

33-812. Disposition of proceeds of sale

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

1. To the costs and expenses of exercising the power of sale and the sale, including the payment of the trustee's fees and reasonable attorney fees actually incurred.
2. To the payment of the contract or contracts secured by the trust deed.
3. To the payment of all other obligations provided in or secured by the trust deed and actually paid by the beneficiary before the trustee's sale.
4. To any condominium association or planned community association as defined in chapter 9 or 16 of this title that had a subordinate lien as provided by law, even if the trustee intends to deposit the balance pursuant to subsection C of this section. The trustee may pay an association's lien on receipt of a written claim and shall be discharged from any liability for any payment made in good faith. The trustee may inquire as to the existence of a lien if there is a recorded declaration on the property without regard to whether a lien has been recorded. Any person who is an applicant or respondent pursuant to subsection H of this section may require the condominium association or planned community association to prove its entitlement to any funds received from the trustee. An association that demonstrates that the amount it received from the trustee was proper in all material respects is entitled to an award of its reasonable attorney fees and court costs against the applicant or respondent who contested the payment. If the applicant or respondent against whom the association's award is entered is entitled to excess proceeds of the sale, the award of attorney fees and costs shall be payable from those excess proceeds.
5. To the junior lienholders or encumbrancers in order of their priority as they existed at the time of the sale. After payment in full of all sums due to all junior lienholders and encumbrancers as of the date of the sale and excluding any postsale attorney fees, payment shall be made to the trustor, except that if the trustor has sold or transferred the property to another owner before the trustee's sale, payment shall be made to the person who is the owner of record at the time of the trustee's sale.

B. After application of the proceeds pursuant to subsection A, paragraphs 1, 2 and 3 of this section, if there are additional proceeds to be distributed, the trustee, within fifteen days of the completion of the trustee's sale, shall mail by first class mail and by certified or registered mail, postage prepaid, to all known addresses a notice of any excess proceeds to the trustor as of the date of the recording of the notice of sale. The trustee may deduct the costs of mailing the notice of excess proceeds from the additional proceeds.

C. In the trustee's discretion and instead of any one or more of the applications specified in subsection A of this section, the trustee may

elect to deposit the balance of the proceeds with the county treasurer in the county in which the sale took place pending an order of the superior court in the county. On deposit of the balance of the monies and after complying with subsection D of this section, the trustee shall be discharged from all responsibility for acts performed in good faith according to this chapter. The county treasurer shall reject any deposit that does not comply with subsection D of this section.

D. If the trustee elects to deposit the balance of the sale proceeds as prescribed by subsection C of this section, the trustee as plaintiff shall commence a civil action in the superior court in the county in which the sale occurred. The action shall name the applicable county treasurer as the defendant, but the county treasurer has no obligation to respond to the complaint or appear in the action. The trustee shall mail by certified or registered mail, with postage prepaid, a conformed copy of the complaint that displays the filing stamp of the court clerk to the county treasurer and all persons, other than the beneficiary, who are entitled to notice pursuant to section 33-809 and to any other person known by the trustee to have an interest of record in the property at the time of the sale. The conformed copy shall be mailed to all known addresses for those persons who are required to receive notice pursuant to this subsection. The trustee shall incorporate in or attach to the complaint:

1. A copy of any one of the following:

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

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

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

2. A copy of the list of the persons and each of the known addresses to which the complaint will be mailed.

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

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

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

F. Upon filing the complaint and filing the subsequent certificate of mailing for the complaint with the certified mailing receipts of the addressees, the trustee as plaintiff is discharged without prejudice from the proceedings.

G. Any person with a recorded or other legal interest in the property at the time of the sale may apply for the release of the proceeds by filing an application for distribution in the civil action that was filed by the trustee pursuant to subsection D of this section. The applicant shall mail postage prepaid by any form of mail that requires a signed and returned receipt a copy of the application to the county treasurer and all persons at each of the addresses named on the list of persons that is incorporated in or attached to the complaint and to any other address of the persons that is known to or ascertained by the applicant or the applicant's agent. The mailing of the application to each interested party shall occur within three business days after the filing of the original application with the court. On return of the signed receipt or the undelivered or unclaimed original envelope, the applicant shall file with the court an affidavit that states that the application was mailed to the person and that the application was either:

1. Received, as evidenced by the receipt. The applicant shall attach to the affidavit a copy of the receipt.
2. Not received, as evidenced by the returned envelope. The applicant shall attach to the affidavit a copy of the original unopened and undelivered or unclaimed returned envelope. If the returned envelope was marked with a new forwarding address, within ten business days after receipt of the original returned envelope the applicant shall:
 - (a) Send by certified mail a copy of the application to the new forwarding address.
 - (b) File a second affidavit of mailing with the court.
 - (c) Mail a copy of the second affidavit to all parties indicating that the application was mailed to the forwarding address.
 - (d) Continue service of the application pursuant to this paragraph until the original, unopened and undelivered envelope is returned without any forwarding address.

H. When mailing to all known addresses of a business or financial institution with an interest of record in the property, the trustee or applicant shall only be required to mail to the primary address of the business or financial institution as recorded with the corporation commission.

I. Any person who receives the application or who claims a right to the proceeds may file a response to the application within forty-five days of the latest mailing of the application. The person filing a response shall mail a copy of the response to each applicant. Within ten calendar days from the date the response is mailed, an applicant may file with the clerk and mail to each respondent a reply to the response. On expiration of the time for filing a reply, an applicant shall provide the court with postage prepaid business envelopes that are addressed to all persons who are entitled to receive copies of the complaint pursuant to subsection D of this section. If an association with a claim is not paid by the trustee pursuant to subsection A, paragraph 4 of this section and is required to file an application or response pursuant to this

subsection in order to recover proceeds, the association may request from the excess proceeds of the sale an award of its reasonable attorney fees and costs incurred.

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

K. Within ninety days after completion of the sale, the trustee shall apply the proceeds of the sale pursuant to subsection A of this section or shall deposit the proceeds with the treasurer pursuant to subsection C of this section. If the trustee fails to comply with this subsection, the trustee forfeits any entitlement to the fees and costs prescribed in subsection E of this section and shall pay interest at the rate provided for judgments pursuant to section 44-1201 from the date of completion of the sale until the trustee complies with this subsection. Any person with a recorded or other legal interest in the property at the time of the sale may commence a civil action against the trustee for the trustee's failure to comply with this subsection. The court may award the prevailing party its reasonable attorney fees and costs incurred in that civil action.

L. Excess proceeds deposited with the county treasurer pursuant to subsection C of this section are presumed abandoned if the monies remain with the treasurer for at least two years from the date of

deposit and there is no pending application for distribution.

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

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

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

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

