

FORECLOSURES

~~Bad~~ The ~~Good~~, the Bad and the Ugly

Presented by

Charlie Cookson

Commercial Underwriter

Fidelity National Title Group

The material presented herein is for educational purposes only and is not intended as legal advice. Contact qualified legal counsel for legal advice on the foreclosure process.

- **Foreclosure is the process in which a lender(or other creditor) enforces their lien against the collateral that was pledged as security by the Owner or has attached under Oregon's Lien laws.**
- **Depending on the type of lien, the foreclosure process can have different requirements.**
- **The specific requirements must be handled according to statute or the validity of the foreclosure may be questioned.**



Mortgage versus Trust Deed

What is the difference?

- *A mortgage has two parties, the **borrower**/Mortgagor and the **lender**/Mortgagee*



- *A trust deed has three parties, the **borrower**/grantor; the **trustee**; and the **lender**/beneficiary.*

- *A mortgage **must** be foreclosed **judicially**, since there is no trustee to conduct the sale.*
- *A trust deed can be foreclosed **either** judicially or non-judicially.*
- *The Trust Deed Act form allows for a process of foreclosure that avoids having to go to court. The trustee can conduct the entire process by providing notice and recording the necessary documents.*

Non-Judicial Foreclosure

Also known as Trustees Sales

- The entire foreclosure is done by statutory process and recording only. ORS 86.726-86.815
- The timeline is set by statute and at a minimum of 120 days, but can take up to 7-10 months to complete.
- There is NO judicial oversight and the process solely relies on the Trustee following the correct process
- Foreclosure by notice is a complicated process and there are MANY specific requirements. Only some of which are covered in this presentation

**Residential Trust Deeds(ORS 86.705 (6))
have additional foreclosure requirements**

*****Any Discrepancy or variation from the
statutory requirements can be used in an
argument for the overturning of the
foreclosure.**

Non-Judicial Foreclosure

Also known as Trustees Sales

The first requirement for foreclosing a Residential Trust Deed is that the Lender must request/offer a Resolution Conference(Mediation) unless the Lender is exempt under 86.726

Lender must record either a Certificate of Compliance or file an Affidavit of Exemption with the State of Oregon. You may also see the Affidavit of Exemption recorded.

<https://www.doj.state.or.us/consumer-protection/homes-mortgages/foreclosure-avoidance-program/>



Non-Judicial Foreclosure

Also known as Trustees Sales

- The Beneficiary will usually Appoint a new Trustee to process the foreclosure. This MUST come from the Beneficiary of Record
- ALL Assignments must be recorded!! **See later MERS Discussion
- Public notice of a foreclosure comes when the **Notice of Default** (NOD) records. This signifies the start of the foreclosure, and the sale date is named within the NOD. It must be more than 120 days from when the parties receive notice.

Non-Judicial Foreclosure

Also known as Trustees Sales



- Public notice of a foreclosure comes when the **Notice of Default** (NOD) records. This signifies the start of the foreclosure process and the sale date is named within the NOD. It must be more than 120 days from when the parties receive notice.

Non-Judicial Foreclosure

Also known as Trustees Sales

- Trustee mails out Notice of Sale to all parties with an interest who will be foreclosed out.
- Owner of the Property
- 2nd Trust Deeds
- Creditor of Judgments
- Subsequent owners
- Contract Vendees
- Home Owners Association
- The Notice of Sale and NOD must identify the Date, Time and Location of Sale. There must be at least 120 days between Notice and Sale.
- Personal Service of the foreclosure must be made upon Occupants.

Non-Judicial Foreclosure
Also known as Trustees Sales

Danger Notice for Residential Trust Deed Foreclosures

On or Before the date the Notice of Sale is served or mailed, the sender must give warning notice to the grantor of the Trust Deed in the format specified in ORS 86.756

NOTICE:
YOU ARE IN DANGER OF LOSING
YOUR PROPERTY IF YOU DO NOT
TAKE ACTION IMMEDIATELY

Non-Judicial Foreclosure

- Notice of the Sale must also be published in a paper of general circulation once a week for four consecutive weeks.
- The last publication must occur more than 20 days prior to sale date.

