

Seeking A Deficiency After A Short Sale Under NRS 40.458

by

Frank Z. LaForge¹

In 2011 the Legislature amended Nevada’s deficiency scheme in Assembly Bill 414 by adding NRS 40.458, which sets forth the conditions under which a creditor may recover a deficiency in the wake of a short sale. This brief article sorts through this strangely drafted statute by calling attention to its key provisions.

First, by its own terms, the application of NRS 40.458 is strictly limited to short sales involving (i) “a banking or other financial institution” (NRS 40.458(1)(c) and (ii) a purchase-mortgage single-family dwelling that serves as the debtor’s principal residence. (NRS 40.458(1)(b)-(c)).

Second, although at first blush NRS 40.458 appears to represent another limitation on a creditor’s ability to seek a deficiency, on closer examination, it actually operates to limit a debtor’s ability to claim that the creditor has forfeited the opportunity to seek a deficiency after a short sale. In this regard, the creditor is precluded from seeking a deficiency after a short sale only if both of the following conditions are met:

1. The short sale agreement does not expressly state that (i) the debtor will still owe the creditor a particular amount in the wake of the short sale or (ii) the creditor retains the right to recover a deficiency (NRS 40.458(1)(e)(1)); and
2. The short sale agreement contains a “conspicuous statement” that the creditor has waived the right to seek a deficiency. NRS 40.458(1)(e)(2).

In short, NRS 40.458 seems to ensure that creditors will not inadvertently lose their right to seek a deficiency by agreeing to a short sale. Still, one wonders why the Legislature found it necessary to include the first condition—that the short sale agreement not specifically state that the creditor may seek a deficiency—when the second condition—that the creditor must expressly waive that right—seems more than sufficient to protect creditors.

Third, with respect to the conspicuous waiver of the creditor’s right to seek a deficiency, NRS 40.458 requires that the waiver be “acknowledged by the signature of *the debtor or grantor*.” NRS 40.458(1)(e)(2) (emphasis added). It seems possible that that the drafters of the statute meant to require the signature of *the creditor*, since the creditor—and not the debtor—is the party agreeing to waive a right.

¹ Frank Z. LaForge is a commercial litigator with Holland & Hart LLP. He has represented banks in a number of deficiency cases in Nevada.

Finally, the brief legislative history for this statute suggests that the Legislature's underlying motive was to ensure that debtors know whether they might be subsequently liable for a deficiency before they enter into a short sale agreement. It therefore seems strange that NRS 40.458 permits a subsequent deficiency action *unless* there is a conspicuous waiver of *the creditor's right to seek a deficiency judgment*. (The more direct approach would have been to prohibit a deficiency absent a clear reservation of that right, acknowledged by the debtor.) In most cases, the creditor will have little reason to voluntarily waive this right, and, since the short sale cannot proceed without its approval, it seems unlikely that most contracts will include such a waiver. Because a creditor may still seek a deficiency on the basis of a short sale agreement that is completely silent on that issue, NRS 40.458 seemingly leaves debtors in no better shape than before its enactment.