

Nevada Foreclosure Law – Pre-Foreclosure Checklist

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Pre-Foreclosure Checklist

1. Define the events of default.

(a) Identify all monetary defaults — *e.g.*, Trustor's failure to make payments under the secured note, failure to make payments on any senior obligation, or failure to pay property taxes.

(b) Identify any non-monetary defaults — *e.g.*, Trustor's failure to perform other obligations such as procuring or maintaining insurance, or breach of the covenant of maintenance and repair. *See Manke v. Prautsch*, 81 Nev. 261 (1965), holding that a party claiming breach of the covenant of maintenance and repair must show the security for the debt was impaired.

(c) Was there a transfer of the encumbered property in violation of a "due-on-sale" clause?

(d) Was there an encumbrance of the property in violation of a "due on further encumbrance" clause?

(e) Does the existence of a default trigger other obligations upon acceleration of the debt, such as prepayment penalties?

(f) If a notice of default been recorded under a senior deed of trust, check and calendar the reinstatement period.

2. Check the promissory note choice of law provisions.

Is the choice of law other than Nevada law? For example, if the note is governed by California law, determine the likelihood of a deficiency. If a deficiency is likely, a trustee's sale will preclude the beneficiary from obtaining a deficiency judgment under California law. (Cal. Code Civ. Proc. §580(d)) The pros and cons of a judicial foreclosure should be weighed.

3. Identify the holder of the note.

(a) Does the beneficiary have in its possession the originally executed note?

(b) Check for a recorded assignment of the deed of trust.

4. Check the deed of trust notice and cure provisions.

The deed of trust may contain special notice requirements or cure periods which are in addition to the statutory notice requirements and reinstatement period.

5. Obtain a trustees sale guaranty to determine who is entitled to receive the notice of default.

(a) NRS 107.080(3) requires that both the trustor and the person who holds record title must be noticed.

(b) NRS 107.090(3) and (4) provide that the notice of default and notice of sale must be mailed to persons recording a request for notice and subordinate lienholders.

(c) Is there a guarantor or surety? NRS 107.095 provides that the notice of default must be given to a guarantor or surety. Failure to properly notice the guarantor releases the guarantor from liability. (NRS 107.095(1))

6. Are there any IRS liens?

If so, the notice of sale must be given to the IRS in order for a junior IRS lien to be terminated. (26 USC 7425(c)(1); 26 CFR 301.7425-3) In addition, the IRS can redeem the property for the amount of the successful bid.

7. Does the deed of trust have an assignment or rents provision?

Consider the appointment of a receiver for income producing property.

8. Is the deed of trust an "all-inclusive" deed of trust?

If the answer is yes, this will affect the amount of the credit bid at sale. Bidding more than the beneficiary's "equity" in the note may result in surplus payable (in cash) to junior lienholders and the trustor.

9. Is there an issue regarding the priority of additional advances under the note secured by the deed of trust?

Were any optional future advances made? Does the deed of trust state that it is governed by NRS 106.300 to 106.400, inclusive, to protect the priority of optional future advances from intervening junior liens? Beware of creating surplus by bidding the amount of optional advances which are subordinate to junior liens.

10. Are there any title defects in the beneficiary's security interest?

For example, if the encumbered property was a community property asset of a trustor at the time the deed of trust was executed, did the trustor's spouse also execute the deed of trust? Both spouses must execute the deed of trust to encumber community property under the joint control provisions of NRS 123.230(3).

11. Check for bankruptcy filings.

The bankruptcy court filings should be checked in the jurisdiction in which the real property is located and the jurisdiction of the trustor's residence address, if different. (The recordation of a notice of default or commencement of judicial foreclosure proceedings will violate automatic stay provisions of 11 USC §362.)

12. Is the trustor entitled to protection under the Servicemembers Civil Relief Act?

The Servicemembers Civil Relief Act grants persons serving in the military certain protections where the deed of trust originated before commencement of military service, including invalidating a foreclosure sale held within 90 days after the period of military service. (A knowing violation of the act is a misdemeanor.) (50 App. USC 533 (2003))

13. Environmental matters.

(a) Have the title company check for any superfund liens affecting the encumbered property.

(b) Does the beneficiary have any reason to believe property might be contaminated? If so, does the deed of trust contain an environmental provision (NRS 40.502). A separate action may be brought to enforce an environmental provision. (NRS 40.508 and NRS 40.430(4)(n))

14. Are there any leases of the property?

If so, are the leases senior or junior to the deed of trust? If the leases have been subordinated to the deed of trust, check to see if the subordination is combined with a non-disturbance and attornment agreement.

15. Is the property a unit in a common interest community?

Is the deed of trust subordinate to the declaration? If so, the deed of trust is subordinate to assessments due during the six month period immediately preceding the foreclosure of the assessment lien. (NRS 116.3116(2)(c)).