But wait, there's more!!

- If Notice of Sale is not provided to a necessary party, their interest is not cleared and will need to be addressed prior to a new sale of the property.

Non-Judicial Foreclosure

Also known as Trustees Sales

Federal tax Liens recorded on the Property?

Did the IRS receive notice 25 days prior to the Sale Date?

Did a Bankruptcy stay the foreclosure?

After receiving a relief of stay, a Trustee must send an amended Notice of Sale within 30 days.

POSTPONEMENT

At the time and place of auction, the cryer may announce a postponement.

If postponed for more than two days, new notice must be provided.

The Sale Date may not be postponed more than 180 days or the foreclosure must start over.

Non-Judicial Foreclosure
Also known as Trustees Sales

Affidavit of Mailing

At or before the time of the Sale, the Trustee must record the following affidavits:

- **Affidavit of Mailing**
- **Affidavit of Service**
- **Affidavit of Service Attempts or Posting**
- **Affidavit of Publication**
- **Affidavit of Danger Notice Mailing**

The above Affidavits are how we can determine who received notice of the foreclosure and if requirements were met

Non-Judicial Foreclosure aka Trustees Sale

- "The Sale"
- On day and time of sale, the property is auctioned to the highest bidder. Lender automatically has a credit bid for the amount that they owe.
- **The Winner!**
- **The Trustee provides the high bidder at auction a "Trustees Deed".**
- **Buyer at auction records the Trustees Deed and that is the finalization of the foreclosure. Ownership changes hands and notified Junior Liens are cleared**

Non-Judicial Foreclosure aka Trustees Sale

- **Possible Problems**

- Error in record assignments
- Missing Notice to interested parties
- MERS
- What about the Moratorium?

- Because there is no judicial oversight, any technical discrepancy from the requirements in the Statute, leaves the possibility of overturning the foreclosure.



MERS in your Trustee Sales

(Mortgage Electronic Registration Systems)

Why is it a problem if MERS signed an Assignment of the Trust Deed or signed the Appointment of Successor Trustee? .

Brandrup v. Recontrust Company, N.A.,
SC S060281 (June 6, 2013)

Niday v. GMAC Mortgage, LLC, SC
S060655 (June 6, 2013)

- 2 Oregon Supreme Court rulings addressed questions as to the role of MERS in a Foreclosure.
- MERS was found not to meet the definition of beneficiary and could not initiate foreclosure.
- It was also determined that they were not acting as an Agent for the Beneficiary

MERS is a system that allows lenders to track the buying and selling of loans electronically without an actual recorded assignment for each transfer

Non-Judicial Foreclosure

Also known as Trustees Sales

- For the most part, Non-Judicial Foreclosures do not have Redemption rights.
- ****EXCEPT The FEDS!
- IRS Liens
- Federal Criminal Judgments
- Trust Deeds where an entity of the US Government is Beneficiary
HUD, VA, ETC
- IRS Liens foreclosed on the property give the IRS Rights of Redemption for 120 Days.
- Other Federal interests have 1 year Redemption rights
- Redemption means that they can pay the buyer at auction the amount of the bid and step into their shoes

Non-Judicial Foreclosure

Also known as Trustees Sales

- Junior Federal Interests other than Tax Liens create additional concerns for Non-Judicial Foreclosures
- Pursuant to 28 USC 2410 (c) Federal Liens may only be foreclosed by Judicial Foreclosure

- ***** Discuss with your Underwriter or Legal Counsel*****

- Show Me State Premium Homes v. United States

-

Judicial Foreclosures



- This is a foreclosure that goes through the court system. It can be a much slower process than non-judicial.
- We're often asked, but there is no way for *us* to know a finite date when it'll be completed.

The process starts by the Lender filing a Complaint with the court to enforce their lien. The Complaint will name all parties with a junior interest.

Ideally, the attorney also records a Lis Pendens with the county clerk.

