

Foreclosure Guide



Courtesy of

Madan Ahluwalia, Esq.

Managing Attorney

Ahluwalia Law Professional Corporation

2033 Gateway Place, #500

San Jose, CA 95110

T: 408.416.3149

F: 650.204.6813

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	FORECLOSURE OF CALIFORNIA MORTGAGES	1
A.	Types of Foreclosures in California	1
i.	Non-Judicial Foreclosure.....	1
ii.	Judicial Foreclosure.....	2
B.	Foreclosure Timeline.....	3
C.	Unlawful Detainer Action.....	3
III.	STEPS TO STOP THE FORECLOSURE	3
IV.	WRONGFUL FORECLOSURE ACTION	4
V.	BANKRUPTCY.....	5

California Foreclosures

I. INTRODUCTION

Under early English and U.S. law, the mortgage was treated as a complete transfer of title from borrower to the lender¹. The lender was entitled not only to payments of interest on the debt but also to the rents and profits of the real estate. This meant that as far as the borrower was concerned, the real estate was of no value, that is, “dead,” until the debt was paid in full hence the Norman-English name “mort” (dead), “gage” (pledge).

Foreclosure is a legal process that resulted in the termination of an owner’s right to a property. Usually a lender initiates a foreclosure process when a borrower defaults on a mortgage loan. A foreclosure process usually involves the forced sale of the property by a sheriff, where the proceeds of the sale are applied to the mortgage debt.

II. FORECLOSURE OF CALIFORNIA MORTGAGES

A. Types of Foreclosures in California

California is a title theory state. In California, the property title remains in trust until the loan is fully satisfied. The document that secures the title is the “Deed of Trust”, also referred to as a Mortgage. California has a complicated set of rules concerning foreclosures and alternate rules for foreclosures. California foreclosures are governed by the *California Civil Code, Section 2924*.

i. Non-Judicial Foreclosure

The primary method of foreclosure in California is the Non-Judicial Foreclosure. This type of foreclosure does not involve court action.

¹ The party who borrows the money and gives the mortgage is the mortgagor (the debtor); the party who pays the money and receives the mortgage is the mortgagee (the lender).

The “Deed of Trust” is a security agreement making the property collateral for repayment of the loan. The “Deed of Trust” contains a clause called a “Power of Sale” which upon default entitles allows a trustee to sell the property outside of court in order to satisfy the underlying defaulted loan. The trustee acts as a representative of the lender to effectuate the sale, which typically occurs in the form of an auction. Unlike many states where trustees are appointed by lenders, *title companies primarily serve as trustees managing foreclosure sales in California*. California has a requirement known as the one-action rule. If a foreclosure is completed by non-judicial means, a second action to recover a deficiency judgment is not permitted.

ii. Judicial Foreclosure

Using a Judicial Foreclosure, a lender may recover a deficiency judgment in certain circumstances. But since this process takes longer than Non-Judicial Foreclosure, it is rarely used.

California statutory law provides for two steps in the foreclosure process before the lender can sell the house on the courthouse steps.

The first statutory step is to record a Notice of Default (“NOD”). The NOD sets out the amount of the arrearage on the loan and gives the borrower 90 days from recordation to pay the arrears and any costs incurred by the lender in initiating the foreclosure process. Payment reinstates the loan in good standing.

The second statutory step is to provide the borrower with a Notice of Sale (“NOS”), fixing the date the foreclosure sale will take place. Foreclosure sales are typically conducted on the steps of the county courthouse. To keep the property, the borrower must then pay the full amount owed on the loan, or reach some other deal with the lender.

B. Foreclosure Timeline

When a borrower has missed several months of mortgage payments (generally about three months), the lender files a Notice of Default. The NOD identifies the default amount and the date by which the borrower must pay-off the default. If after 90 days the borrower has not remitted the arrearages, the lender may authorize and instruct the Trustee to record the Notice of Trustee Sale. A Notice of Trustee Sale is required to give 20 days notice prior to the sale. The notice contains the date, time and location of the sale and posted on the property and in public location as well. Then the Trustee Sale auction will be held at the place and time mentioned in the NOS. The successful bidder receives a trustee's deed to the property once the sale is completed.

C. Unlawful Detainer Action

Any lender, who uses the *power of sale* in the "Deed of Trust" to conduct a foreclosure sale, is prohibited from suing the borrower for any deficiency or loss on the original loan transaction (if there was a refinance then a deficiency action may result after the non-foreclosure). The statutory trade-off is that in exchange for the ability to foreclose without going to court, the lender gives up the right to any remedy against the borrower other than taking the property.

The new owner of the property is then entitled to file an *unlawful detainer action* to evict anyone in the property. Sometimes, the new owner will offer the occupants cash to facilitate their move from the property. Otherwise, the new owner will provide a written 3-Day Notice to Quit to any former owner occupying the property for them to leave. If the former owners do not leave in three days time, the new owners must file an unlawful detainer lawsuit to evict the occupants.

III. STEPS TO STOP THE FORECLOSURE

Following steps could be helpful to Homeowner(s) in stopping the foreclosure:

1. Make offer pursuant to CCP 2923.6 with interest 5% or less
2. Challenge validation of Debt (15 USC 1692(g)); they do not possess the “Note”
3. Write QWR Qualified Written Request asking for accounts
4. If Refinance, write TILA rescission letter
5. Attempt to make payments pursuant to 2923.6 offer
6. Write hardship letter and ask for Modification
7. Serve Lawsuit
8. Get Injunction or Temporary Restraining Order.

IV. WRONGFUL FORECLOSURE ACTION

Wrongful foreclosure occurs when a lender or institution forecloses on an individual and sells their home illegally – or using methods which are outside the bounds of the law.

A wrongful foreclosure action is filed by the borrower against the servicer, the holder of the note, and usually the foreclosing trustee. The complaint usually alleges that there was an illegal, fraudulent or wilfully oppressive sale of property under a power of sale contained in a mortgage or deed of trust.

The causes of action alleged in a wrongful foreclosure action filed in California may include the following:

1. DECLARATORY RELIEF;
2. FRAUD;
3. TORTIOUS VIOLATION OF STATUTE;
4. BREACH OF CONTRACT;
5. ACCOUNTING AND/OR PROMISSORY ESTOPPLE;
6. QUIET TITLE;
7. VIOLATION OF BUSINESS AND PROFESSIONS CODE §17200;
8. WRONGFUL FORECLOSURE (VIOLATION OF CIVIL CODE SECTION 2924 AND VIOLATION OF 2923.5)
9. VIOLATION OF CA CIV. CODE §1788.17
10. VIOLATION OF CA CIV. CODE §1572; &
11. INJUNCTIVE RELIEF

V. BANKRUPTCY

If you are facing foreclosure, bankruptcy might be able to help. In many cases, filing Chapter 7 bankruptcy can delay the foreclosure by a number of months. Some people may be able to save their home by filing for Chapter 13 bankruptcy.