

Foreclosure Law 101

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On the Monday after Thanksgiving as downtown office workers returned to their desks after a long weekend, employees of Nevada Legal News prepared for the day's foreclosure sales. The Clark County Commission named the lobby of the daily legal newspaper's office, located at 930 S. Fourth St., as the official public location to hold or "cry" a trustee's sale, instead of the courthouse steps.

On that one Monday, 375 properties were cried for sale at Nevada Legal News, which conducts the majority of sales itself with title companies handling a sliver of the sales.

A borrower's journey from homeowner to foreclosure statistic is an emotional one, but at its core, it's a legal transaction from start to finish.

Judicial or Not?

The majority of foreclosure sales on residential property are "non-judicial," meaning that the foreclosure is not conducted in the course of a law suit overseen by a judge.

Most of what we call "mortgages" are actually purchase money loans secured by a deed of trust. A deed of trust involves three parties – the borrower ("grantor"); the lender ("beneficiary"); and a third party entrusted to hold the title ("trustee"). The trustee is typically a title company. Nevada law gives such a deed priority "over all other liens created against the purchaser before he acquires title to the real property." See NRS 107.026.

Foreclosure on a deed of trust is governed by NRS 107, and is non-judicial. Deeds of trust include a "power of sale" clause which allows the trustee to sell the property to pay off the debt, once specific steps outlined in the statute are met. In addition, the lender can only pursue one action at a time to collect on the loan, either non-judicial foreclosure or a lawsuit, but not both. Only when the foreclosure sale is concluded may the lender file a lawsuit for any deficiency.

Nevada law specifies that it is against public policy for a borrower to waive the "one action" rule, unless the loan exceeds \$500,000, is not a purchase money obligation and the real property is not a farm or principal residence. See NRS 40.453 and 40.495.

Basic Foreclosure Steps

After a borrower has defaulted on loan payments, the lender can invoke the trustee's power of sale. NRS 107.080 provides step-by-step instructions.

First, the lender will notify the trustee of the default with a Declaration of Default and a Beneficiary Statement, which is required by NRS 107.200. The Beneficiary Statement includes the amount due, the property address, the address of any guarantor(s) and other detailed information set forth in the statute. The trustee may not begin the foreclosure process until it receives the Beneficiary Statement.

Three important prerequisites must be met before the foreclosure sale is actually set. The borrower must receive, via certified or registered mail, a Notice of Default and Election to Sell, which is also recorded with the county recorder. NRS 107.085 also requires that the borrower receive a notice at least 60 days prior to the sale which provides information on credit counseling and reporting unfair lending practices.

The borrower must receive a 35-day redemption period, beginning "first day following the day upon which the notice of default and election to sell is recorded and ... mailed." See NRS 178.080(3). Finally, the trustee must wait three months after recording the notice to proceed.

If the borrower makes all payments, including any costs and fees, during the redemption period, the foreclosure process ends. The lender need not accept partial payments during the redemption or any time during the process. Many times, such payments will stop the process, but that depends entirely on the lender and whatever payment arrangements can be made with the borrower.

If three months elapse and the borrower has failed to make good on the delinquency, the trustee will set the sale date and record a Notice of Sale. The notice must be served on the borrower personally or mailed by certified or registered mail; must be posted in three public places for at least 20 days prior to the sale; and must be published in a general circulation newspaper once a week for three consecutive weeks.

On the sale date, the trustee will perform the sale and take the highest bid. The lender may bid using instructions previously provided to the trustee. After the sale, the trustee will record a Trustee's Deed in favor of the successful purchaser.

If the trustee failed to substantially comply with the provisions of NRS 107 in noticing or conducting the sale, the sale may be declared void if an action is filed in court within 90 days of the sale. The deadline is extended to 120 days if the trustee failed to provide notice to the borrower or any other person entitled to notice.

Special Situations

Here are, of course, exceptions to the foreclosure rules. Here are only a few examples:

- **Bankruptcy** – A bankruptcy filing means an automatic stay that halts a foreclosure sale, even if it's filed two minutes before the sale. If the sale continues or a Trustee's Deed is recorded without the court granting relief from the stay, the sale is void.
- **Servicemember** – If the borrower is a member of the armed forces, she is covered by the Servicemembers Civil Relief Act, which may protect the property from foreclosure or provide the servicemember additional time to cure a default.
- **IRS liens** – The IRS has the highest priority, if it abides by its own rules and timely files a lien on the property. Additional notices and timelines apply.
- **Junior encumbrances** – The protection afforded by the one action rule does not generally apply to junior lienholders, such as a second mortgage.

If these or other special circumstances arise during a foreclosure

proceeding, additional considerations are required.

This article is of a general nature and is not intended to address every legal situation that may arise in a foreclosure. For advice on a specific situation, consult an attorney or call the NVAR Legal Helpline, 1-800-748-6999.

PRACTICAL TIPS

- When a listed property is being foreclosed upon, it is a good idea for the seller to notify the trustee (the title company handling the foreclosure) and the lender that he is attempting to sell the property.
- Once in escrow, the preliminary title report will show the Notice of Default, and the lender's payoff statement will likely include the trustee's costs of sale to date.
- Close of escrow should take place before the trustee's foreclosure sale date. Otherwise, the seller loses title and cannot sell the property.
- The listing broker should take appropriate steps to withdraw the listing from MLS after the foreclosure sale.



PRESENTS

**General Membership Meeting
Luncheon & CE Class**

**WEDNESDAY, JANUARY 23, 2008
RENAISSANCE HOTEL
3400 PARADISE RD**

**LUNCH - 11:30AM – 1:00PM
CLASS - 1:30PM – 4:30PM**

Doors Open at 11:00
Vendor Exhibits & Networking

Reservations are required as seating is limited. Registration is available at www.lasvegasrealtor.com or call 702.784.5000

Cost is \$35, which will be credited to your GLVAR account when you attend this event. Deadline is Friday, January 18, 2008.

Keynote Speaker



A.J. Gwyn, Commander of the Southern Crime Prevention Task Force
Topic: Refuse to be a Victim!



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