

State of Arizona  
Senate  
Forty-ninth Legislature  
Second Regular Session  
2010

# SENATE BILL 1202

AN ACT

AMENDING SECTION 33-812, ARIZONA REVISED STATUTES; RELATING TO DEEDS OF TRUST.

(TEXT OF BILL BEGINS ON NEXT PAGE)

1 Be it enacted by the Legislature of the State of Arizona:

2 Section 1. Section 33-812, Arizona Revised Statutes, is amended to  
3 read:

4 33-812. Disposition of proceeds of sale

5 A. The trustee shall apply the proceeds of the trustee's sale in the  
6 following order of priority:

7 1. To the costs and expenses of exercising the power of sale and the  
8 sale, including the payment of the trustee's fees and reasonable attorney  
9 fees actually incurred.

10 2. To the payment of the contract or contracts secured by the trust  
11 deed.

12 3. To the payment of all other obligations provided in or secured by  
13 the trust deed and actually paid by the beneficiary before the trustee's  
14 sale.

15 4. To any condominium association or planned community association as  
16 defined in chapter 9 or 16 of this title that had a subordinate lien as  
17 provided by law, even if the trustee intends to deposit the balance pursuant  
18 to subsection C of this section. The trustee may pay an association's lien  
19 on receipt of a written claim and shall be discharged from any liability for  
20 any payment made in good faith. The trustee may inquire as to the existence  
21 of a lien if there is a recorded declaration on the property without regard  
22 to whether a lien has been recorded. Any person who is an applicant or  
23 respondent pursuant to subsection H of this section may require the  
24 condominium association or planned community association to prove its  
25 entitlement to any funds received from the trustee. An association that  
26 demonstrates that the amount it received from the trustee was proper in all  
27 material respects is entitled to an award of its reasonable attorney fees and  
28 court costs against the applicant or respondent who contested the payment.  
29 If the applicant or respondent against whom the association's award is  
30 entered is entitled to excess proceeds of the sale, the award of attorney  
31 fees and costs shall be payable from those excess proceeds.

32 5. To the junior lienholders or encumbrancers in order of their  
33 priority as they existed at the time of the sale. After payment in full of  
34 all sums due to all junior lienholders and encumbrancers as of the date of  
35 the sale and excluding any postsale attorney fees, payment shall be made to  
36 the trustor, except that if the trustor has sold or transferred the property  
37 to another owner before the trustee's sale, payment shall be made to the  
38 person who is the owner of record at the time of the trustee's sale.

39 B. After application of the proceeds pursuant to subsection A,  
40 paragraphs 1, 2 and 3 of this section, if there are additional proceeds to be  
41 distributed, the trustee, within fifteen days of the completion of the  
42 trustee's sale, shall mail by first class mail and by certified or registered  
43 mail, postage prepaid, TO ALL KNOWN ADDRESSES a notice of any excess proceeds  
44 to the trustor as of the date of the recording of the notice of sale. The

1 trustee may deduct the costs of mailing the notice of excess proceeds from  
2 the additional proceeds.

3 C. In the trustee's discretion and instead of any one or more of the  
4 applications specified in subsection A of this section, the trustee may elect  
5 to deposit the balance of the proceeds with the county treasurer in the  
6 county in which the sale took place pending an order of the superior court in  
7 the county. On deposit of the balance of the monies and after complying with  
8 subsection D of this section, the trustee shall be discharged from all  
9 responsibility for acts performed in good faith according to this chapter.  
10 The county treasurer shall reject any deposit that does not comply with  
11 subsection D of this section.

12 D. If the trustee elects to deposit the balance of the sale proceeds  
13 as prescribed by subsection C of this section, the trustee as plaintiff shall  
14 commence a civil action in the superior court in the county in which the sale  
15 occurred. The action shall name the applicable county treasurer as the  
16 defendant, but the county treasurer has no obligation to respond to the  
17 complaint or appear in the action. The trustee shall mail by certified or  
18 registered mail, with postage prepaid, a conformed copy of the complaint that  
19 displays the filing stamp of the court clerk to the county treasurer and all  
20 persons, other than the beneficiary, who are entitled to notice pursuant to  
21 section 33-809 and to any other person known by the trustee to have an  
22 interest of record in the property at the time of the sale. **THE CONFORMED**  
23 **COPY SHALL BE MAILED TO ALL KNOWN ADDRESSES FOR THOSE PERSONS WHO ARE**  
24 **REQUIRED TO RECEIVE NOTICE PURSUANT TO THIS SUBSECTION.** The trustee shall  
25 incorporate in or attach to the complaint:

26 1. A copy of any one of the following:

27 (a) The trustee sale guarantee and all amendments or endorsements  
28 obtained by the trustee.

29 (b) The title search used by the trustee in connection with the  
30 trustee's sale of the subject property and all amendments or endorsements  
31 obtained by the trustee.

