

NATIONAL MORTGAGE SERVICER'S REFERENCE DIRECTORY

NEW HAMPSHIRE

by Thomas Haughey and Mark Lamper
Haughey, Philpot & Laurent, P.A.

NOTE: There are TWO new MANDATORY topics for Chapter 1 - Deed-In-Lieu of Foreclosure and Forbearance Agreements. Scroll down and provide a brief summary for each topic, including relevant info for your state concerning each topic. Or, if you've already discussed one or both of these topics, please consider if there is additional information you could include that servicers would find helpful. Keep in mind that this information may later be excerpted for a separate "Loss Mitigation Guide" that servicers have requested.

STATUTE OF LIMITATIONS

Actions for the recovery of real estate in New Hampshire must be commenced within 20 years from the date the right of action accrued [N.H. RSA 508:2]. This provision is applicable to mortgage foreclosures [*Jenot v. White Mountain Acceptance Corp.*]. However, foreclosure actions are equitable actions, and the full statutory period may not be allowed if *laches* (unreasonable and prejudicial delay) is proven. *Id.*

See the section of this summary titled *Deficiency Suits* for New Hampshire's statutes of limitations pertaining to those matters.

DOCUMENTS DESIRED TO COMMENCE FORECLOSURE

Originals or copies of the note, mortgage, assignments, title policy, and breach letters.

BREACH LETTERS

New Hampshire has no statutory provisions dictating the method of sending, or the contents of first mortgage breach letters. However, the acceleration provisions of the conventional mortgage widely used in New Hampshire mandates that breach letters specify the nature of the default, the action required to cure the default, a date, not less than 30 days from the date of the mailing, by which the default must be cured, and that failure to cure the default on or before the date specified may result in the acceleration of the sums secured by the mortgage

and a sale of the mortgaged premises. The notice shall further inform the mortgagors of their right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of the mortgagors to acceleration and sale.

New Hampshire RSA 397-A:16-a,XI provides, regarding second mortgages (and thirds, fourths, and so forth), that certified-mail notice be sent not less than 15 days prior to the commencement of foreclosure, notifying the mortgagors of the mortgage holder's intention to foreclose, and specifying the amount of principal, interest, and other indebtedness, if any, owing and accruing under the mortgage and note (or equity access agreement, etc.).

FORECLOSURE SYNOPSIS

Almost all foreclosures in New Hampshire occur nonjudicially. The judicial process is used only if the subject mortgage does not contain a power of sale, or there is some other unusual problem. A typical nonjudicial foreclosure can be accomplished in 65 days.

While foreclosures in the state of New Hampshire are authorized by statute [New Hampshire RSA 479:25-27], they are greatly influenced by case law. Under this framework, a mortgagee executing a power-of-sale provision contained in a mortgage is not only bound by the procedural requirements set forth in the statutes, but also by such duties as the exercise of good faith and due diligence in the performance of the foreclosure sale, as articulated in *Murphy v. Financial Development Corp.*, 126 NH 536, 495A.2d 1245 (1985).

NOTICE

RSA 479:25 provides the statutory requirements for notice to both the mortgagor and the public at large. Notice of the sale must be published once a week for 3 successive weeks in a newspaper that is generally circulated within the town where the property is situated.

The first publication of the foreclosure notice must be at least 21 days before the date of the sale. In addition, a copy of the notice must either be served upon, or mailed by certified mail to, each mortgagor at his last known address at least 26 days prior to the date of sale. The notice must also be sent to any person who has a lien on the mortgaged premises, so long as the lien is recorded at least 30 days before the final scheduled date of sale. Such notice to lien holders must be served or sent at least 21 days before the sale date.

The statute also specifically sets out the essential elements that must be included in the notice. First, the notice must provide the date, time, and place of sale, including the town, county, and street address. It must include the date of the mortgage, the volume and page of the mortgage, and in what registry of deeds the mortgage is recorded. This information is provided so that any person interested in examining the mortgage documents may do so. The notice must also set out the terms of the sale. The terms should state the dollar amount of the deposit required by interested purchasers in order to participate in the sale, and in what form

such payment must be made (i.e., cash, certified check, or other form of payment satisfactory to the mortgagee). Furthermore, it is prudent to provide that the mortgaged premises will be sold “as is” in all respects, including, but not limited to, physical condition of the premises, and subject to the rights, if any, of any occupants of the premises. Also, it is good practice for the mortgage holder to reserve the right to waive or amend any of these terms at its discretion at the time of the sale.

