



Bidder Beware

Deciphering the Utah Trust Deed Act



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Non-judicial foreclosure through the Utah Trust Deed Act is the mechanism preferred by lenders foreclosing on real property in Utah, and it's easy to understand why the non-judicial process outlined in the act is preferred over the more expensive and slower alternative of judicial foreclosure. However, lenders should be aware of at least one pitfall that can be encountered under the act when a lender assumes the value of its bid at the trustee's sale is of no legal significance. This assumption is a dangerous one. Instead, the better practice is for the lender who bids at the trustee's sale to recognize the bid is a legally significant act that will be treated as the legal equivalent of cash under the act.

With that said, let's interpret the Utah Trust Deed Act and highlight some practical solutions for lenders to avoid forfeiting their right to recover a deficiency judgment.

Paying the Price

A lender must remember that a purchaser at the trustee's sale who

makes the highest bid—whether that person is a third-party or the lender itself—is required to pay the price bid.

When the lender (or beneficiary) bids at the trustee's sale, the lender is bidding in "credits" based on the underlying obligation, and can bid with these "credits" up to the amount owing on the loan as of the date of the sale, plus advances for taxes, insurance and maintenance of the trust property, if any. Once the bidding is concluded, the purchaser at the trustee's sale is required to pay the price bid to the trustee.

When this happens, the trustor's obligation on the underlying note is reduced by the amount of the proceeds generated at the trustee's sale. Importantly, the act does not distinguish between the lender and any other bidder. Rather, the proceeds from the winning bid are applied, among other things, to pay the obligation secured by the trust deed, without regard to whether those proceeds are in the form of "credits" derived from the lender's winning bid or cash derived from a third-party's winning bid.

Understanding State Statute

If, and only if, the funds yielded from the trustee's sale are insufficient to cover the deficiency between the amount due and owing on the underlying obligation, should the lender file an action to recover "the balance due upon the obligation for which the trust deed was given as security ..." This statute has confused some because it states that a court may not enter a "judgment for more than the amount by which the amount of indebtedness ... exceeds the fair-market value." However, it's important to remember that this provision is intended to protect a debtor from a lender underbidding at the trustee's sale, which would result in a larger deficiency.

This provision does not isolate fair market value as the only factor to consider when determining if a deficiency exists. Rather, the court, pursuant to the plain language of the act, will apply the cash (if the winning bidder is a third-party) or the credit (if the winning bidder is the lender) to the amount due and owing under the promissory note. There can be no deficiency when the lender has credit bid the full amount of the underlying obligation, and a lender who sues for a deficiency after making a full credit bid will be held liable for the borrower's attorney fees if such an action is brought.

Other jurisdictions applying statutes substantially similar to the act have described this as the "full credit bid rule." While Utah courts have not yet used this specific verbiage, it's clear the "full credit bid rule" is operational through simple application of the plain language of the act. It is a mistake to think the act allows a court to award the lender the difference between the amount owed and the fair-market value without regard to the amount bid at the foreclosure sale.

The Bottom Line

A lender who bid with credits at the trustee's sale must be careful when selecting the amount of their bid. If a lender desires to obtain a deficiency judgment, then he or she should make a reasonable effort to value the real property and then make a bid that is commensurate with that value.

Even if there are no other bidders at the trustee's sale, as is common, when the value of the property is less than the amount of the underlying obligation, a lender should avoid asserting a bid equal to the full amount of the underlying obligation, because the bid asserted is an irrevocable offer that the court will treat the same as cash. **UB**