



Real Estate Finance: Arizona

Clare H. Abel, Burch &
Cracchiolo, P.A.

This Article is published by Practical Law Company on
its ^{PLC}Real Estate web service at
<http://us.practicallaw.com/3-500-5703>.

A Q&A guide to real estate finance law in Arizona.

INSTRUMENT AND EXECUTION

1. Does a mortgage or a deed of trust secure a lien on real property? If it is a deed of trust, who is typically designated as the trustee?

To secure a lien on real property, Arizona law allows for the use of a:

- Mortgage (*Ariz. Rev. Stat. §§ 33-701 to 33-715 (2012)*).
- Deed of trust (*Ariz. Rev. Stat. §§ 33-801 to 33-821 (2012)*).
- Contract for deed to secure a lien on real estate (*Ariz. Rev. Stat. §§ 33-741 to 33-750 (2012)*).

Deeds of trust are used most frequently because they include an opportunity for a non-judicial (power of sale) foreclosure proceeding, which is quicker than a judicial foreclosure (*Ariz. Rev. Stat. §§ 33-807 to 33-816 (2012)*).

A deed of trust is a three-party instrument including:

- The borrower as grantor/trustor.
- The lender as grantee/beneficiary.
- The trustee.

The trustee under a deed of trust is typically either:

- A title company that is authorized to do business in Arizona.
- A servicing agent of the lender.
- An attorney.

The contract for deed, or installment contract for conveyance of land, is a seldom-used device for securing a lien on real property.

The contract for deed provides that the seller retains title to the real property until the purchase price has been paid in full.

2. Describe any laws that would limit a borrower's or guarantor's personal liability for debt secured by real property.

Arizona has anti-deficiency statutes that apply to:

- Deeds of trust (*Ariz. Rev. Stat. § 33-814(G) (2012)*).
- Mortgages (*Ariz. Rev. Stat. § 33-729 (2012)*).

A lender on a purchase money loan on real property is limited to an action against the real property only if the real property is:

- 2.5 acres or less.
- Limited to and utilized for a single one or two family dwelling.

This anti-deficiency limitation applies even if the real property is investment property (*N. Ariz. Prop. v. Pinetop Prop. Group, 725 P.2d 501 (Ariz. Ct. App. 1986)*). However, it does not apply to second mortgages or deeds of trust (*Sw. Sav. and Loan Ass'n v. Ludi, 594 P.2d 92 (Ariz. 1979)*).

3. Are there restrictions on interest rates charged for loans secured by real property?

In Arizona, the usury laws apply to consumer loans. A consumer loan is the direct closed end loan of money in an amount of \$10,000 or less that is subject to a finance charge. The laws do not distinguish between loans that are secured by real property, other property or are unsecured.

Interest rates on home equity loans are limited to:

- A periodic rate corresponding to an annual percentage rate of 36% on that portion of the outstanding balance each monthly billing cycle that is **not** more than \$500.
- A periodic rate corresponding to an annual percentage rate of 24% on that portion of the outstanding balance each monthly billing cycle that is more than \$500.

(*Ariz. Rev. Stat. § 6-632(B) (2012).*)

These restrictions do not apply to federally chartered banks, savings and loans.

4. Are there any requirements for the execution of a mortgage or deed of trust? In particular, please consider if:

- Witnesses are required.
- Specified officers of a corporation (or members of a limited liability company) must execute the security instrument.
- The signatory's name and title must be specified on the signature page.
- A corporate seal is required.
- Signed resolutions must be presented with the security instrument for purposes of recording.
- There are any other important requirements in your state?

WITNESSES

In Arizona, witnesses are not required for the execution of a mortgage or a deed of trust. However, a notary must acknowledge all signatures on an instrument that is to be recorded.

SPECIFIED OFFICERS

Arizona law does not specify that a particular officer of a corporation must sign a real estate security instrument.

SIGNATORY'S NAME AND TITLE

It is customary in Arizona to include the printed name and title of the person signing the real estate lien in the signature block of the instrument, and the name and title of the person executing it in the notary block.

CORPORATE SEAL

If the corporation has a seal it can be, but need not be, affixed to the real estate security instrument.

SIGNED RESOLUTIONS

There is no legal requirement that a signed resolution be attached to a real estate security instrument. However, Arizona title companies customarily require that one be provided to them for their file before recording any instruments.

OTHER REQUIREMENTS

There are no other requirements for executing a deed of trust or mortgage in Arizona.

5. Provide the statutory form of acknowledgment for:

- An individual.
- A corporation.
- A limited liability company.
- A limited partnership.
- A trustee.

These forms are the minimum requirements for a document to be recorded in Arizona. If the document is signed or is to be recorded in another state, the notary may have to provide additional information as required by the other state.

