

AN OVERVIEW OF THE CALIFORNIA NON-JUDICIAL FORECLOSURE PROCESS

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The typical California deed of trust (called a “mortgage” in some other states) identifies three parties, the “beneficiary” (the lender), the “trustor” (the borrower), and the “trustee.” Generally speaking, it is the trustee who processes the foreclosure.

If the property to be foreclosed is the borrower’s residence, then with several specified exceptions, on loans executed between 2003 and 2007, Civil Code section 2923.5 requires the beneficiary or its designated agent prior to initiating the foreclosure to contact the borrower in person or by telephone to assess the borrower’s financial situation and explore options to avoid foreclosure. The toll free number for HUD must be provided. Due diligence by sending a certified letter and leaving several messages is sufficient if the borrower does not respond. If the matter is not resolved through this process, the beneficiary may begin the foreclosure 30 days after initial contact is made or attempted. The lender and its mortgage servicer also have new obligations under the Homeowner’s Bill of Rights concerning loan modification. They may not engage in “dual tracking” by processing loan modification and foreclosure simultaneously and must provide a single point of contact. They must confirm that all relevant documents are accurate and complete. They must send out various notices including warnings to service members and notices to borrower that they may request copies of the note and deed of trust and their payment history from where the loan was 60 days delinquent. (CC 2923.55). There are significant penalties now in place for mortgage servicers who violate certain of their obligations.

The actual foreclosure process is initiated by the mailing to the borrower by first class and certified mail of a Notice of Default. It is also mailed to various other

designated persons or entities such as holders of junior deeds of trust. The trustee owes no duty to search out a current address for the borrower or junior lienholder and need only mail foreclosure notices to the last known address. (See I.E. Associates v. Safeco Title Ins. Co. (1985) 39 Cal.3d 281.) A Request for Notice advising of a change of address should be recorded if the borrower or lienholder wishes to receive notice at an address other than the address of the property being foreclosed or other than at the address on the junior lien. The Notice of Default identifies the nature of the default and the amount currently needed to cure it. The Notice of Default does not have to be signed by the trustee, and may instead be signed by the beneficiary or its designated agent (Civil Code section 2924). The trustee can be changed anytime up until the Notice of Trustee's Sale is recorded (Civil Code section 2934a).

The Notice of Trustee's Sale may be recorded anytime after three months have passed since the recording of the Notice of Default. The Notice of Trustee's sale will set the actual foreclosure sale date. Once this Notice of Trustee's Sale is processed, the sale may be postponed for almost any reason by oral announcement at the scheduled sale. If the postponement is for 10 business days or more, new written notice must be sent within 5 business days.

Like the Notice of Default, the Notice of Trustee's Sale is to be recorded in the county recorder's office and mailed by first class and certified mail. It also must be published in a newspaper of general circulation once per week for three consecutive weeks and posted on the property and in a public place such as the county courthouse. A special warning to tenants must also be posted. These methods are intentionally redundant, so receipt of actual notice by any means is sufficient.

The borrower, or current property owner, or any junior lienholder, may cure the default by paying the delinquent amount and any foreclosure costs incurred, at any time until five business days before the scheduled sale date. If the sale is postponed more than five business days, this deadline is likewise extended. Once the sale date is less than five

business days away, the foreclosing beneficiary may require that the loan and expenses be paid in full.

The sale itself will be by auction and will give rise to transfer of title by means of a document called a Trustee's Deed Upon Sale. The new owner's title will have the same priority in time as the deed of trust that gave rise to the foreclosure. The security of any junior liens will be terminated by that deed. The borrower or other residents of the property are not automatically dispossessed, but will need to be evicted, either voluntarily or by means of an unlawful detainer proceeding. Tenants are entitled to 90 day notice prior to eviction and leases must be honored unless the purchaser plans to use the property as residence for himself or his family members.

This is a general outline and exceptions may apply to particular situations. To evaluate these circumstances as well as other related issues, you may wish to make an appointment to come in and discuss your circumstances in detail. Likewise, if you think some of these requirements may not have been satisfied, we can review your foreclosure to see if you are entitled to any relief or to recovery of damages. We also regularly assist trustees in ensuring that the statutory framework is complied with and defend trustees when sales are challenged.

Lawrence Dreyfuss is president of The Dreyfuss Firm, a professional law corporation located in Irvine, California. He is a 1974 graduate of UCLA and a 1977 graduate of The UCLA School of Law, and has more than 35 years civil litigation experience. He handles cases throughout California in state and federal trial and appeals courts concerning real property transactions and non-disclosures, secured lending and foreclosures, title problems, partition of jointly owned property, broker liability, contract disputes, and numerous other business and real estate issues. Mr. Dreyfuss has received the highest possible ratings (AV) for legal expertise and ethics from Martindale Hubbell, the preeminent national resource for attorney evaluations.

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