

FORECLOSURE

CALIFORNIA NON-JUDICIAL FORECLOSURE

HELP



The following information is not intended as legal advice. Consult appropriate professionals for legal advice and tax implications.

Sale

In most Non-judicial Sales, a title insurance company is named as the trustee to arrange the sale of the real estate.

California's infamous one-action rule (where the lender can only elect one action to take against the borrower when the borrower defaults), must be carefully chosen. If the lender forecloses the deed of trust out of court (California lenders rarely elect judicial foreclosures) they essentially waive the ability to bring a lawsuit to recover a deficiency (a second action). However, if the lender chooses to sue the borrower and obtain both a foreclosure order, and if the proceeds from the judicial sale of the real estate are not sufficient to repay the loan balance (a deficiency) then a suit is permitted as the lender's one action.

Preliminary Notice: *Notice of Sale*

A Notice of Sale must contain the name, street address and phone number of the trustee conducting the sale and the original trustor, along with a statement warning the borrowers that their property is about to be lost at a public foreclosure sale and to contact a lawyer for an explanation. The Notice of Sale must also give the property's street address. If no street address exists, the notice must state the address of the beneficiary from whom a set of directions to the property may be obtained if they are requested in writing within ten days from the first publications of the foreclosure notice.

Advertising

A copy of the Notice of Sale must be posted in a conspicuous place on the property to be sold at least 20 days before the sale. If access to the property is restricted by means of a central guard gate, then the Notice of Sale must be posted on the guard gate. A copy of the Notice of Sale must also be posted at a public place in the city where the property is to be sold (or in rural areas, the corresponding judicial district) at least 20 days before the sale date.

Recording

A Notice of Trustee's Sale must be recorded at least 14 days before the sale date.

Mailing

A Notice of Trustee's Sale must be sent by certified mail, return receipt requested, 20 days before the foreclosure sale to the borrower, anyone who requests notice or recorded a request, and to the trustors, beneficiaries or parties at interest.

Sale Procedures: *Time*

All sales under a Power of Sale in a Deed of Trust will be made between the hours of 9:00am and 5:00pm on any business day, Monday-Friday, at the time specified in the Notice of Trustee's Sale.

Place

The sale shall commence at the location specified in the Notice of Trustee's Sale.

Manner

The sale must be made a public auction going to the highest bidder. The trustee has the right to require every bidder to show evidence of their ability to pay the full bid in cash, cashier's check or certain bank checks. Each bid is by law an irrevocable offer to purchase. However, a higher bid cancels an earlier bid. It is unlawful and a criminal offense (a fine of \$10,000 or up to one year in jail) to offer anyone consideration not to bid, or to fix or restrain the bidding process in any manner.

Reinstatement

Debtors may reinstate up to five days before a non-judicial foreclosure sale.

Junior

Junior lien holders may no longer redeem, so they may try to protect themselves by (1) advancing funds to bring the senior loan payments current, then foreclosing for the sums advanced; (2) bidding at the foreclosure sale so the price will be sufficient to pay off the senior and the junior liens; (3) acquire the property by bidding at the foreclosure sale. If the debtor has a right to redeem and does so, the junior who purchased the home must be reimbursed.

Deficiency

Lenders may not seek a deficiency judgment if (1) the foreclosure is non-judicial; or if (2) foreclosure is on a purchase money obligation. The same rules do not apply to guarantee or later lien holders. The lenders may seize alternative collateral. If the lender forecloses by filing a lawsuit, then the lender can obtain both a foreclosure sale order and a judgment against the borrower for a deficiency after the court-ordered sale, but only for the difference between the judgment and the fair value of the security.

Redemption

A borrower's right to redemption is terminated when a deficiency judgment is waived or prohibited. When redemption is permitted, after judicial foreclosure, only the borrower can now redeem and junior lien holders or "redemptionors" may not. When the lender is permitted to seek a deficiency, elects to pursue a deficiency and forecloses judicially, the borrower may redeem 12 months after sale, but a full credit bid by the lender cuts it to 3 months.



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Ultimately, the only thing that will stop a foreclosure proceeding is repayment of the debt, everything else is delay of the proceedings.

CONSIDER THIS . . .

KEEPING THE PROPERTY VS. SELLING THE PROPERTY

If your monthly house payment (including property taxes and insurance) does not exceed 40% of your gross monthly income, it should be possible for you to keep the property. If the payment is greater than 40% of gross monthly income, consider selling or transferring the property to avoid negative impacts to your credit. The objectives in order of importance should be:

1. Keeping the property if possible.
2. Don't give away equity if you can keep it or liquidate and put it in your pocket.
3. Minimize damage to your credit. You will need it later on.

LENDER WORKOUT

Before exploring new options, have you tried to come to terms with your existing lender? Lenders want the loan to be current, not to have to complete a foreclosure. Can you make up the defaulted amount over a period of months? Can you re-write the note and include the defaulted amount? Can you give the lender a deed-in-lieu of foreclosure and preserve your credit? These are questions you should ask yourself and possibly your lender if you haven't done so already. They will want to know why the loan is in default and why you think you will be able to make the payments in the future. Temporary financial setbacks that have since been cured are the best candidates for this. Your lender will probably not be inclined to stop foreclosure proceedings if they have reason to believe they will have to start again in 6 months.

REFINANCING AND NEW JUNIOR LOANS

Basic lending guidelines will require all home loans will total up to less than 75% of the current market value of the property. If you have more equity than that, you should have no difficulty in obtaining a new refinance or 2nd Trust Deed to bring your loan current. Expect higher interest rates and loan fees.

LOANS TO GET YOU CURRENT

If you experienced a temporary financial setback that has since been cured and are going to be able to keep the property, first consider family and friends for a loan to get current. It's much cheaper than hard money loans, but MAKE SURE you will be able to pay them back. You do not want to put them in the position of having to foreclose to get their money back. Hard money loans are typically private investors who will lend money based on equity in the property. Credit and income are not issues of importance and loan approval is usually a matter of days with funding following shortly. Loan amounts will usually be enough to bring existing loans current, pay the financing costs and put some money in your pocket. Loans will be amortized over 30 years to keep the payments lower and the balance will be due in 2 to 5 years.

BANKRUPTCY

This is a major step that will have lasting impact on credit reports. Seek appropriate legal advice. If the Notice of Default has just been filed on your home, you have sufficient time to explore the options for new loans or selling the property. If the foreclosure sale is going to be held very shortly, bankruptcy is a very common way to delay the sale. When you file bankruptcy, your financial matters fall under the jurisdiction of the courts which could limit your options. SEEK LEGAL ADVICE.



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