



Legal Alert

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Receivership Sales in Arizona

The Arizona Revised Statutes authorize lenders to foreclose on real-property collateral in two ways: (1) non-judicial trustee's sale, or (2) judicial foreclosure.ⁱ Trustee's sales require advance notice of at least 90 days.ⁱⁱ Judicial foreclosures—which require the lender to file and prosecute a lawsuit—typically take even longer.

The delay can be problematic. Perhaps the collateral is at risk for an immediate decrease in value (due to partially complete construction, for example), and the owner who is facing foreclosure lacks sufficient incentive to continue protecting the asset. Or maybe the property is income-producing, with the security interest extending to all proceeds, and the lender is concerned that the owner will pocket the money while the foreclosure is pending.

The interim remedy is a receiver. A receiver is a neutral party appointed to assume control of an asset and act at the court's direction.ⁱⁱⁱ An Arizona statute authorizes courts to appoint receivers "to protect and preserve property or the rights of parties therein."^{iv} Indeed, another statute applies directly to lenders and provides for the appointment of a receiver to protect an interest in income from a property.^v Loan documents often include a contractual right to a receivership, and courts generally enforce such agreements.^{vi} There are certain procedures that lenders must follow to obtain a receivership.^{vii}

One question that often arises is whether a receiver can sell the property to a third party. Owners argue that unlike the federal counterpart—which expressly allows receivership sales^{viii}—the Arizona legislature created only two methods for foreclosing on real-property collateral. Allowing lenders in Arizona to use receiverships to effectively foreclose on collateral is an "end run" on the statute.

Lenders recognize that due to the limited ability to market properties in foreclosure, combined with the expense of interim ownership and the stigma associated with bank-owned properties, private sales often yield greater returns. Receivership is an “equitable” remedy,^{ix} and the underlying purpose is to preserve an asset’s value. Although the applicable rules do not specifically mention selling the property, a receiver may perform “such other duties respecting the property as authorized by the court.”^x

The Arizona appellate courts have not yet tackled this question. Local superior-court judges have reached inconsistent results. The most well-known local precedent in support of allowing receivership sales was the ruling in *LaSalle Bank v. Phoenix Kingdom I, LLC*,^{xi} where the judge allowed a court-appointed receiver to sell several apartment complexes to an investment firm, with the sale proceeds going to the lender. Until there is a definitive published opinion or further direction from the legislature, this question will likely continue to be addressed *ad hoc*.

Please contact us if you need guidance in seeking the appointment of a receiver or otherwise enforcing rights to real-property collateral.

ⁱ A.R.S. §§ 33-721 *et seq.* (foreclosure of mortgage by court action); A.R.S. § 33-810 *et seq.* (sale of property under deed of trust).

ⁱⁱ A.R.S. § 33-808(C)(1).

ⁱⁱⁱ *Stowell v. Arizona Sav. & Loan Ass’n*, 380 P.2d 606 (Ariz. 1963).

^{iv} A.R.S. § 12-1241; *see also* Rule 66, Ariz.R.Civ.P.

^v A.R.S. § 702.

^{vi} *United States v. Queen’s Court Apartments, Inc.*, 296 F.2d 534, 540 (9th Cir. 1961).

^{vii} Rule 66(a, b), Ariz.R.Civ.P.; A.R.S. § 12-1242 (requiring a verified application, supported by an affidavit, with advance notice to the property owner, or substantial cause and a bond for damages if sought without notice).

^{viii} 28 U.S.C. § 2001; *see also S.E.C. v. American Cap. Invest.*, 98 F.3d 1133, 1144 (9th Cir. 1996) (“[T]he power of sale is within the scope of a receiver’s ‘complete control’ of receivership assets.”). Note that federal law governs the issue of whether to appoint a receiver in all federal-court lawsuits, even where jurisdiction is based on the parties’ diversity. *Canada Life Assur. Co. v. LaPeter*, 563 F.3d 837 (9th Cir. 2009). Out-of-state lenders should consider seeking receiverships in federal court.

^{ix} *First Phoenix Realty Investments v. Superior Court*, 841 P.2d 1390, 1391-92 (Ariz.App. 1992).

^x Rule 66(c)(1), Ariz.R.Civ.P.

^{xi} *LaSalle Bank v. Phoenix Kingdom I, LLC*, Ariz. Super. Ct. No. CV2009-007743.