Section 33-506 of the Arizona Revised Statutes provides short forms of acknowledgement. The forms provided below slightly differ from the statutory short forms, but are equally sufficient.

INDIVIDUAL

STATE OF [STATE])
)
 COUNTY OF [COUNTY])

On this [DATE] day of [MONTH], [YEAR], before me personally appeared [SIGNATORY NAME], whose identity was proven to me on the basis of satisfactory evidence to be the person who [he/she] claims to be, and acknowledged that [he/she] signed the [above/attached] document.

[SEAL] [NOTARY SIGNATURE] _____
 Notary Public

CORPORATION

STATE OF [STATE])
)
 COUNTY OF [COUNTY])

On this [DATE] day of [MONTH], [YEAR], before me personally appeared [SIGNATORY NAME], the duly authorized [SIGNATORY TITLE] of [CORPORATION NAME], [Inc./Co./ Corp.], a [STATE OF INCORPORATION] corporation, whose identity was proven to me on the basis of satisfactory evidence to be the person who [he/she] claims to be, and acknowledged that [he/she] signed the [above/attached] document.

[SEAL] [NOTARY SIGNATURE] _____
 Notary Public



LIMITED LIABILITY COMPANY

STATE OF [STATE])
)
 COUNTY OF [COUNTY])

On this [DATE] day of [MONTH], [YEAR], before me personally appeared [SIGNATORY NAME], the [Manager/Managing Member] of [LIMITED LIABILITY COMPANY NAME], L.L.C., a [STATE OF FORMATION] limited liability company, whose identity was proven to me on the basis of satisfactory evidence to be the person who [he/she] claims to be, and acknowledged that [he/she] signed the [above/attached] document for the purposes therein stated.

[SEAL] [NOTARY SIGNATURE]
 Notary Public

LIMITED PARTNERSHIP

STATE OF [STATE])
)
 COUNTY OF [COUNTY])

On this [DATE] day of [MONTH], [YEAR], before me personally appeared [SIGNATORY NAME], as General Partner of the [NAME OF LIMITED PARTNERSHIP] Limited Partnership, a [STATE OF FORMATION] limited partnership, whose identity was proven to me on the basis of satisfactory evidence to be the person who [he/she] claims to be, and acknowledged that [he/she] signed the [above/attached] document for the purposes therein stated.

[SEAL] [NOTARY SIGNATURE]
 Notary Public

TRUSTEE

STATE OF [STATE])
)
 COUNTY OF [COUNTY])

On this [DATE] day of [MONTH], [YEAR], before me personally appeared [SIGNATORY NAME], as Trustee of the [NAME OF TRUST] Trust dated [MONTH] [DAY], [YEAR], whose identity was proven to me on the basis of satisfactory evidence to be the person who [he/she] claims to be, and acknowledged that [he/she] signed the [above/attached] document for the purposes therein stated.

[SEAL] [NOTARY SIGNATURE]
 Notary Public

PRIORITY

6. Describe the relevant statutes granting priority to mechanics' liens.

Arizona law provides lien rights to those who provide labor and materials that add to the value of real property. When performing work at the insistence of the owner (or an agent of the owner), the following have lien rights:

- Original contractors.
- Subcontractors.
- Suppliers.
- Laborers for wages.
- Architects.
- Engineers.
- Land surveyors.

(*Ariz. Rev. Stat. § 33-981 (2012).*)

This privilege **does not** extend to:

- Unlicensed or improperly licensed contractors.
- Unregistered or improperly registered design professionals.
- Suppliers to suppliers.

First, a preliminary 20 day lien notice must be provided to the owner to inform the owner of the identities of all those who might have the right to file a lien against the property (*Ariz. Rev. Stat. § 33-992.01 (2012)*). The preliminary lien notice must be provided no later than 20 days after the claimant first performed labor and furnished materials to the property. Failure to timely provide the notice may result in loss of the lien rights. The specific requirements of the notice are found in *Section 33-992.01* of the Arizona Revised Statutes.

The owner has ten days following receipt of the preliminary 20 day notice to furnish information necessary to correct inaccuracies in the notice or risk losing as a defense, the inaccuracy of that information.

The lien may be filed at any point after there is a balance due and owing but no later than 120 days after either:

- The project is completed.
- The last date any labor or materials were furnished to the site.

The priority of the mechanic's lien relates back to the "first shovel" on the project.

If a Notice of Completion is filed, then the lien must be filed within 60 days of the recording of the Notice of Completion (*Ariz. Rev. Stat. § 33-993 (2012)*).

A suit to foreclose the lien must be filed within six months of the date the lien was recorded or the lien is null and void (*Ariz. Rev. Stat. § 33-998 (2012)*).