Lastly, RSA 479:25 prescribes the following statutory language that must be included in any notice of sale: “You are hereby notified that you have a right to petition the superior court for the county in which the mortgaged premises are situated, with service upon the mortgagee, and upon such bond as the court may require, to enjoin the scheduled foreclosure sale.”

The statute further provides that if the mortgagors, or any and all persons, firms, corporations, or others claiming by, from, or under them fail to institute such petition and properly complete service upon the mortgagee before the scheduled sale, any such actions shall be barred, based upon the validity of the foreclosure.

DEATH OF OWNER

As stated above, a mortgage holder foreclosing on a New Hampshire mortgage must serve notice of the foreclosure via certified mail upon all mortgagors of the mortgage. The statute defines “mortgagors” to include all current owners of the mortgaged premises. Therefore, if a mortgagor is deceased, a probate proceeding may be necessary to establish the identity of the current owner(s) of the property and the identity of a personal representative of the estate. New Hampshire RSA 556:1 prohibits commencement of actions against administrators within 6 months of the original grant of administration. Although technically a nonjudicial foreclosure action may not be deemed to be an action, the obvious intent of such statute, together with circumstances of a recent death, would seem to make unadvisable commencement of a nonjudicial foreclosure against personal representatives or heirs of a recently deceased mortgagor sooner than 6 months after the appointment of an initial administrator or executor of a mortgagor’s estate.

DEED-IN-LIEU OF FORECLOSURE [NEW CATEGORY]

[Authors: Briefly summarize relevant rules, statutes, and case law regarding **deeds-in-lieu of foreclosure**. Also, please include any additional information concerning deeds-in-lieu that servicers would find helpful in your state.]

FORBEARANCE AGREEMENTS [NEW CATEGORY]

[Authors: Please discuss the nuances of **forbearance agreements** in your state, including post-agreement servicing requirements and best practices, and summarize any other information regarding such agreements that is important in your state.]

SALE AT AUCTION

The foreclosure auction sale must take place on the mortgaged premises, unless another place was specified in the mortgage.

The foreclosure auction may either be performed by a professional auctioneer, or by counsel for the mortgagee. Mortgage servicers must comply with the oft-repeated rule that a mortgagee executing a power of sale is bound by both the statutory procedural requirements and a duty to protect the interests of the mortgagor through the exercise of good faith and due diligence. A mortgagee, therefore, must exert every reasonable effort to obtain a fair and reasonable price under the circumstances. [*Reconstruction Finance Corp. v. Faulkner*, 101 N.H. 352, 361; 143A.2d 403, 410 (1958)]

What constitutes a fair price determines whether the mortgagee must establish an upset price, adjourn the sale, or make other reasonable efforts to assure a fair price, depending on the circumstances [*Murphy, supra.*].

Every aspect of the auction promotion and sale must be commercially reasonable. Ads should be run in the “real estate for sale” section of local newspapers to generate third-party interest in the sale. An upset price based upon a recent appraisal should be set via the mortgage holder’s bid. New Hampshire courts have avoided establishing a formula for fair value. Certainly 100 percent of current, fair market value is a safe figure. Logically, a mortgage holder should be permitted to deduct from fair market value, anticipated costs of holding and reselling the property, and perhaps a risk factor. Generally, 85 percent of fair market value is thought to be safe, with 70 percent thought to be borderline.

At the auction, appropriate written notices should be given to bidders concerning radon gas, lead paint, etc. as indicated in RSA 477:4 a, c, and d. Also, if the property being sold is a condominium, a written notice should be given to bidders of their right to obtain RSA 356-B:58 information from the condominium owners association, and the high bidder should be required to sign a receipt of such notice.

Common practice is to have a memorandum of sale prepared in advance of the auction. This memorandum may specify the time and place of the closing, risk of loss provisions, and so forth. When signed by a third party purchaser, such a memorandum may be relied upon to limit the mortgage holder’s liability as well as to alleviate any concern that the statute of frauds might otherwise apply to the sale.

