

# CALIFORNIA FORECLOSURES

By Gordon L. Gerson, Esq.  
GERSON LAW FIRM APC

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It is all about the "F" word.

"Foreclose" is the word most often uttered by lenders when a loan secured by real estate is in default. This article examines the mechanics of foreclosure of real property located in California which is pledged as collateral pursuant to a deed of trust and pursuant to the terms of a promissory note governed by California law.

Tool box basics of California foreclosure law include the following:

In California, real property secured by a deed of trust may be foreclosed upon by non-judicial foreclosure proceedings or judicial foreclosure proceedings.

The non-judicial foreclosure proceeding is the most often employed by lenders because of both the speed and ease of commencing and concluding it. California Civil Code Section 2924 et seq. govern California non-judicial foreclosures. The sale is commenced and concluded as follows:

- At the lender's instructions, a Notice of Default ("NOD") is filed by the trustee designated on the deed of trust for record in the office of the recorder of the county in which the mortgaged property is located and served on the borrower (sometimes referred to in the NOD as the "trustor"). The NOD states among other matters, that there has been a breach of a loan, and if the breach is curable (as in the instance of non-payment) that the borrower has not less than ninety (90) days from the filing of the NOD to cure it (i.e., make all payments owed in the event of a monetary default) or otherwise cure a breach of a non-monetary default, and if not cured during a ninety (90) day period, there may be a Notice of Trustee Sale to sell the mortgaged property. The foregoing is generally referred to as the "Reinstatement Period."
- Following the Reinstatement Period, at the instructions of the lender (sometimes referred to as the "beneficiary" in the NOD), the trustee causes a Notice of Sale to be mailed to the borrower. The Notice of Sale is required to be published at least once a week for three (3) consecutive calendar weeks, the first publication to be at least twenty (20) days before the date of sale, in a newspaper of general circulation published in the city in which the mortgaged property is located. Among requirements of the Notice of Trustee Sale, is that it set the time and place of where the foreclosure sale will be conducted. Even though the Reinstatement may have expired, by statute the borrower shall have up until five (5) days before the sale to reinstate the loan in order to avoid foreclosure of the mortgaged property, and if not reinstated, the trustee sale goes forward on the

date and time specified in the Notice of Trustee Sale unless, (i) the borrower pays-off the entire loan balanced or (ii) the trustee's sale is postponed by the trustee at the lender's sole election in accordance with applicable sections of California Civil Code Sections 2924, et seq.

- The sale is conducted by the trustee or an agent appointed by the trustee, and is generally held either on the courthouse steps in the county where the mortgaged property is located, or at the trustee's office. Following the trustee's sale, a Trustee's Deed (which is the equivalent of a grant deed) is given to the highest bidder, thus concluding the non-judicial foreclosure process.

Judicial foreclosures in California are remarkably different. To conduct a judicial foreclosure the following transpires:

- The lender must file a summons and complaint to commence a lawsuit in state court, in the county in which the mortgaged property is located, and personally serve the borrower with the summons and complaint. The purpose of the lawsuit is to obtain a court order for judicial foreclosure. The lawsuit may include other causes of action, including actions to enforce a guaranty or to have a receiver appointed for the mortgaged property.
- The lawsuit will proceed like most other lawsuits filed in the State of California. The borrower, as the defendant in the lawsuit, has an opportunity to answer the summons and complaint(s) served upon it, and to contest the matter in court. If necessary, there will be a trial. Accordingly, it may take up to six (6) months or more, to obtain a final court order for judicial foreclosure.
- If a court order is obtained for judicial foreclosure, there will be a marshal's sale of the mortgaged property. A marshal's deed will be conveyed to the highest bidder or to the lender if there are no bidders.
- Following the judicial foreclosure sale, the lender has the right for ninety (90) days to file an application with the court for a "fair value" hearing. The purpose of a fair value hearing is to determine the value of the property if marketed under then current market conditions and to obtain a "deficiency judgment" against the borrower (and, if applicable, also against the guarantor if the guarantor was named in the lawsuit). The deficiency judgment will be for the difference between the outstanding amount of the loan at time of the judicial foreclosure, and the amount paid by the highest bidder at sale, or if there were no bidders, then the difference between the fair value of the mortgaged property and the amount owed to the lender. The court will enter a deficiency judgment which is a conventional money judgment which may be enforced against the borrower (and if applicable, the guarantor) as any court judgment would be enforced.

While a deficiency judgment is unique to a judicial foreclosure (and not obtainable in a non-judicial foreclosure), another unique factor of the judicial foreclosure is that the borrower will have one (1) year from the date of the court order for judicial foreclosure, to "redeem" the mortgaged property. That is, if the borrower at any time during such twelve (12) month period following the court order for judicial foreclosure tenders to the lender the full amount owed on the loan, it is entitled to its mortgaged property. In effect,

the borrower's right of redemption results in few, if any, potential purchasers at a judicial foreclosure sale, and if there were no bidders at the sale and lender then became the owner of the mortgaged property, it is difficult, if not impossible, to market the mortgaged property for sale during the one (1) year redemption period.

It is possible for a lender to commence both a judicial foreclosure and non-judicial foreclosure relating to the same loan, and against the same mortgaged property. However, the lender must ultimately elect to go forward with either the judicial foreclosure or the non-judicial foreclosure. The election must be made prior to a court trying the judicial foreclosure lawsuit or before the auction begins for the non-judicial foreclosure. There are strategic reasons for commencing both judicial and non-judicial foreclosures. One strategy is premised upon the concept that even the threat of completing a judicial foreclosure in order to obtain a deficiency judgment against a borrower and guarantor may result in payment of a negotiated compromised deficiency amount, and the ability to then move forward with only a non-judicial foreclosure.

That set forth above constitutes the basics of non-judicial foreclosures and judicial foreclosures in California. California law becomes literally a maze of statutes and court decisions relating to numerous other issues relating to:

- Deficiency judgments
- Enforcement of guaranties
- Loan documents governed by non-California law even though the mortgaged property is located in California
- Loan documents governed by California law but the mortgaged property is in another state
- Sale of mixed collateral (meaning both real mortgaged property and personal mortgaged property which a lender has also secured)

A lender's strategy in enforcing loan documents (as well as a borrower's understanding of what confronts it in the days following its defaulting on a loan) require understanding the basics of foreclosure law as part of any foreclosure strategy.

*DISCLAIMER: This article is intended to provide a general overview of lending issues. It is not intended nor should it be relied upon as legal advice. Each loan is fact specific and as such different principles of law may apply, and counsel should be consulted. For additional information contact Gordon L. Gerson at GERSON LAW FIRM APC, [ggerson@gersonlaw.com](mailto:ggerson@gersonlaw.com) or call (858) 452-5400.*