

Foreclosure FAQ

What is a foreclosure?

"Foreclosure" is a common term used to describe a trustee's sale proceeding- the correct terminology to use when describing the procedure for enforcing a lender's rights once an obligation secured by a Deed Of Trust (or similar instrument) is in default.

What constitutes a breach or a default?

A breach exists when the borrower fails to make the payments of principal and interest when due pursuant to the note secured by deed of trust. If the balance of the note is due, the breach would be the failure to make the principal payment due plus interest, by the maturity date. Most deeds of trust have provisions for default being declared when a senior lien, insurance, taxes and assessments have not been paid, or if the property is transferred without the lenders approval.

Should I forego a foreclosure and take a deed in lieu?

Before you can even consider an alternative, the borrower must be willing to offer a deed in lieu. There are advantages to taking a deed in lieu. It could save you time and money. You should order a preliminary title report and review it carefully to determine if there are any junior liens that would survive the deed in lieu. If you are satisfied with the title report, you would take the deed in lieu subject to a title insurance policy being issued in your favor as reflected in the preliminary report. This procedure would take a lot less time than the approximate four months of foreclosure. The main disadvantages to taking a deed in lieu of foreclosure are the junior liens will not be extinguished and that the borrower may later have a change of heart and seek to have the courts set the deed in lieu aside.

Must the original trustee process a non-judicial foreclosure?

No. The beneficiary may substitute trustees anytime.

Should I notify a senior lender of the existence of my junior lien? Yes. A senior lender may have a provision in his deed of trust that provides for senior priority for additional advances to the borrower. When advances are "obligatory" to protect the lender's security interest, they are so secured. However, if the advances are "optional" and the senior lender has knowledge of a junior lien, the advances may not be senior to the junior lien of trust. A junior lender, therefore, should give the senior lender notice of their lien. Many lenders would like to reduce their collection efforts by having the junior lienholder advance to their loan. Send the senior lender a notice which tells them that you are willing to reinstate their loan.

Must I give notice of delinquency to a junior lienholder even if I don't file an NOD?

No. Junior lienholders may request status of senior lien by doing the following:

Under the California civil code section 2924e, a lender is required to send a notice to a junior lienholder within 15 days after the delinquency reaches four months, when certain conditions exist: the borrower must consent; the junior lienholder must submit the request in writing by certified mail along with \$40; the property must contain one to four residential units; the request shall be recorded in the county in which the property is situated; and it has not been longer than five years since the original request, unless a renewal payment of \$15 has been made.

Junior lenders who acquire interest by assignment, now have the same rights as the original beneficiary to require senior lenders to provide information regarding delinquencies of four months. The new junior beneficiary must pay a processing fee of \$15 to the senior beneficiary. See section 2924e(b).

If my loan is in a senior position, when should I start my foreclosure?

You may have to consider various constraints before you can file a notice of default. Is this a standard Fannie Mae/Freddie Mac document? If it is, you must send the borrower a notice of intent to foreclose 30 days prior to the filing of the NOD. You may have sold the loan to some

other lender; they may have certain procedures and standards that you must adhere to, such as asking their permission to foreclose after a suitable effort has been made to work with the borrower to encourage repayment. If your loan is insured, you have be required to follow certain steps in order to be allowed to file a claim with the insurer.

The most important consideration when deciding to start a foreclosure is "Am I well secured if I wait?" If there is adequate protection between the value of your loan and the value of the property, delay should cause no loss. If there is inadequate protection, then every day delayed will cost you money. Choose a trustee who will record your NOD without any unnecessary delays and will stand behind their work.

If my loan is in a junior position, when should I start my foreclosure?

If you service a loan for someone else, if it is insured, or it is a standard FNMA/FHLMC document, then you have the same constraints mentioned in the previous question. Being in junior position adds one other very important dimension for you consideration. The senior lender can foreclose you out of your security or certainly diminish your protection as their loan interest balance grows.

If the senior lender begins foreclosure, and neither you nor the borrower bring them current, the lender could very well go to sale and eliminate your security. It is much better for you to initiate foreclosure early, go to auction, acquire the property and sell it, before the senior lender can complete the foreclosure. Of course, if necessary, you may have to reinstate the first lender to allow enough time for you to complete your foreclosure.

Should I reinstate the senior loan which is in foreclosure, or bid at its sale?