32 (c) A detailed description of the liens and encumbrances used by the  
33 trustee in connection with the trustee's sale of the property.

34 2. A copy of the list of the persons and each of the **KNOWN** addresses  
35 to which the complaint will be mailed.

36 3. A detailed description of any disbursements made by the trustee  
37 pursuant to this section.

38 4. A narrative description of the liens and encumbrances as shown in  
39 the trustee's sale guarantee, title report or detailed description, including  
40 an analysis of the apparent priority of potential claimants. The trustee  
41 shall not be liable for any error in the narrative description or analysis.

42 E. The trustee may withhold from the proceeds of the sale a reasonable  
43 trustee's fee and reasonable attorney fees actually incurred and the costs of  
44 filing the complaint, depositing the proceeds and mailing the notices.

1 F. Upon filing the complaint AND FILING THE SUBSEQUENT CERTIFICATE OF  
2 MAILING FOR THE COMPLAINT WITH THE CERTIFIED MAILING RECEIPTS OF THE  
3 ADDRESSEES, the trustee as plaintiff is discharged without prejudice from the  
4 proceedings.

5 G. Any person with a recorded or other legal interest in the property  
6 at the time of the sale may apply for the release of the proceeds by filing  
7 an application for distribution in the civil action that was filed by the  
8 trustee pursuant to subsection D of this section. The applicant shall mail  
9 postage prepaid by any form of mail that requires a signed and returned  
10 receipt a copy of the application to the county treasurer and all persons at  
11 each of the addresses named on the list of persons that is incorporated in or  
12 attached to the complaint AND TO ANY OTHER ADDRESS OF THE PERSONS THAT IS  
13 KNOWN TO OR ASCERTAINED BY THE APPLICANT OR THE APPLICANT'S AGENT. THE  
14 MAILING OF THE APPLICATION TO EACH INTERESTED PARTY SHALL OCCUR WITHIN THREE  
15 BUSINESS DAYS AFTER THE FILING OF THE ORIGINAL APPLICATION WITH THE  
16 COURT. On return of the signed receipt or the undelivered or unclaimed  
17 original envelope, the applicant shall file with the court an affidavit that  
18 states that the application was mailed to the person and that the application  
19 was either:

20 1. Received, as evidenced by the receipt. The applicant shall attach  
21 to the affidavit a copy of the receipt.

22 2. Not received, as evidenced by the returned envelope. The applicant  
23 shall attach to the affidavit a copy of the original unopened and undelivered  
24 or unclaimed returned envelope. IF THE RETURNED ENVELOPE WAS MARKED WITH A  
25 NEW FORWARDING ADDRESS, WITHIN TEN BUSINESS DAYS AFTER RECEIPT OF THE  
26 ORIGINAL RETURNED ENVELOPE THE APPLICANT SHALL:

27 (a) SEND BY CERTIFIED MAIL A COPY OF THE APPLICATION TO THE NEW  
28 FORWARDING ADDRESS.

29 (b) FILE A SECOND AFFIDAVIT OF MAILING WITH THE COURT.

30 (c) MAIL A COPY OF THE SECOND AFFIDAVIT TO ALL PARTIES INDICATING THAT  
31 THE APPLICATION WAS MAILED TO THE FORWARDING ADDRESS.

32 (d) CONTINUE SERVICE OF THE APPLICATION PURSUANT TO THIS PARAGRAPH  
33 UNTIL THE ORIGINAL, UNOPENED AND UNDELIVERED ENVELOPE IS RETURNED WITHOUT ANY  
34 FORWARDING ADDRESS.

35 H. WHEN MAILING TO ALL KNOWN ADDRESSES OF A BUSINESS OR FINANCIAL  
36 INSTITUTION WITH AN INTEREST OF RECORD IN THE PROPERTY, THE TRUSTEE OR  
37 APPLICANT SHALL ONLY BE REQUIRED TO MAIL TO THE PRIMARY ADDRESS OF THE  
38 BUSINESS OR FINANCIAL INSTITUTION AS RECORDED WITH THE CORPORATION  
39 COMMISSION.

40 ~~H.~~ I. Any person who receives the application or who claims a right  
41 to the proceeds may file a response to the application within ~~thirty~~  
42 FORTY-FIVE days of the LATEST mailing of the application. The person filing  
43 a response shall mail a copy of the response to each applicant. Within ten  
44 calendar days from the date the response is mailed, an applicant may file  
45 with the clerk and mail to each respondent a reply to the response. On

1 expiration of the time for filing a reply, an applicant shall provide the  
2 court with postage prepaid business envelopes that are addressed to all  
3 persons who are entitled to receive copies of the complaint pursuant to  
4 subsection D of this section. If an association with a claim is not paid by  
5 the trustee pursuant to subsection A, paragraph 4 of this section and is  
6 required to file an application or response pursuant to this subsection in  
7 order to recover proceeds, the association may request from the excess  
8 proceeds of the sale an award of its reasonable attorney fees and costs  
9 incurred.

