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## Are judicial foreclosures likely to increase in state?

Lance Maiss, 5/28/2012

Since 2009, Nevada has led the charge in the country for providing mediation as a prerequisite to non-judicial foreclosure. That's right — non-judicial foreclosure. So, what about judicial foreclosure? We just might start seeing more of them in the future.

### Foreclosure in Nevada

Nevada provides for two different ways to foreclosure of property: judicial foreclosure and non-judicial foreclosure. A judicial foreclosure involves commencing an action in court for the recovery of amount owed under the defaulted loan. For one year after the foreclosure, a homeowner has the right of redemption to recover the property. The more common method of foreclosure in Nevada is the non-judicial foreclosure, which does involve court action. With the requirement of "power of sale" provisions in trust deeds, lenders typically pursue non-judicial foreclosures as a much faster and less expensive way to go, along with no right of redemption for the homeowner. In either type of foreclosure, should the sale be insufficient to cover the loan amount, a lender may seek a deficiency judgment in accordance with applicable law. Foreclosure mediation

As the real estate market crashed in 2008, Nevada's government acted quickly to pass laws that allow a homeowner to interface with the lender about the mortgage in default, exploring whether any alternatives other than foreclosure are available to the homeowner. Thus, an eligible homeowner could elect mediation, submitting a \$200 fee after receiving a notice of default and election to sell. The lender then kicks in \$200 as well. The total amount of \$400 pays for a mediator. Rules were also put in place requiring, among other things, the homeowner to provide certain financial information and requiring the lender to provide original or certified copies of the documents proving ownership of the mortgage. After mediation is conducted, either side may file a petition for judicial review in court challenging the outcome of the mediation.

### The statistics

According to a Foreclosure Mediation Factsheet provided by the State of Nevada, statistics show that 12,556 mediations were completed as of September 13, 2011. From those mediations, 11,057 did not result in foreclosure. Of the amount that did not result in foreclosure approximately 50 percent (5,578) resulted in some sort of agreement, but 50 percent (5,479) did not. So, what happens to the 50 percent that did not result in a foreclosure or an alternative agreement? Those mortgage defaults often go through the mediation program again or have made their way into court. Certainly, these numbers do show that homeowners have been assisted by the program, whether achieving an alternative to foreclosure or simply buying time until the lender may actually conduct the foreclosure.

### A new wrinkle

One of the problems that surfaced during the mediation process was the inability of lenders to produce the requisite documents for, or otherwise proving, ownership of the defaulting loan. Thus, last October, Nevada added a new wrinkle to the process, passing a law that required lenders to record these requisite documents, under penalty of perjury, along with the notice of default. As a result, notices of default recorded statewide significantly decreased. In turn, the entire mediation and foreclosure process significantly decreased as well — for now.

Judicial foreclosures may look more attractive. It is expected that lenders will be increasing their foreclosure activity in the coming months. However, lenders may now be considering the judicial foreclosure method instead of the non-judicial foreclosure method for several reasons. Here are three. First, there is no required participation in the mediation program and the delay that comes with it. Second, the associated cost of commencing an action first may no longer be that much more than the associated cost of the non-judicial foreclosure process when considering the expenses incurred before, during, and after mediation. Third, lenders and homeowners can still work out an alternative, if available, during the judicial foreclosure process.

Lance Maiss, of counsel in Armstrong Teasdale's Reno office. He practices primarily in business litigation, corporate services, real estate and government relations. Contact him at [lmaiss@armstrongteasdale.com](mailto:lmaiss@armstrongteasdale.com) or 322-7400.

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