Mechanics' liens are **not** permitted:

- Against owner-occupied dwellings (*Ariz. Rev. Stat. § 33-1002 (2012)*).
- Where a payment bond instead of lien rights has been issued and a copy of the contract has been recorded (*Ariz. Rev. Stat. § 33-1003 (2012)*).

7. Are there liens which can supersede the priority of a lender's recorded lien?

Any lien that is recorded before the lender's lien has priority unless it has been specifically subordinated to the lender's lien.

Additionally, regardless of the time of recording, the following liens have statutory priority over a lender's lien:

- Liens for unpaid taxes (*Ariz. Rev. Stat. § 42-1154 (2012)*).
- Agricultural liens on crops (*Ariz. Rev. Stat. § 47-9334 (2012)*).
- Special taxing district liens (*Ariz. Rev. Stat. § 48-3165 (2012)*).
- Racketeering liens for criminal conduct (*Ariz. Rev. Stat. § 13-2314.02 (2012)*).

8. How do lenders maintain the priority of their real property liens over superseding liens, such as real property tax liens and mechanics' liens? In particular, please consider:

- Permanent loans.
- Construction loans with future advances.
- Credit facilities with future advances under revolving lines of credit.

PERMANENT LOANS

In Arizona, to avoid tax liens, some permanent lenders establish escrow accounts from payments by the borrowers to pay taxes directly rather than leave those payments to the borrower.

CONSTRUCTION LOANS

For construction costs, it is customary for the lender to require that a borrower submit "draw requests" that specify the percentage of completion at each request and the lender often retains inspectors who verify the level of completion before payment of any draw.

CREDIT FACILITIES

Arizona's future advances statute relates specifically to future advances made on a loan secured by personal property (*Ariz. Rev. Stat. §§ 47-9323 and 47-9204 (2012)*). For personal property, Arizona law provides that a loan agreement may provide for future advances.

The priority of future advances depends on the terms of the loan agreement. If the advances are a part of the original loan

agreement then everything relates back to the original date the deed of trust is recorded.

If there is a modification of the original deed of trust to allow for additional funds borrowed or loaned, then the terms of the amended deed of trust relate back to the date on which the original deed of trust was recorded, provided the amended deed of trust incorporates the terms and refers back to the original recording date.

If the parties enter into a new loan agreement for the "advances," then the priority is determined by the date of the new deed of trust. The parties can negotiate how future advances will be handled.

The only protection that a lender has in determining its priority is obtaining a title report or a "bring down" to the current date. This does not establish the lender's priority, but it gives the lender a source for recovery if their loan is later determined not to be the most senior loan.

9. What are a landlord's legal rights to a tenant's personal property located in the leased premises? Are these rights governed by statute, common law or contract?

Arizona commercial landlords have a lien on the tenant's personal property found on the leased premises for the amount of rent that is due and unpaid (*Ariz. Rev. Stat. §33-362 (2012)*).

After holding the personal property for 60 days, the commercial landlord may dispose of the tenant's personal property through a sale. The landlord must conduct the sale in accordance with *Sections 47-9609 to 47-9628* of the Arizona Revised Statutes, which includes proper notice of the sale.

In Arizona, it is customary for a lender to take an assignment of rents and to file a UCC-1 financing statement with the Arizona Secretary of State's Office. The UCC-1 perfects the lender's lien against any personal property located on or within the real property, including fixtures. This filing is in addition to the recording of its lien by deed of trust or mortgage in the county recorder's office where the real property is located.



MORTGAGE RECORDING TAXES

10. Is there a mortgage recording tax (or similar tax)? If so:

- What is the rate and how is the tax calculated?
- Can a loan or refinance be structured to reduce the tax?
- Is the tax payable on making a loan secured by real property or perfecting a lien on real property?
- Is there any type of real property or transaction that is exempt from a mortgage recording tax (or similar tax)?
- Are there any other state or local taxes or fees imposed on the grant, perfection or enforcement of a security interest in real property? Are there any exceptions?

RATE AND CALCULATION

There is presently no recording or mortgage tax in Arizona.

STRUCTURE

There is presently no recording or mortgage tax in Arizona.

PAYMENT

There is presently no recording or mortgage tax in Arizona.

EXEMPTION

There is presently no recording or mortgage tax in Arizona.

OTHER TAXES AND FEES

There are nominal fees imposed by each county to cover the costs of recording documents. While the fees vary, they are typically either a flat fee or an initial fee with additional fees for each page over a fixed number of pages.

TITLE INSURANCE

11. Are title insurance premiums or service charges for lenders' title insurance policies regulated? Are the costs of title insurance negotiable within a specified range of rates? Are there any discounts available for reissued policies?