Reinstating the senior loan should require considerably less cash than bidding at its sale. If the loan has matured, then you may pay off the loan prior to the sale or bid at the sale.

If the senior lender filed a notice of default several months earlier, you may be able to save time by bidding at the senior's sale. However there are some pitfalls to this strategy. The senior may delay his foreclosure; you have no control over when they may go to sale. File your own notice of default as soon as possible so that at least you are proceeding to your own sale. If you intend to bid at the senior's sale, come to the sale early, bring sufficient certified funds to bid the amount of the debt plus your lien. *You cannot credit bid* the amount owed to you under your deed of trust; your standing as a bidder is the same as any others. If you fail to arrive on time for the sale, your lien may be eliminated.

Do I need the borrower's permission to foreclose?

No. You already have their permission; they gave it when they signed the note and deed of trust.

What documents do I need to foreclose?

You will need to provide the trustee with the note and deed of trust, any modification or extension agreements, additional notes and any assignments. If an original document is lost, it may be necessary to provide a lost instrument bond. Consult with your trustee. You also need to provide the trustee with certain essential information, such as the unpaid balance of the note, the date to which the interest is paid, the reason for the default (such as failure to make the payment which became due on a certain date), information regarding any advances you have made, the last known residence or business address of the last known owner, and the property address. If you are not using the original trustee, a substitution of trustee must be signed and notarized by the beneficiary.

Why is an accurate "last known address" of the last known owner vital?

Failure to send notice to an accurate business or residence address of the last known owners may invalidate the foreclosure. Search all your records completely and carefully. If the borrower has more than one loan with your firm, review all sets of records. If the borrowers are married and you receive word from one of them that (s)he is no longer residing at the property address and you are provided with a new address, be sure to communicate that information to the trustee as soon as possible.

How long does it take to foreclose?

If there are no delays, a foreclosure will be completed in about four months. After the recording of the NOD there is a mandatory three-month waiting period before the trustee can publish the notice of trustee's sale. Generally the sale will take place four weeks after the pre-publication period has ended. The date of the sale is influenced by the county where the property is located, the regular schedule of sales for that county and by the frequency of publication of the newspaper in which the trustee is required to publish. The trustee must also consider the newspaper deadlines for advertising and the time-necessary for preparation of the notice of sale and its delivery to the newspaper. The California Civil Code also requires that the notice of sale be posted on the property and a public place at least 20 days prior to the sale; adequate time must be allowed for this to be completed. If the IRS has recorded a federal tax lien at least 30 days before the sale, they require notification at least 25 days before the sale. If the loan is insured by the Veterans Administration, the sale date must be set to allow time enough for them to provide bid instructions.

Who pays the foreclosure fee and costs?

If the borrower brings the loan current or pays it off, the borrower is responsible to the lender for the foreclosure fee and costs. Since the lender is obligated to pay the trustee, the lender should be sure to not overlook these foreclosure expenses. If the property is sold to an outside bidder at the foreclosure auction, the foreclosure expenses will be paid by the bidder. Only when the lender is the successful bidder at the sale will the lender not be able to look to someone else to recover the trustee's fee and costs. Hopefully, when the property is resold, the lender can expect to recover their foreclosure expenses.

Do all trustees charge the same?

No. The California Civil Code sets the maximum fee that is deemed to be valid and lawful. A trustee need *not* charge that maximum amount. The quality of service and the trustee's financial strength should be of primary concern when selecting a trustee.

What is a Declaration of Default?

This document contains the official written instruction from the beneficiary to the trustee. Most deeds of trust require the beneficiary to furnish the trustee with a Declaration of Default. It identifies the deed of trust to be foreclosed, states the breach, and directs the trustee to sell the property to satisfy the indebtedness.

What is the fastest way to record the NOD? You may send the trustee a pre-signed substitution along with the other documents, or the trustee can prepare one and return it to you for your signature. If you are to be regularly using a trustee, you might consider giving the trustee a *limited power of attorney* authorizing them to sign the substitution of trustee and the notice of default. Sending pre-signed substitutions or giving a limited power of attorney reduces the time between your decision to foreclose and the actual recording of the notice of default to as little as 24 to 48 hours.

What are the most common delays to the foreclosure process?

