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DEFICIENCY JUDGMENTS



The mission of Nevada Legal Services is to strengthen the community by ensuring fairness and providing equal access to justice for low-income Nevadans.

www.nlslaw.net

DEFICIENCY JUDGMENTS:

In Nevada, if you go through foreclosure and the sale price is not enough to cover the balance of your mortgage, your lender can come after you for the "deficiency." However, there are limits to the amount of the deficiency judgment and in certain circumstances the lender is prohibited from getting a deficiency judgment.

WHAT IS A DEFICIENCY AFTER FORECLOSURE?

When a lender forecloses on a mortgage, the total debt owed by the borrowers to the lender frequently exceeds the foreclosure sale price. The difference between the sale price and the total debt is called a "deficiency."

SOME DEFICIENCY JUDGMENTS ARE PROHIBITED:

A deficiency judgment is not allowed when all of the following apply:

- the lender is a financial institution (banks, savings and loan associations, credit unions, and thrift companies are examples of financial institutions)
- the loan is a purchase-money loan that has not been refinanced
- the property is a single-family residence owned by the borrowers at the time of the foreclosure sale
- the borrowers have continuously occupied the property as their principal residence, and the loan was obtained on or after October 1, 2009. (Nev. Rev. Stat. § 40.455).

LIMITATION ON DEFICIENCY JUDGMENTS:

In Nevada, a lender may obtain a deficiency judgment within six months following foreclosure, but the amount of the judgment is limited to the lesser of:

- the difference between the total debt and fair market value of the home, or
- the difference between the total debt and foreclosure sale price (Nev. Rev. Stat. § 40.459).

COURT HEARING TO ESTABLISH FAIR MARKET VALUE:

Before awarding a deficiency judgment, the court will hold a hearing to receive evidence from the lender and the borrowers concerning the fair market value of the property as of the date of foreclosure sale. The lender must give the borrower notice of the hearing 15 days prior to the hearing. The court will appoint an appraiser to appraise the property if the lender or borrowers make a request at least 10 days before the hearing date (Nev. Rev. Stat. § 40.457).

THE ONE ACTION RULE:

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 and even where there is a potential deficiency, these actions may still be barred

Unless they meet certain criterion. 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.

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”.

SANDPOINTE DECISION:

On June 10, 2011, NRS 40.459(1)(c) was added to Nevada’s law by Assembly Bill 273, which limits the amount of a deficiency judgment a creditor may obtain after foreclosure where the right to obtain the judgment was transferred from the original lender.

In Sandpointe, the Nevada Supreme Court ruled that Nevada’s new deficiency law, NRS 40.459(1)(c), is only available as a defense to a deficiency lawsuit when the underlying real property was foreclosed upon after the effective date of the statute, or June 10, 2011.

If the underlying real property was foreclosed upon before June 10, 2011, the Nevada Supreme Court concluded that application of NRS 40.459(1)(c) would constitute retroactive application of the statute, which the Nevada Legislature did not clearly intend.

BANKRUPTCY AND DEFICIENCY JUDGMENTS:

Filing for bankruptcy to obtain relief from a deficiency judgment is possible. Under a Chapter 7, all personal liability on the mortgage note is extinguished so that the bank cannot pursue you for any deficiency that may arise from a foreclosure sale.

HOW DEFICIENCY JUDGMENTS ARE COLLECTED:

A deficiency lawsuit is like a lawsuit to recover an unsecured debt, like credit card debt or medical bills. Because the deficiency is exactly that, an unsecured debt. Before the foreclosure, your mortgage was a secured debt you owed your bank a certain amount of money and your home guaranteed repayment. If you failed to pay back your mortgage loan, the bank had the right to sell your home to recoup the debt. After foreclosure, you may still owe your bank some money (the deficiency), but the security (your house) is

No longer securing that debt. The deficiency is now an unsecured debt.

When you originally took out the mortgage you used to buy your home, you signed two documents. One of these documents was a promissory note, in which you promised to repay the mortgage debt to your lender.

The other document was a security agreement (deed of trust), in which you pledged your house as security for the loan. The security agreement gave your lender the right to foreclose. Once the foreclosure is over, the security agreement is no longer in effect. But the promissory note lives on, as does your obligation to repay any remaining debt.

If your lender sues you to recover the deficiency and wins, the court will issue a judgment ordering you to pay off the deficiency. If you ignore this court order, your lender can use the deficiency judgment to place liens on other property that you own, garnish your wages, or freeze your bank accounts.

WHAT TO DO IF YOU CANNOT PAY THE DEFICIENCY:

If you cannot afford to pay back the deficiency and you want to avoid having your wages garnished or your accounts frozen, talk to your lender. See if they are willing to work out a repayment plan with you.

Also, you may want to consider filing for bankruptcy.

If you qualify for Chapter 7 bankruptcy, it could wipe out the deficiency debt, along with many of your other unsecured debts. With a Chapter 13 bankruptcy, you might have to repay just a small portion of the deficiency.

HOW TO AVOID LIABILITY FOR A DEFICIENCY:

If you are behind on your mortgage payments and you do not wish to keep your home, you should contact your mortgage servicer to find out if you are eligible for any foreclosure alternatives, such as a short sale or deed-in-lieu of foreclosure.

Through a short sale, your lender approves the sale of your home for less than you owe on your mortgage. The difference between the sale price and the total debt amount is the deficiency. You must ask for a deficiency waiver as part of the short sale.

Through a deed-in-lieu of foreclosure, you sign your home over to your lender, and in exchange your lender foregoes foreclosure and releases you from your mortgage. The deficiency amount under a deed-in-lieu of foreclosure is the difference between the fair market value of the property and the total debt.

Whether you pursue a short sale or deed-in-lieu of foreclosure, you should try to get your lender to agree in writing to release you from liability for any remaining debt.

PLEASE NOTE: Laws are subject to change. Information contained in this pamphlet is based on laws in effect at date of publication: April 7, 2014.