POST-SALE CONVEYANCE — FORECLOSURE DEED

The foreclosure deed names the mortgage holder of record as the grantor/seller, and the high bidder at the auction as the grantee/buyer. Oddly, in many cases this results in a deed from an entity, the holder of record, to the same entity. New Hampshire imposes a substantial transfer

tax based on the high bid amount separately against the transferor and the transferee. If the transferor and transferee recited in the deed are not exempt entities — FNMA, FHLMC, VA, HUD — the tax must be paid.

SALE RESCISSION

New Hampshire hasn't a statute or definitive case dealing with rescissions of foreclosure sales. Since an auction sale is essentially in the nature of a contract, usual principles of contract law and damages would seem to be applicable to rescissions of foreclosure sales. Therefore, it is advisable to include in the published terms of the auction sale, and/or the memorandum of sale to be executed by the high bidder, provisions allowing the mortgage holder to rescind the sale and provisions attempting to limit the liability of the mortgage holder should rescission be necessary.

SPECIAL CONSIDERATIONS IN SECOND MORTGAGE FORECLOSURES

See second paragraph under **Breach Letters** above.

Regulations issued by New Hampshire's Department of Revenue Administration require that the transfer tax payable on second mortgage foreclosure deeds be computed based upon the value of the property at the time of the sale. This will usually be a much higher amount than the amount of the high bid since such sales are typically made "subject to" the first mortgage, i.e., the high bidder will have to pay off the first mortgage following a second mortgage foreclosure sale, or the first mortgage holder may proceed with its own foreclosure.

THE CLOSING

In many situations, the closing of the foreclosure sale will be straightforward because the mortgagee will be the high bidder at the foreclosure sale, notwithstanding efforts to interest third parties in the auction. Regardless, a watchful eye must be kept upon the time limits prescribed by the statute. RSA 479:26 sets out that title to the foreclosed premises shall not pass to the new purchaser until the party selling pursuant to the power of sale records a foreclosure deed, a copy of the notice of the sale, and an affidavit fully setting forth his or her acts in the premises. If for some reason there is a failure to record the deed and affidavit within 60 days after the date of the sale, then the sale shall be rendered void, and of no effect as to liens or other encumbrances intervening between the day of the sale and the time of recording of the foreclosure deed and affidavit. If the recording is made within the 60-day time limit, then title to the premises shall pass to the purchaser, free and clear of all interests and encumbrances that do not have precedence over the mortgage.

In 1992, RSA 479:26(I) was amended to reflect a single exception to the 60-day time limit for recording of the deed and affidavit. If such recording is prevented by an order or stay of any court, or any provision of the U.S. Bankruptcy Code, then the time for recording shall be extended for an additional 10 days after the expiration or removal of such order or stay.

However, if any recording is made subject to this exception, these reasons must be set forth fully and particularly in the affidavit.

Occasionally, a situation arises where the purchaser fails to pay the balance of the purchase price according to the terms of sale. RSA 479:26(III) states that upon such an occurrence, the mortgagee may elect to keep the down payment, and the foreclosure will be declared void. However, as previously mentioned, if a memorandum of sale is executed on the date of the sale, then the mortgagee may choose to keep the down payment on a contractual basis as well as the statutory basis.

OTHER METHODS OF FORECLOSURE

As stated earlier, nearly all foreclosures in New Hampshire are pursuant to a power-of-sale provision in the mortgage. Although seldom used, there are 4 other methods, which should be briefly mentioned, that can be used to foreclose upon a mortgaged premises. The first three are very rare and only arise when there is no power-of-sale provision in the mortgage. They are cumbersome entry, notice entry under process [479:19(I)], entry and publication [479:19(III)], and possession and publication [479:19(III)]. All three procedures have a possession requirement for 1 year, and varied other, and publication requirements that are set out in the statute.

The other occasionally used procedure is described in RSA 479:22 as a “Decree for Sale.” Under this method, the mortgagee must first request that the superior court decree that the mortgaged premises be allowed to be sold under a power-of-sale provision contained in the mortgage. Once such a decree has been entered, then the mortgagee may sell the property pursuant to such power, and commence all acts authorized or required by this power, or as the court orders in its decree. This method of foreclosure is useful if unusual circumstances exist, making it desirable to have the sale confirmed by a court order.