- The most common delay comes from the filing of bankruptcy.
- A temporary restraining order (TRO) is used to preserve the status quo pending a court hearing for a preliminary injunction.
- A preliminary injunction is used to preserve the status quo pending a final determination of the action on the merits.
- The beneficiary or his servicer doesn't send the trustee the most current assignment. The trustee prepares the NOD and the substitution with the wrong beneficiary shown. Several days after the documents are recorded the title company discovers the error. The trustee

now must rescind the original NOD and re-record new documents. If there is uncertainty regarding the current beneficiary, ask the trustee handling the foreclosure to check with the title company for current information.

- The recording information on the deed of trust was incorrect. A copy of the deed of trust has the recording information written incorrectly or the original deed of trust was re-recorded later.
- The paid-to-date was incorrect.
- The unpaid balance was incorrect.
- The last known address was incorrect or incomplete.
- Money (partial payment) is accidentally accepted from the borrower.
- Instructions are misunderstood. The beneficiary instructs the trustee to cancel the sale rather than postpone, or postpone rather than sell.
- The NOD is re-recorded (start-over) because of failure to notify someone.
- Correspondence requiring response is accidentally filed rather than handled.
- Opening bid information given to the trustee too late to order a date down of the trustee's sale guarantee.

What law authorizes foreclosures through a trustee's power of sale?

There is no law that authorizes a trustee's non-judicial foreclosure; that power is created by the borrower when he signs that deed to trust, pledging the real property as security. The words used in the deed of trust are; "with power of sale." There are, however, many laws that regulate the trustee. See California Civil Code section 2924.

How does bankruptcy of the borrower affect the foreclosure?

The filing of a petition of bankruptcy by the borrower, by a lessee (tenant) who has a recorded lease, or by the beneficiary of a junior deed of trust, immediately stops the foreclosure, with or without notice. The trustee may not proceed in any way; he may, however, postpone an already scheduled and noticed sale. If the trustee conducts a sale after a bankruptcy is filed, but without any knowledge of it, the sale is void or voidable depending on circumstances. See section 2924j. Before the trustee can continue the foreclosure, the lender must obtain relief from the bankruptcy court. You should seek legal advice immediately from an attorney who *specializes in bankruptcy*. Relief must terminate the stay against the property of the debtor and the property of the estate in bankruptcy. Relief as to the debtor is not relief as to the estate. The trustee's sale cannot be held within seven days after the expiration of the stay in bankruptcy unless the court order so provides. See Civil Code section 2924g(d). Attorneys representing lenders in bankruptcy should include as part of their relief orders a statement that a foreclosure sale may occur immediately upon entry of the bankruptcy relief order.

Could a senior lender get relief from the bankruptcy stay and go to sale while the junior lender is still stayed?

Yes. If you are a junior lienholder, notify your attorney as soon as you get word of a bankruptcy. Assist them in every way to get relief before the senior lender does.

Who is entitled to receive a copy of the Notice of Default?

Within ten business days after the NOD records, notice must be mailed by certified/registered mail to the original trustors at the address shown on the deed of trust; the current owners, if known, at their last known business or residence mailing addresses, and to those who have recorded a request for a copy of a Notice of Default. In addition to the required certified/registered mailings, simultaneous mailings must be made by regular, first class mail to the trustors and current owners. See section 2924b(B)(1).

Within one month after the notice of default is recorded, a copy of the NOD must be mailed certified/registered to those entitled to notice under the California Civil Code section 2924b(c)(1), including the current owner of record and those lienholders with a recorded interest.

Does the borrower need actual notice to have a valid foreclosure?

No. The non-judicial foreclosure sections of the California Civil Code were designed to balance the needs of the borrower and lender. The procedure is supposed to be clear and easy to follow so that there is little reason to go into court to argue issues. The notification procedure provides many opportunities for the borrower to receive notice. If they do not make the effort to keep the lender of the trustee informed, they may lose their property without notice. The trustee has no obligation to search for a lost borrower. The borrower can give constructive notice with their current address. See I.E. Assocs., v. Safeco Title Ins. Co. (1985) 39 C3d 281, 216 CR 438.

What is a Trustee's Sale Guarantee report?

The Trustee's Sale Guarantee (TSG) report provides the foreclosing trustee with the information necessary to process your foreclosure and guarantees the correctness of that information. It sets forth the record owners and lists all exceptions of record against the secured property. It provides the names of those who are to receive notices and the name of the newspaper in which the trustee must publish. The TSG is provided by a title company in the county where the property is located. When you receive your copy from the trustee, you should be alert to certain items:

- New Owners.
- Delinquent real estate taxes.
- Notice of default recorded by a senior deed of trust. You should contact the senior beneficiary to determine if their loan is still delinquent.
- Federal (IRS) tax liens recorded.
- Bankruptcy.
- Lis Pendens. This provides constructive notice of pending litigation, the outcome of which will not be affected by the foreclosure.
- Notice of substandard dwelling.
- Any irregularities noted therein.

