

NRS 106.210 Limits on Foreclosure

by

Douglas C. Flowers*

As amended in Nevada's 2011 legislative session, NRS 106.210 provides that any assignment of a mortgage or the beneficial interest under a deed of trust (an "assignment") "must be recorded in the office of the recorder of the county in which the property is located..." Prior to the 2011 changes, NRS 106.210 permitted the recording of an assignment, but did not make it mandatory. Now, recordation of assignments is clearly required by the statute. This raises a practical question: what happens if an assignment is not recorded?

Traditionally, an assignee failing to record an assignment probably faced no greater negative consequence for failure to record than some possible added difficulty in convincing a title company to assist in case of a non-judicial foreclosure upon default (given the absence of a public record attesting to the assignee's beneficial interest). This issue still exists under revised NRS 106.210, but another more severe penalty accrues now as well. Specifically, the assignee of an unrecorded assignment faces the prospect of holding an unenforceable security instrument. Whether the security instrument is actually unenforceable seems to turn on whether it is a mortgage or a deed of trust.

Per NRS 106.210(1), an assigned *mortgage* "may not be enforced unless and until the assignment is recorded" as required in NRS 106.210(1). As to assigned *deeds of trust*, the same statute states that "the trustee under the deed of trust may not exercise the power of sale pursuant to NRS 107.080 unless and until the assignment is recorded" as required by the statute. However, NRS 106.210 contains no express prohibition on the enforcement of an unrecorded assigned deed of trust if the enforcement is pursuant to judicial foreclosure. Thus, it appears no recourse to enforcement exists for an "assigned but unrecorded" mortgage, while an "assigned but unrecorded" deed of trust can be enforced, but not in the preferred method under NRS 107.080.

Of course, the foregoing is largely academic. Counsel will almost always advise recordation of an assignment, and if the assignment has not been accomplished at the time enforcement of the underlying instrument becomes an issue, the focus will likely be on completing a belated assignment, not out-maneuvering NRS 106.210. That said, should an

* Douglas C. Flowers is a partner in the firm of Holland & Hart LLP, where he works in the real property and commercial finance practice groups. He is a member of the Real Property Section's executive board, and chairs its real estate finance subcommittee. Though any errors are his alone, the editorial assistance of Karen Dennison, Michael Buckley, and DeArmond Sharp in the preparation of this piece is gratefully acknowledged.

assignee find itself in a position of holding an assigned security instrument for which recording of the assignment is no longer possible (perhaps in case of a legal assignment, the form of which nevertheless fails recording requirements, and the assignor is no longer in existence), some of the initial terror may be assuaged if the underlying instrument is a deed of trust rather than a mortgage, as judicial foreclosure remains an option.