

# Non-Judicial Foreclosure

## A Lengthy Technical Process

In order to understand the foreclosure process, it is necessary to understand the basic framework used by lenders in securing loans to borrowers. The documents created to memorialize the loan transaction enable the lender to exercise the remedy of foreclosure in the event that the loan is not repaid by the borrower according to the terms of the agreement.

There are two (2) basic types of foreclosure in California. In a judicial foreclosure, a court action is commenced to foreclose the mortgage or deed of trust securing the loan. This is really a lawsuit, and is governed by the Rules of Civil Procedure and Rules of Evidence applicable to legal actions generally. An alternative type of foreclosure is the non-judicial foreclosure, or private trustee's sale under the procedures set forth in Civil Code Sections 2924-2924h. This latter remedy is available, however, only if the deed of trust (or mortgage) contains a power-of-sale clause. This article discusses the provisions applicable to the non-judicial private trustee's sale.

In the usual loan transaction, a promissory note, containing the dollar amount loaned, along with the interest rate and payment terms, is executed by the borrower to evidence the debt. The borrower will also execute a deed of trust in favor of the lender, which makes the property the security for the loan. It will also set forth the specific responsibilities of the borrower, and the lender's recourse if the responsibilities are not met. In addition to the borrower and the lender, the deed of trust will also name someone to act as trustee.

The trustee under a deed of trust is not a true trustee, however, and is not subject to the general rules governing express trusts. Instead, the function of a trustee under a deed of trust is either to foreclose at the lender's direction in the event of a breach, or to reconvey the trust deed once the obligation has been satisfied in full. The statute allows the beneficiary to substitute in another trustee should it desire to do so.

Generally speaking, there are two categories of default which will entitle a beneficiary to institute foreclosure, i.e.: Monetary Default: Nonpayment of the principal, interest and impounds (if applicable), or non-payment of the Balloon Payment.

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(Balloon payment loans require appropriate pre-foreclosure notifications under C. C. Sec. 2924i. Non-Monetary Default: Failure to preserve the property physically and/or financially, by maintaining insurance, taxes and the non-voluntary lien-free status established at the time of the loan. Note: The lender may advance funds to cure a non-monetary default and/or may demand proof of cure as a condition of reinstatement. When a default occurs and an institutional lender is involved, the lender will ordinarily complete any preforeclosure servicing prescribed by various loan guidelines in order to attempt a resolution of the default. However, should the borrower either fail to respond or fail to perform under an agreement to resolve the default, the lender may refer the loan to the trustee for foreclosure.

The lender will provide the trustee with the necessary documents (i.e., the Note, Deed of Trust, Assignments, Modification Agreements, Subordinations, etc.), and a Declaration of Default and Demand for Sale detailing the breach information. If the lender will not be utilizing the existing trustee appointed in the Deed of Trust (or subsequently appointed by substitution), the lender will also execute a Substitution of Trustee, naming the new trustee. The trustee will formally institute the foreclosure process by preparing, executing and recording the Notice of Default. A Trustee's Sale Guaranty (TSG) will be ordered from a title company to assure that the lender and trustee are made aware of necessary information regarding the present condition of title and proper addresses for notices to all parties of interest, per C.C. Sec. 2924 and applicable provisions of the Internal Revenue Code.

Once the Notice of Default is recorded, the title company will confirm the recording, in writing, to the trustee. This confirmation will contain the county in which Notice was recorded and the date and instrument number of recording, along with a disclosure of any Requests for Notice. Receipt of confirmation will signal the trustee to mail the Notice to all parties entitled to a ten (10)-business day notice under C.C. Sec. 2924b. However, the trustee may also be required to post or publish the notice, under specific circumstances defined in Sec. 2924b(d). Within thirty (30) days after recording the Notice of Default, the trustee will review the TSG to ascertain the necessity of additional mailings, IRS notification, and title status.

By statute, the Notice of Default must mature for three (3) calendar months. This time is often referred to as the redemption period, during which the borrower or junior lien holder and beneficiary may explore ways to cure the default. If the default has not been resolved during this period, however, the trustee will continue the process by requesting a title update in order to secure information, which may affect the ability to grant clear title after the sale. (Additional mailings may be necessary, including those required under IRS guidelines). A Notice of Sale will be drawn, posting & publication ordered, mailings prepared and the Notice sent for recordation. Each of these activities must be performed as prescribed under Sec. 2924 et. seq. to assure validity of the Trustee's Deed upon sale, the insurability of the property upon conclusion of the foreclosure process, and subsequent liquidation by either the beneficiary or a third party.

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Sec. 2924 et. seq. preserves the right of the borrower or junior lien holder (except in cases where the balloon payment is due) to reinstate the loan up to five (5) business days prior to the sale. The beneficiary is compelled to accept reinstatement until this "window" has expired. Once this period has expired, the beneficiary may exercise its discretion as to whether or not to accept reinstatement.

Approximately twenty-four (24) hours prior to sale, the trustee will request an additional title update, to be delivered prior to sale time on the day of sale. If the status of title is such that there is no impediment to the sale (such as a bankruptcy, city or county notice indicating an environmental or safety hazard, or DEH ATF/IRS seizure), the sale may be held as scheduled. The beneficiary will provide the trustee with specific instructions regarding the bid for sale. The trustee will review the bid, audit the foreclosure file, and provide the auctioneer with instructions for the sale. The auctioneer will conduct the sale as instructed, and report the results to the trustee.

The trustee will notify the beneficiary and prepare the Trustee's Deed, which will vest title into the name of the successful bidder. If a third party is the successful bidder, the trustee will also be responsible to distribute the proceeds of the sale. These proceeds will be distributed in accordance with CC Sec. 2924k. If any surplus funds are left over after paying the outstanding loan balance and the costs and expenses of foreclosure, CC Sec. 2924j requires the trustee to mail a written notice to all persons who might have a claim against the funds within thirty (30) days after the execution of the trustee's deed. The claimants then have another thirty (30) days to send their claims to the trustee. If the trustee is unable to resolve any conflicting claims, the trustee must either deposit the funds with the Clerk of the Superior Court or file an action in Interpleader.

If the auctioneer receives no bids for the property, which exceed the opening bid, the property will revert to the beneficiary, who will take title under the Trustee's Deed. Unlike a judicial foreclosure, there is no statutory right of redemption following a non-judicial private sale. This article is intended as a general overview of the non-judicial foreclosure process. Specific questions should be directed to a qualified real estate attorney.

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