Title insurance companies are regulated by:

- The *Arizona Department of Insurance* for any insurance issued.
- The *Arizona Department of Financial Institutions* for their role as an escrow agent.

Rates must be provided to and are published by the State of Arizona. There is little or no ability to negotiate those rates. Discounts are not available for reissued policies, as these rates are posted as well.

12. Provide a list and brief description of the title insurance endorsements available to lenders?

Each title insurer and underwriter has its own list of endorsements that it may extend on a given transaction. However, it is customary in Arizona to begin with an American Land Title Association (ALTA) owner's policy and, where applicable, a lender's policy. The insurer's willingness to issue additional endorsements varies from transaction to transaction.

Endorsements that have been utilized in Arizona transactions include but are not limited to:

- Zoning (Unimproved Land/Completed Structure) (ALTA Form 3).
- Environmental Protection Lien (ALTA Form 8).
- Restrictions, Encroachments, Minerals (Owner's, Lender's Unimproved Land, Improved Land) (ALTA Form 9).
- Leasehold (ALTA Form 13).
- Future Advance (ALTA Form 14).
- Access (ALTA Form 17).
- Tax Parcel (ALTA Form 18).
- Contiguity (ALTA Form 19).
- Survey (ALTA Form 25).
- Subdivision (ALTA Form 26).

These forms are available on ALTA's *website* (subscription required).

Arizona does not regulate the type or extent of endorsements that a title insurer may issue. Endorsements are negotiable on a case-by-case basis.

In Arizona, title insurance is regulated by the *Arizona Department of Insurance*. Their actions as an escrow agent are regulated by the *Arizona Department of Financial Institutions*.

13. How is gap coverage (the time between closing the loan and actually recording the lien) typically handled by the title insurance companies?

The title insurance company ordinarily assumes this risk and requires the borrower to:

- Provide an affidavit.
- Indemnify against intervening liens.

FORECLOSURE

14. Describe the foreclosure process available and the typical timing for the process. Are there any significant costs of or impediments to foreclosing a lien on real property?

Deeds of trust are typically foreclosed in Arizona by a non-judicial trustee's sale. However, the loan documents may provide the lender with an opportunity to elect to foreclose through a judicial proceeding.

The non-judicial trustee's sale is applicable only to deeds of trust. A mortgage or contract for deed to secure a lien on real estate must be foreclosed through a judicial proceeding.

In the non-judicial trustee's sale, at least 90 days before the date of sale, the trustee provides by registered or certified mail a:

- Statement of Breach or Nonperformance and Election to Sell.
- Notice of Sale that includes:
 - the sale date, time and place; and
 - a description of the property to be sold.

A notice of foreclosure is also published at least four consecutive weeks before the sale in a newspaper of general circulation in the county in which the property is located, with the last publication not less than ten days before the sale.

The notice must be posted in a:

- Conspicuous place on the property at least 20 days before the sale.
- Location in the county where public notices are posted (typically at the county courthouse).

(*Ariz. Rev. Stat. § 33-808 (2012).*)

The non-judicial process ordinarily takes approximately 90 to 120 days.

15. Describe any significant costs of or impediments to foreclosing a lien on real property.

The costs associated with a non-judicial foreclosure proceeding include:

- Preparation of documents and conduct of the sale.
- Costs of publication.
- Mailing and posting costs.
- Cost of a trustee's sale guarantee, if one is purchased from a title insurance company.

A judicial proceeding takes significantly longer than the non-judicial proceeding and includes costs such as:

- Filing fees.
- Court costs.
- Attorneys' fees associated with filing and defending a lawsuit.

FOREIGN ENTITIES

16. Are there any permissions, approvals or licenses specifically required for foreign banks (or other foreign lenders) to make loans secured by real property?

There are no specific requirements, approvals or licenses for foreign lenders to make loans secured by real property located in Arizona provided the foreign lender is not transacting other business in Arizona.

However, a foreign entity must be authorized to do business in Arizona to avail itself of Arizona courts (*Ariz. Rev. Stat. §§ 10-1502 and 29-809 (2012).*)

A foreign entity may register to do business in Arizona with the *Arizona Corporation Commission*. If the foreign entity is also a regulated financial institution, it may be required to comply with the requirements of the *Arizona Department of Financial Institutions*.

Practical Law Company provides practical legal know-how for law firms, law departments and law schools. Our online resources help lawyers practice efficiently, get up to speed quickly and spend more time on the work that matters most. This Article is just one example of the many resources Practical Law Company offers. Discover for yourself what the world's leading law firms and law departments use to enhance their practices.

Contact Us

PRACTICAL LAW COMPANY®

Practical Law Company
747 Third Avenue, 36th Floor
New York, NY 10017
646.562.3405
plcinfo@practicallaw.com
www.practicallaw.com