Who should record a request for a copy of a Notice of Default?

If you are a junior lienholder and have changed your address from that shown on the upper left hand corner of your recorded deed of trust, you should record a request for notice pursuant to Civil Code section 2924b(a) showing your current address. Failure to do this may prevent you from receiving notice of a pending foreclosure on a senior deed of trust. Additionally, if you want a copy of a Notice of Default mailed to you within ten business days of its recording, record a request.

When can I refuse reinstatement?

For NOD's recorded prior to January 1, 1986, reinstatement is allowed by law (unless the loan has reached full maturity) during the first three months; after the first three months you can refuse reinstatement. For NOD's recorded after January 1, 1986, you may not refuse reinstatement until five business days before the date set for sale or a postponed sale; after that you may refuse reinstatement. See Civil Code section 2924c(e). The standard FNMA/FHLMC deed of trust allows reinstatement by the borrower up to five calendar days before the sale date.

Who is entitled to reinstate the loan?

The trustor and any junior lienholder of record have the right to reinstate the loan. The reinstatement amount should be enough to restore the entire loan to its original installment basis and include attorney fee and costs which were necessary to protect the security, foreclosure fee and costs, late charges, and advances. Contact the trustee for updated fees and costs before accepting reinstatement. A partial payment may not cure the default. Accepting partial payment may invalidate the foreclosure. If you believe it is in your best interest to accept partial payments, consult your attorney regarding a written agreement between you and the borrower.

What costs can be included in the reinstatement or payoff amount?

Money advanced to protect the lender's security, other than improvement of the property, are allowable. For instance, repairing a leaking roof, that would result in damage and decrease the value of the property, would be allowable. Replacing the whole roof would not be allowable. The costs of collection letters and advice from an attorney in certain instances now appear allowable. See *Buck v. Barb* 147 CA 3rd 920. Additionally, attorney fees and costs incurred while defending yourself in court or seeking relief from bankruptcy are allowable. Check with your attorney before including any questionable items. Also there are regularly allowable trustee's costs for recording, mailing, publishing, posting, trustee's sale guarantee, and one postponement fee of \$50 upon the written request of the trustor pursuant to section 2924c(c).

How long does the publication period last?

After the three month pre-publication period has ended, a notice of trustee's sale is prepared and sent to the newspaper for publication. The first ad must run at least 20 days before the scheduled sale date. The time between the first ad and the sale date is the publication period.

Where is the Notice of Sale published and how often?

The Notice of Sale is published in an adjudicated newspaper of general circulation in the city where the property is located. If there is not a paper adjudicated to run legal notices in that city; then a newspaper in the judicial district may be used.

The Notice of Sale must publish once a week for three weeks with the first ad running no later than 20 days before the sale.

Who is entitled to receive the notice of trustee's sale?

All parties pursuant to Civil Code section 2924b and (b3).

What should the beneficiary do during the publication period?

During this period the lender should assess their equity position in the property to determine if they should bid less than their total debt.

Am I limited to only three postponements?

The lender or the trustee is limited to three discretionary postponements, after which it is necessary to republish the Notice of Sale. The lender may agree with the borrower to any number of postponements; it is best to get this agreement in writing and signed by the borrower. The sale can be postponed any number of times "by operation of law" or one time only for bankruptcy determination. See section 2924g(c). A Notice of Sale is generally considered stale after one year. It would then be best to re-notice the trustee's sale.

Must I bid the full indebtedness, plus advances and costs?

No. It is not required and there may be good reasons not to. For instance, if you would like to encourage outside bidders, set the opening bid low and credit bid price upward until you reach your total indebtedness. Another reason that you might want to bid less than the full amount would be to allow for a claim to an insurance company for a casualty loss against the property. If you had bid the full indebtedness, the insurance company could claim that your debt had been fully satisfied. There may also be some tax consequences to consider.

Are the trustee's sales really held on the steps of the county courthouse?

Yes. Most trustees use the same place to conduct their sales. The most common spot is the front entrance to the county courthouse, city hall, or hall of records. The only requirement by law is that it be conducted in a public place.