EVICTION

The eviction procedure in New Hampshire is governed by RSA 540, and the process is identical for mortgagors and tenants alike. The process begins with serving a 30-day notice to quit upon each adult occupant [RSA 540:3]. For this reason, it is of great importance that the name of each occupant is known.

Toward this end, an effort should be made at the time of the foreclosure sale to ascertain the names of any occupants of the premises. If the occupant fails to quit the premises on or before the “quit date,” as set forth in the notice, then it becomes necessary to have a sheriff serve the occupant with a landlord/tenant writ, which shall assert that the occupant is in possession of the premises without right [RSA 540:13]. This writ is returnable approximately 2 weeks after being forwarded to the sheriff for service, and the occupant must be served at least 7 days before the return date. If either the occupant, or an attorney acting on his behalf, responds by

filing an appearance before the return date, the matter should be scheduled for a hearing within 2 weeks. Should the landlord/owner prevail at the hearing, and 7 days elapse without the filing of a notice of appeal, the landlord/owner will be entitled to a writ of possession for service upon the occupant by the sheriff [RSA 540:14]. As a matter of general practice, the sheriff will typically allow the occupant 3 or 4 days to vacate the premises after service of the writ of possession.

If a tenant leaves personal property behind after vacating a premises, the landlord/owner must care for such personal property for 28 days. After this time has elapsed, the landlord/owner may dispose of such property without notice to the occupant [RSA 540:A:3(VII)]. It would seem prudent to exceed these statutory requirements in the case of exceptionally valuable objects.

DEFICIENCY SUITS

Typically, the amount of the deficiency following a foreclosure is the difference between the total debt and the proceeds of the high bid amount from the foreclosure auction. Suit for the deficiency amount is brought on the note secured by the mortgage. Of course, the FDCPA requires that a deficiency suit may only be brought in the district where the mortgagor signed the note and mortgage, or in the district where the maker/mortgagor currently resides. The New Hampshire statute of limitations pertaining to suits on notes is set out in RSA 382-A:3-118. For installment notes, the applicable period is within 6 years of acceleration.

In addition, RSA 508:6 provides that “Actions upon notes secured by a mortgage of real estate may be brought so long as the plaintiff is entitled to bring an action upon the mortgage.” This statute establishes a 20-year statute of limitations for notes secured by mortgages on real property when read in conjunction with RSA 508:2, which states that “No action for the recovery of real estate shall be brought after 20 years from the time the right to recover first accrued to the party claiming it or to some persons under whom he claims.”

On December 31, 1997, the Supreme Court of New Hampshire reaffirmed this construction of a 20-year statute of limitations in its decision in *Del Norte, Inc. v. Provencher*. In this instance, the court held that “although the mortgagee no longer has recourse to the property once it has been sold free and clear at a foreclosure sale, he may still assert, in an action against the debtor (mortgagor), that where the covenants of the mortgage given to secure the note remain undischarged, the debtor waived the right to plead the statute of limitations for 20 years.” Therefore, where a deficiency remains following a foreclosure, and the mortgage has not been discharged, the holder may commence an action upon the note within the prescribed statute of limitations period.

Finally, RSA 524:10 allows a note holder to sue on the note prior to, or instead of, foreclosure, a useful provision if the mortgaged premises are worthless or contaminated.

ESTIMATED FORECLOSURE TIMELINES*

<u>NONJUDICIAL FORECLOSURE</u>	<u>DAYS FOR EACH STEP</u>	<u>TOTAL DAYS</u>
1. Loan Referred/File Received	1	1
2. Sale Scheduled and Notice of Default Sent	5	6
3. Legal Notice Sent To Newspaper	24	30
4. Title Reviewed and/or Service Completed	1	31
5. Sale Held	28	59
6. Deed Recorded	16	75

* These timelines are optimum and assume no delays. They are based upon UNCONTESTED foreclosure actions that are referred with all necessary documents (and with all necessary assignments previously recorded) and conducted under GSE guidelines. Accordingly, timelines will vary from case to case depending on loan type and the particular circumstances.