This gives constructive notice that there is a pending lawsuit and any new interests are junior to any outcome of the case

Judicial Foreclosures

- With Judicial Foreclosures, the review process is much simpler. Here are my main items of concern:
 - *Are all necessary parties named as defendants?*
 - *Did all Parties receive proper service? Are you sure?*
 - Were any by publication?
 - Is ORCP 71(B) a concern?

Judicial Foreclosures

- *Review the complaint. What is the plaintiff asking for?*
- *Is the legal description of the Trust Deed and complaint correct?*
- *Review Judgment of Foreclosure. What does it say about priority and/or the interest of other parties in the case.*
- ****Watch out for construction lien Defendants & other Cross Claimants*

Judicial Foreclosures

Judgment of Foreclosure

This specifies the amount of the judgment and the lien priority of the judgment.

***Residential Trust Deed Foreclosures are not allowed to create a deficiency judgment

Writ of Execution (***) Must be Recorded)

An Order to the Sheriff to sell the property in order to satisfy the Judgment

Execution Sale Pursuant to ORS 18.860-18.993

Return on Sale & Certificate of Sale

Sheriff reporting back to the Court the result of the Sale and issuing a Certificate of Sale to the buyer at Auction

Redemption Rights

On a *judicial* foreclosure

- **If the Owner or a Junior Lien holder pays the amount that it sold for at Auction, they have "Redeemed".**
- **Redemption rights *start* at the *date* of the sheriffs sale.**
- Redemption can be done by the owner or a junior lienholder.
- If a redemption by the owner occurs, it reinstates all the junior liens, just as if the foreclosure hadn't been started. Owners/vestees have 180 days right of redemption. (ORS 18.964)
- Junior lienholders have 60 days right of redemption. (ORS 18.964)
- If there was a federal lien on the property, the USA has a 1 year right of redemption. Example: US District Court judgment (28 USC 2410)
- If there was a federal tax lien on the property, the IRS has 120 days right of redemption. (26 USC 7425(d))

Redemption Rights

“Investors and clients”

There are many ways our clients can attempt to acquire distressed property

- *Buy at Auction*
- *Contact the Owner after foreclosure Sale and purchase the property for a small amount. AKA buy the Redemption rights.*
- *Convince the owners to deed the distressed property with an agreement to “Rescue” the property from foreclosure.*
- *Purchase Junior liens and acquire their Redemption rights.*
- *Right of First Refusal or PSA recorded*

*Many of these strategies are regulated by Oregon Statute and/or have unseen pitfalls. If your transaction is out of the ordinary ...***ASK QUESTIONS*

- See ORS 18.965, 18.924(4)&(5) ORS 88.010 Mortgage Rescue Fraud Prevention Act

Judicial Foreclosures

If no one Redeems, the Buyer at Auction presents the Certificate of Sale to the Sheriff and is issued a Sheriffs Deed.

When Sheriffs Deed records, that is the completion of the Foreclosure. Ownership changes and any Junior Liens are cleared from the property.

Judicial Foreclosures

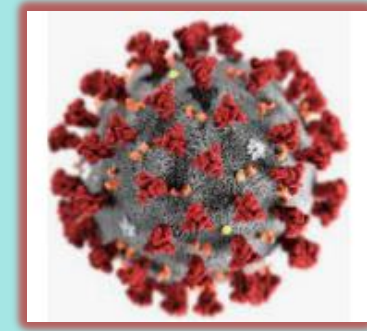
- **Possible Problems:**

Parties not properly served.

A deceased Owner means identifying heirs in order to serve them.

- What about Possession?

What about the Moratorium during Covid-19?



- National Federal moratorium began March 18, 2020.
(For Federally backed loans, Fannie Mae, Freddie Mac, HUD)
- Oregon's moratorium (HB4204) **began** June 30, 2020, retroactive to March 8, 2020.
- Oregon's **FIRST** moratorium **ended** December 31, 2020. **
- Oregon's HB4204 affects *all* loans & Lien foreclosures except County Tax Foreclosure.
Think private party TD's, construction liens, in addition to conventional loans.

