

Foreclosure Disclosures

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Nevada likes to be number one in many areas: gaming, entertainment and dining to name a few. But there is one list where Nevada is less proud to take the top spot: the number of foreclosure filings per household. In September 2007, Nevada reported a foreclosure filing on 1 in 185 households, compared to national filing rate of 1 in 557 households.

Since each notice within the complex foreclosure process constitutes a “filing,” that number does not reflect where in the process the household may be—whether redemption is still a possibility or the courthouse auction is days away. But that number does relate to the increasing number of MLS listings in foreclosure, as well as the number of questions arising as agents struggle to advise their clients of their rights and responsibilities in a sale/purchase transaction. As of this writing, 1,813 listings had “yes” in the foreclosure field, which accounts for 6.25 percent of all active listings.

Most agents’ questions focus on the disclosures that, in a typical transaction, would be provided by the seller. Many bank-owned properties are refusing to provide such disclosures and instead are relying on certain exemptions for “foreclosure” transactions.

When determining whether a client—be it a bank or a natural person—must provide disclosures, a licensee should keep in mind these questions: Who is the seller: a bank or a person? What kind of transaction is it: a negotiated contract purchase, or a courthouse auction? At what point in the foreclosure process is the seller: a few payments behind (perhaps a short sale) or has the home already been turned over to the bank?

Seller’s Real Property Disclosure

Nevada law requires that a seller complete a disclosure form (the SRPD) and serve it on the purchaser at least ten days prior to conveyance. See NRS 113.130(1). There are certain exceptions where an SRPD is not required:

- By foreclosure pursuant to chapter 107 of NRS.
- Between any co-owners of the property, spouses or persons related within the third degree of consanguinity.
- Which is the first sale of a residence that was constructed by a licensed contractor.
- By a person who takes temporary possession or control of or title to the property solely to facilitate the sale of the property on behalf of a person who

relocates to another county, state or country before title to the property is transferred to a purchaser.

The foreclosure exception is interesting. Chapter 107 is the method by which a lender will conduct a trustee’s sale—essentially an auction—and this is the only transaction contemplated by this exemption. It does not include deeds in lieu of foreclosure. In 2003, the legislature deleted an exemption which removed a “foreclosure or deed in lieu of foreclosure” from the SRPD requirements, along with several other exemptions. Legislative debate indicates that the removal of these exemptions arose from the sale properties used as methamphetamine labs.

In 2005, the legislature added the current exemption which balances the urgent nature of an auction on the courthouse steps with the intent of the SRPD to inform the buyer of any known defects or problems in the property.

Even in an auction scenario, banks are not completely off the hook. NRS 113.130(4) requires the trustee and beneficiary of the deed of trust to provide the purchaser “not later than at the time of conveyance” with a written notice of any defects in the property of which the trustee or beneficiary is aware. The specific SRPD form is not required, but written disclosure is required.

The exception clearly does not apply to a property once it has been foreclosed upon and the bank is now the owner. This sentiment was echoed during legislative debate in 2005, which emphasized the difference between the bank selling the property at auction, and selling the home after actually taking title. A buyer may, of course, waive his right to receive an SRPD by signing a written waiver and having it notarized. See NRS 113.130(3). This is frequently a bank’s “out” card on bank-owned property, and buyers’ agents and brokers should advise their clients of the rights which they are giving up, and strongly advise the buyer to obtain a home inspection.

CIC Resale Package

The other hotbed of inquiry is whether a bank must provide a purchaser with a resale package on a bank-owned property. (Who pays for it is a completely separate question; that is negotiable in the purchase contract.) NRS 116.4109(1) requires a unit owner or his authorized agent to provide the purchaser with a resale package obtained from the common interest community (CIC) association.

Unlike other areas of the law, NRS 116 does not lend itself easily to waivers or bending the rules by agreement. NRS 116.1104 is very specific: “except as expressly provided in this chapter, its provisions may not be varied by agreement, and rights conferred by it may not be waived.”

There are extremely narrow circumstances where NRS 116 does not apply: specific exemptions set out in NRS 116.4101(2) or when waived by a purchaser in a common interest community in which all units are restricted to nonresidential use (i.e., a commercial property). That is the only waiver of a resale package allowed by law.

If it is a residential property, then the transaction must fall into one of the following exemptions for a seller to avoid providing a resale package:

- Gratuitous disposition of a unit;
- Disposition pursuant to court order;
- Disposition by a government or governmental agency;
- Disposition by foreclosure or deed in lieu of foreclosure;
- Disposition to a dealer;
- Disposition that may be cancelled at any time and for any reason by the purchaser without penalty; or
- Disposition of a unit in a planned community which contains no more than 12 units (other limitations apply in such a scenario).

So the question becomes, what does “foreclosure or deed in lieu of foreclosure” mean? Does it apply to homes where a bank already foreclosed and is now the seller? Or does it merely apply to auctions and/or the transfer from the homeowner back to the bank by deed?

Courts generally will interpret a statute based on its plain meaning, the context in which words are used, the subject matter and the spirit and object of the law.

It is reasonable to conclude that the resale package exemption applies only to the transfer of property from the borrower back to the bank under a deed in lieu of foreclosure, or in the event of a true foreclosure sale on the courthouse steps. (Courthouse auctions are widely held by the courts to be “as is.”) Any other interpretation frustrates the intent of the legislature in providing a purchaser with information about the CIC and its governance; such intent is made even clearer by the absence of a residential purchaser’s ability to waive receipt of a CIC resale package.

Moreover, consider the five day right to rescind added to NRS 116.4109(2) in 2005. Every purchase agreement must provide such a right. It makes sense, then, that the CIC statutes would apply to a typical, arms-length, negotiated contract rather than an auction where the buyer is not known until the high bid wins.

In other words, once a property reverts back to the bank, the bank then becomes like any other unit owner and is required to provide a resale package to the purchaser.

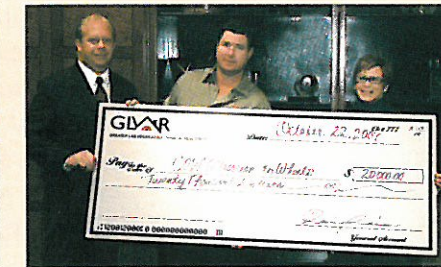
One final thought: in a short sale, although a lender may have final approval of the purchase price, the borrower is still the unit owner/seller and must make all required disclosures, including the CIC resale package. As noted above, payment for the resale package is a negotiable item in the purchase agreement.

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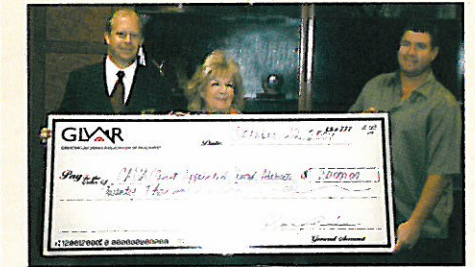
GLVAR’s Annual Golf Tournament raised \$60,000.00 and enabled GLVAR to donate \$20,000.00 to each of these organizations on behalf of our members.



From Left: Jeremy Daugherty, Chairman of Charitable Events & Fundraising Committee, Jason Smith, Variety: The Children’s Charity, and Devin Reiss, President



From Left: Jeremy Daugherty, Chairman of Charitable Events & Fundraising Committee, Devin Reiss, President and Deborah Tarracino, COW (Class On Wheels)



From Left: Jeremy Daugherty, Chairman of Charitable Events & Fundraising Committee, Linda Wade CASA (Court Appointed Special Advocates), and Devin Reiss, President