Is the trustee's sale conducted orally or by sealed bid?

The sale is conducted verbally. The trustee will essentially announce that they are offering to sell at public auction to the highest bidder all right, title and interest conveyed to and now held by the

described deed of trust. The sale will be made, but without covenant or warranty, express or implied, regarding title, possession or encumbrances. After the auctioneer makes an announcement, they will ask if there are any bidders who wish to qualify. If there are, each must show the auctioneer funds in excess of the opening bid. A junior lienholder must qualify as any other bidder and cannot use their lien for bidding purposes. *Nomellini Const. Co. v. Modesto Savings & Loan Assoc.* (1969) 275CA2d 114,79 CR 717. The auctioneer will note the total amount of funds each bidder possesses, so that they know when a bidder is no longer qualified to enter a bid. If a bidder tries to enter a bid that exceeds their funds, the auctioneer will ask them to requalify. Each bid is an irrevocable bid and replaces the previous bid. If a bidder reneges, they may be liable to the trustee for damages and subject to criminal prosecution and penalties. The successful bidder is the one who enters the final bid that is accepted by the auctioneer. See sections 2924g and 2924h.

Must I attend the sale and enter my own bid?

No. The trustee's auctioneer will enter your opening bid on your behalf. However, you may attend the sale and enter your own bid. If you wish to bid more than your total debt due you, it would be necessary for you to appear at the sale with certified funds to cover any bids you make over the amount of your debt.

When am I entitled to possession of the property?

The title a successful bidder receives through a trustee's deed entitles them to immediate possession. The purchaser may allow the previous owners or tenants to stay or they may bring an unlawful detainer action (eviction) to remove them. However, a lease recorded prior to the recording date of the deed of trust entitles the lease to priority over the title received through the foreclosure. A unrecorded lease, where it was reasonable to assume that a lease existed at the same time the deed of trust was recorded, may provide the same priority as a prior recorded lease. Alternately, if the lease is unrecorded and it was not reasonable to assume that a lease existed at the time the deed of trust was recorded or if the lease was recorded subsequent to the deed of trust which has been foreclosed, the purchaser at the foreclosure sale may choose to evict the tenants or allow the tenants to stay.

Is there a redemption period after the sale?

In a non-judicial sale there is no redemption period for the previous owner or junior lienholders. The Internal Revenue Service (IRS) has a 120-day right of redemption, if it had a properly recorded notice of a federal tax lien subsequent to your deed of trust.

What liens or rights may survive the trustee's sale?

Failure of the trustee to notify a junior lienholder of record (absent his actual knowledge of the sale) may allow the junior lien to survive. It is as yet unclear under California law whether the buyer can claim "bona fide purchase" status to defeat the junior lien's attachment. In any event, the junior lien could sue for damages if a BFP's interest eliminated the junior. An IRS tax lien will not be extinguished for 120 days; during that time the IRS has the right to redeem the property. The rights of a plaintiff in a legal action, who has a properly recorded *lis pendens*, will survive the trustee's sale. City and county liens, easements, homeowner's association assessments, and mechanic's liens, where the work was begun before the foreclosing deed of trust was recorded, may survive the trustee's sale. Leases that were recorded prior to the foreclosing deed of trust will survive. An unrecorded lease where it was reasonable to assume that a lease existed may survive. If the foreclosing lender subordinated to a subsequent deed of trust, it will survive. Any liens that were recorded prior to the foreclosing deed of trust (which has not subordinated itself to the foreclosing deed of trust) will survive.

Who gets the over bid surplus?

Any moneys that exceed the foreclosing lender's total indebtedness, including advances and expenses, will go to junior lienholders of record in the order of priority, and finally to the previous

owner of record. If the trustee has doubts about where the moneys should be paid, they should commence an action for interpleader to avoid potential liability.

What happens if I feel sorry for the sold out borrower and deed the property back to them?

If your intent is to replace your original deed of trust with a new one having the same priority...BEWARE. The extinguished junior liens will revive; your new deed of trust will be subordinate. See Jensen v. Duke (1925) 71 Cal. App. 210.

When is the trustee's sale complete?

The sale is final upon the auctioneer saying "sold" and the sale is deemed perfected as of 8am on the day of sale provided the Trustee's Deed Upon Sale is recorded within 15 days of the actual sale date.