FORECLOSURE INFORMATION

Foreclosure proceedings are typically brought by:

Mortgage company when you have not paid your monthly mortgage payment;

Homeowner's Association when you have not paid you monthly assessment; and

Tax lien holders when you have failed to pay your property taxes.

Mortgage Foreclosure:

The loan against your home generally consists of two instruments. The first is a Promissory Note, which sets forth the amount of the loan, the interest rate, the monthly payment and the time by which the loan must be repaid (known as the maturity date). The second is a Deed of Trust (more commonly referred to as a Mortgage) which gives the lender the right to foreclose on the home if you do not timely make your payments.

There is a common misperception that the lender cannot start the foreclosure process until you are at least three (3) payments behind. In most cases, the lender has the legal right to start foreclosure when you miss just one payment.

The foreclosure process is started by the lender recording and sending you a Notice of Trustee Sale. The notice tells you that the foreclosure process has started and the date your home will be sold at a foreclosure auction sale (typically 91 days after the date of the notice).

You have the right to bring the loan current (known as "reinstatement") by paying all back payments, attorney fees, trustee fees and costs up to the day before the trustee sale. If you reinstate, the lender is required to cancel the trustee sale.

Additionally, you may be able to stop the trustee sale by obtaining a court injunction (if you believe the trustee sale is wrongful) or by filing a bankruptcy. However, if you do not do any of these and the trustee sale is completed, it is very difficult to undo the sale. See ARS 33-811. You do not have any right to bring the loan current or buy back the property once the sale is completed.

If the property is sold at auction for more than is owed to the foreclosing lender, you may be entitled to recover these extra funds (known as "excess proceeds").

HOA foreclosure:

The purchase a home in an HOA community constitutes an agreement to give the HOA a lien against your home for the monthly and other assessments.

The HOA can start a foreclosure proceeding against if you are delinquent in your payments for a period of 1 year or in the amount of $1,200 or more, whichever occurs first.

The foreclosure process is started by the filing of a lawsuit. If you do not dispute that you owe the HOA the money, you can stop the lawsuit by paying the past due amounts plus attorney fees and costs. You can dispute the lawsuit by filing an Answer denying the HOA's claims. It is important to be aware there are deadlines for filing the Answer (which can be found in the Arizona Rules of Civil Procedure). Failure to timely file an Answer may result in the Court entering a Default Judgment allowing the HOA to sell the property.

Once the HOA obtains a foreclosure judgment, it will refer the case to the Sheriff's office to sell the property at auction. You may be able to stop the foreclosure by filing a bankruptcy before the date of the sheriff's auction. Additionally, you do have the right to buy back the property (called "redemption") within 6 months after the auction sale. To buy the property back, you will need to pay the amount that was paid by the purchaser at the auction plus interest. If the property sells at auction for more than is owed to the HOA, you may be entitled to the extra funds (called "excess proceeds")

HOAs are usually willing to settle a foreclosure lawsuit by an agreement to have you repay all back payments, attorney fees and costs by monthly payments over a period of time (usually 24-36 months). During this time you will also have to make the regular HOA monthly payments as they become due.

Tax lien foreclosure:

Failure to pay your property taxes will result in a tax lien against your home. The County sells these tax liens to private investors through an instrument called a Certificate of Purchase (also known as a "CP").

The CP holder must wait 3 years before starting the foreclosure process. During this time, you can pay the lien by paying the tax amount plus interest (called "redemption").

If you do not timely redeem, the holder of the CP may start the foreclosure process by filing a lawsuit. If you do not dispute that you owe the amount of tax lien, you can stop the lawsuit by paying the amounts due plus attorney fees and costs. You can dispute the lawsuit by filing an Answer denying the CP holder's claims. It is important to be aware there are deadlines for filing the Answer (which can be found in the Arizona Rules of Civil Procedure). Failure to timely file an Answer may result in the Court entering a Default Judgment allowing the HOA to sell the property. You may also be able stop the foreclosure by filing a bankruptcy before the Judgment is entered.