Non-judicial:

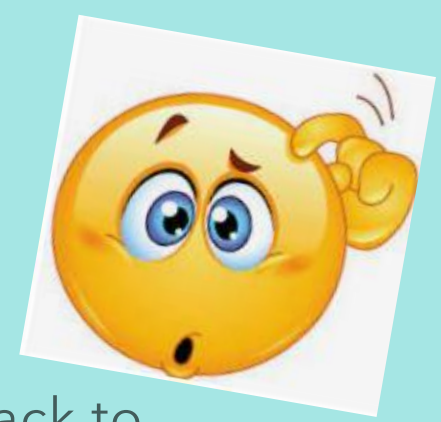
- If the Notice of Default *recorded* before March 8, 2020 and no postponements or other delays, ok to proceed.

Judicial:

- If the judgment or writ of execution *filed* before March 8, 2020;

The foreclosures were allowed to finish and completed.

These are insurable (assuming all other aspects of the foreclosure were processed correctly).



Moratorium confusion

- Oregon moratorium (HB2009) **re-instated** June 1, 2021, *retroactive* back to January 1, 2021. Applies only to 1-4 Family Residential Loans.
- Effective until June 30, 2021 and **extended to December 31, 2021.**
- What happens to those foreclosures which completed before June 1, 2021?
- Allowed foreclosure to proceed on Vacant and Abandoned property.

WOW, that
seems really
confusing!!

Properties allowed to be foreclosed effective January 1, 2021:

Newest Oregon moratorium effective January 1, 2021 exemptions:

- If property is not 1-4 family
- If vacant or abandoned at the time foreclosure was started (** Based on when Notice of Sale was sent or Complaint if done Judicially. For Foreclosures that Restarted 1/1/2021, look at the new Notice of Sale).
- If resulting from borrower's waste, destruction or illegal use.
- County property tax foreclosures.

This moratorium didn't impact constructions liens, HOA liens, **



Servicemembers Civil Relief Act formerly the Soldiers' and Sailors' Civil Relief Act

- This is protection to Servicemembers.
- Foreclosure cannot occur while on active duty.
- We must have proof that they were not on active duty.
- Sometimes these are recorded (if a trustees sale) or filed (if a judicial foreclosure), but...
- Oftentimes they are provided to us and they are off record.

Not required if your owner was a company
or LLC

FEDERAL FORECLOSURES 12 US Code Chapter 38

- Federal Foreclosures may be performed via a federal notice and sale process.
- Instead of a “trustee” you will find a Foreclosure Commissioner.

Tax Foreclosure

- The County files a complaint to Foreclose unpaid Taxes. Taxes unpaid for more than 3 years are subject to being foreclosed
- After obtaining a Judgment of Foreclosure, there is a Two-year period in which the taxpayer may repay the taxes(redeem).
- After Two years, the Sheriff conveys the property to the County by Sheriffs Deed.
- The County will usually resell these parcels to the public.

Tax Foreclosure

(Why are these so difficult to insure?)

- Oregon Statute only requires that the county mail to the last known address of interested parties.
- Because of the low threshold required under Oregon Statute, it raises “Due Process” concerns for any interest that was cleared without proper service.
- Most Title Companies in Oregon will not insure after a Tax Foreclosure before 10 years have passed without taking special steps

Possible Solutions?

- Quiet Title action to clear any remnant interest
- Deed from previous Owner (***)or Heirs)
- Satisfaction or Reconveyance of any remaining liens, Judgments or Trust Deeds
- Admission of receipt of service and consent to validity of foreclosure

Road Blocks to closing sale after foreclosure

- Communication Circle

Trustee who handled foreclosure claims it was fine.

You may be dealing with a third party buyer. No relationship to Foreclosing party.

Foreclosure Laws are complicated!

- MERS

After Two Appellate court judgments, Lenders continue to use ineffective documents!

- Occupancy

Yes, we really do need to know who is in the house. No, I don't think they are going to be your new tenant!

Questions?

- Thank you