10 ~~I.~~ J. Except as provided in subsection L of this section, the court  
11 shall issue an order to the county treasurer to release the proceeds  
12 deposited with the county treasurer to the party entitled to receive them  
13 after applying the priorities prescribed by subsection A of this section. On  
14 notice to all persons who have received a copy of the complaint or who have  
15 filed a responsive pleading, the court may, and if there are competing claims  
16 to the proceeds, the court shall, hold a hearing to determine entitlement to  
17 the proceeds. Every applicant or respondent shall acknowledge the existence  
18 of any apparent lien, encumbrance or interest that could have priority over  
19 the applicant or respondent. If the court finds that a person other than an  
20 applicant or respondent has a superior right to receive the proceeds, the  
21 court shall not issue an order on the proceeds until one hundred eighty days  
22 from the date the complaint was filed. At any time before the expiration of  
23 the one hundred eighty day period, an applicant or respondent may move for a  
24 hearing to determine whether the claimed superior right is valid or  
25 enforceable and whether the claim is entitled to receive priority over the  
26 claim of the applicant or respondent. The motion shall set forth the  
27 specific facts and evidence that support the applicant's or respondent's  
28 position and shall be mailed to all persons who have received a copy of the  
29 complaint or filed a responsive pleading. If a response is not filed within  
30 the one hundred eighty day period by the person found by the court to have a  
31 superior right to receive the proceeds, the court shall enter an order in  
32 favor of any applicant or respondent entitled to the proceeds. On release of  
33 the proceeds, the county treasurer may assess and deduct from the proceeds a  
34 reasonable fee not to exceed one hundred dollars for the treasurer's costs  
35 associated with the civil action.

36 ~~J.~~ K. Within ninety days after completion of the sale, the trustee  
37 shall apply the proceeds of the sale pursuant to subsection A of this section  
38 or shall deposit the proceeds with the treasurer pursuant to subsection C of  
39 this section. If the trustee fails to comply with this subsection, the  
40 trustee forfeits any entitlement to the fees and costs prescribed in  
41 subsection E of this section and shall pay interest at the rate provided for  
42 judgments pursuant to section 44-1201 from the date of completion of the sale  
43 until the trustee complies with this subsection. Any person with a recorded  
44 or other legal interest in the property at the time of the sale may commence  
45 a civil action against the trustee for the trustee's failure to comply with

1 this subsection. The court may award the prevailing party its reasonable  
2 attorney fees and costs incurred in that civil action.

3 ~~K.~~ L. Excess proceeds deposited with the county treasurer pursuant to  
4 subsection C of this section are presumed abandoned if the monies remain with  
5 the treasurer for at least two years from the date of deposit and there is no  
6 pending application for distribution.

7 ~~L.~~ M. Excess proceeds that are fifty dollars or less and that are  
8 presumed abandoned under this section shall be transferred to the county  
9 general fund. No further application for distribution by any applicant or  
10 claim by the department of revenue may be made on these monies.

11 ~~M.~~ N. For all excess proceeds that are greater than fifty dollars and  
12 that are presumed abandoned under this section, the county treasurer shall  
13 submit a report to the department of revenue pursuant to section 44-307. The  
14 county treasurer may assess and deduct from the proceeds a reasonable fee of  
15 not more than fifty dollars for the treasurer's costs associated with  
16 reporting each deposit.

17 ~~N.~~ O. The county treasurer shall be discharged from all claims and  
18 responsibility for acts performed in good faith pursuant to this chapter  
19 after remitting the presumed abandoned excess proceeds to the department of  
20 revenue pursuant to section 44-308.

21 ~~O.~~ P. A claimant may enter into an agreement with a third party to  
22 pay for the recovery of or for assistance in the recovery of excess proceeds  
23 on deposit with the county treasurer. The agreement shall be in writing,  
24 signed by the claimant, and the claimant's signature shall be acknowledged by  
25 a notary public or other person authorized to accept an acknowledgment  
26 pursuant to section 33-511. Any agreement entered into before the expiration  
27 of thirty days after the date the trustee's sale was held, but not including  
28 the date of the sale, is void and unenforceable. Any fee or payment provided  
29 for in an agreement shall be reasonable. The fee or payment shall be  
30 presumed to be unreasonable and the obligation to pay the fee or payment is  
31 unenforceable if the fee or payment agreed on exceeds two thousand five  
32 hundred dollars excluding attorney fees and the costs of filing the claim and  
33 providing the statutorily required notices. Any person seeking a fee or  
34 payment exceeding two thousand five hundred dollars may apply to the court  
35 for additional compensation but the person has the burden of establishing  
36 that the additional compensation is reasonable under the circumstances. This  
37 subsection does not preclude a claimant from contesting the reasonableness of  
38 any fee or payment that is provided for in an agreement for the recovery of  
39 or for assistance in the recovery of excess proceeds.