You have no right to buy back the property or stop the foreclosure once the Court enters the foreclosure Judgment.

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Recovering Excess Proceeds After Foreclosure Of Your Home

In Arizona a home is typically foreclosed through a process known as a Trustee Sale. The Trustee holds an auction to sell the home in an attempt to recover the balance owed to the foreclosing lender.

During the downturn in the real estate market, the purchase price at auction was typically at or less than the loan balance owed to the lender. However, with the recent upturn in the real estate market, we are now seeing purchase prices that exceed the amount owed to the foreclosing lender. The amount by which the purchase price at auction exceeds the balance owed the foreclosing lender is known as Excess Proceeds. For example:

$135,000 price paid at Trustee Sale auction
-$100,000 loan balance owed to foreclosing lender at time of auction
$35,000 Excess Proceeds

In the above example, $100,000 from the sale proceeds goes to pay the amount owed to the foreclosing lender. The question is who is entitled to the remaining $35,000 in Excess Proceeds? Generally, the Excess Proceeds first go to junior voluntary lienholders and then to the homeowner whose home was foreclosed.

Voluntary lienholders are lenders to whom the homeowner voluntarily gives an interest in the home. Two common examples are your mortgage company (both your primary home loan and your secondary home equity loan) and your homeowner's association. By signing a mortgage you voluntarily give the lender an interest in your home; and by purchasing a home within a community development you voluntarily give the homeowner's association an interest in your home.

Involuntary lienholders are creditors who sue to get a judgment against you. A common example is a credit card company that sues, gets a judgment against you for the amount owed on the credit card, and then records that judgment as a lien against your home.

Let's add a few facts to the example above. In addition to the $100,000 loan being foreclosed, there is a 2nd mortgage for $20,000 and a credit card judgment lien of $20,000. Under this scenario, $100,000 goes to pay the amount owed to the foreclosing lender, with the $35,000 in Excess Proceeds being distributed as follows: $20,000 to the 2nd mortgage (voluntary lienholder) and $15,000 to the homeowner. The credit card company (involuntary lienholder) gets nothing.

So how does the foreclosed homeowner know if there are Excess Proceeds available? The Trustee is required to mail a notice to the homeowner's last known address. The problem is the last known address is usually the foreclosed property, which the homeowner has vacated without providing a forwarding address.

The homeowner, armed with the knowledge that a Trustee Sale can generate Excess Proceeds, should track the Trustee Sale process. Call the Trustee's office the day after the sale is scheduled to take place. Ask if the sale was postponed (the Trustee is not required to provide you written notice of the postponement) or completed? If postponed, ask for the new sale date. If completed, ask: are there Excess Proceeds from the sale? When will the Trustee be depositing the proceeds with the county treasurer and filing the required lawsuit? Inform the Trustee that you are the foreclosed homeowner and want to make a claim for the Excess Proceeds. Provide the Trustee with your new address and send a confirming letter (by both certified mail/return receipt requested and regular mail) to the Trustee with your new address and contact information.

Excess proceeds can remain on deposit with the county treasurer for up to 2 years. Certain deadlines begin to run when the Trustee deposits the Excess Proceeds and files the lawsuit. Upon receiving notice that the lawsuit has been filed, you should immediately contact one of the legal aid offices listed below for free legal help in recovering Excess Proceeds:

In Maricopa County, contact Community Legal Services at
(602) 258-3434 or (800) 852-9075;

In Yavapai County, contact Community Legal Services at
(928) 445-9240 or (800) 233-5114;

In Mohave and La Paz Counties, contact Community Legal Services at
(928) 681¬-1177 or (800) 255-9031;

In Yuma County, contact Community Legal Services at
(928) 782-7511 or (800) 424-7962.

This article provides general information about Excess Proceeds. It does not address your specific factual circumstances and should not be relied on as legal advice. Please contact an attorney for legal advice specific to your situation.

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