMMON TO ALL STATES

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

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

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

TAX AFFECTS?

TAX AFFECTS COMMON TO ALL SHORT SALES AND FORECLOSURES

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

ANSWER: Yes.

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

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

‘Nuff said.

BIO FOR J. ROBERT ECKLEY

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