



LIABILITY AFTER THE SALE

The Arizona anti deficiency statute is one of the most protective in the country. It allows debtors to stop making their mortgage payments until the property goes to trustee sale and, in many cases, the lender cannot pursue the debtor for any amount of the deficiency. The property has to be 2.5 acres or less, one or two units, and used as a dwelling. It is well established that the property can be a primary residence, second home or rental property. It is also clear that the lender cannot choose to pursue the collection of the debt instead of proceeding with the trustee sale. If the lender takes back the property by trustee sale, the mortgage can be purchase money or a refinance. This includes rate and term refinance as well as cash out. But, what happens to those debtors who do not fall under the protection of this statute?

Most, but not all of the time, the lender will pursue them. In the case of the lender that goes the route of the trustee sale, the lender has only 90 days to pursue the debtor. Once the 90 days expires, the lender is out of luck. This statute greatly reduces the time allowed compared to other instances when a debtor has defaulted on a note. Lenders usually have six years for a breach of contract action. Lenders today are overwhelmed by the sheer numbers of foreclosures. Many times they miss the deadline for collecting what is owed. Those debtors are the lucky ones; others find themselves served with a lawsuit. Many had to stop paying their mortgage because they lost a job or had other unanticipated financial difficulties. They do not have the funds or the ability to borrow the funds to defend a lawsuit. The lender then gets a default judgment and proceeds to garnish wages and levy on bank accounts, etc. This adds anxiety to a situation that is already extremely stressful. Many debtors have no choice but to file bankruptcy. This is the only way they can get relief.

When a client is not protected by the anti deficiency statute, pursuing a short sale is an opportunity to negotiate the deficiency. Some lenders view Arizona as a non recourse state. Those lenders may release the deficiency even when they are not required to. Other lenders approve the short sale, release the lien and are silent about the deficiency. These lenders have up to six years to pursue the remaining debt. This creates anxiety on the part of clients because they do not know if and when a demand for the debt will come. To relieve anxiety, it is a good idea to ask the lender how much they require to release the remaining deficiency. This creates the opportunity for negotiation. Many times, lenders (and investors) are quite reasonable and take pennies on the dollar to settle. Other times, it is not so easy. As a general rule, a cash payment will be less than if the debtor signs a promissory note. The cash payment, or any part thereof, can come from the debtor, buyer, or real estate agents. If a promissory note is the only option, negotiating a small principal balance with a low or zero percent interest rate is the goal. If the amount the lender is requesting seems unreasonably high, waiting a few weeks or months and trying again sometimes works. The downside is that the buyer gets tired of waiting and may cancel. Then another buyer must be secured as soon as possible. This is all part of putting the puzzle together to complete the transaction.

Many short sale approvals specifically state that the lender may pursue or will pursue the deficiency. Negotiating now rather than later usually benefits the debtor. This assumes that the debtor is not protected by our anti deficiency statute. Too many debtors in recent years are exposing themselves to pursuit of debt when they owe none. These debtors reaffirm the debt even though they don't intend to.

We are confronted with requests for payment from lenders and must be prepared with the appropriate response and action when necessary. Just because a lender seeks payment does not mean they are legally entitled to it under Arizona law. It is imperative to know if and when to negotiate.

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