



PREVENTIVE LAW SERIES

FORECLOSURE



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WHAT ARE THE LEGAL DOCUMENTS THAT MAKE UP A CALIFORNIA MORTGAGE?

(1) Deed of trust: A document that transfers legal title of the property to the lender pending full payment of the loan obligation. It allows the lender to foreclose on the property if the borrower defaults.

(2) Note: This serves as written evidence of the debt to the lender that is secured by a mortgage, or deed of trust, and sets forth the amount of the loan and the terms of repayment.

HOW LONG DOES IT TAKE TO FORECLOSE A PROPERTY IN CALIFORNIA?

Depending on the timing of the various required notices, it usually takes a minimum of 120 days to finalize an uncontested non-judicial foreclosure. This process may be delayed if the borrower contests the action in court, seeks delays and adjournments of sales, or files for bankruptcy.

HOW ARE MORTGAGES TREATED IN CALIFORNIA?

California is a title theory state where the property title remains in trust until payment in full occurs for the underlying loan. The document that secures the title can be called a deed of trust or a mortgage. California has a complicated set of rules concerning foreclosures; however, the state is generally consumer-friendly.

HOW ARE CALIFORNIA MORTGAGES FORECLOSED?

There are two types of foreclosures in California: non-judicial and judicial foreclosures.

- **Non-Judicial:** This is the primary method used in California. This type of foreclosure does not involve court action. California's non-judicial foreclosures have strict notice requirements and the mortgage documents are required to contain a "power of sale clause."
 - **A power of sale clause** allows the trustee of the property upon default to sell the property in order to satisfy the defaulted loan. In California, title companies primarily serve as trustees managing foreclosure sales. The trustee acts as a representative of the lender to effectuate the sale, which typically occurs in the form of an auction.
- **Judicial:** These usually occur when no power of sale clause is included in the loan documents. During a judicial foreclosure the lender files with the court and then the court issues a final judgment of foreclosure. The property is then sold as part of a publicly noticed sale. A complaint is filed in county court along with what is known as a *lis pendens* -- a recorded document that gives public notice of the pending foreclosure.

POWER OF SALE NOTICE REQUIREMENTS AND WAITING PERIODS

There are two statutory waiting periods before a home may be foreclosed on and sold: redemption period and publication period.

- **Redemption period:** This period starts after a notice of default is recorded in the county where the property is located. A notice of default does not necessarily occur after one or a few payments are not made, but generally after a loan is substantially in default, which can be more than six months past due.
- **Publication period:** The publication period requires a notice of sale containing the name and address of trustee, certain disclosures (including that the property is about to be lost to foreclosure sale), the name of the beneficiary, and other information must be recorded in the county in which the property is located at least 14 days before any foreclosure sale. This period does not move forward for a minimum of 60 days.

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FOR LEGAL ADVICE IN A PARTICULAR SITUATION, ALWAYS CONSULT WITH AN ATTORNEY

THE RIGHT OF REDEMPTION IN CALIFORNIA

A right of redemption is a legal right that allows a party whose property has been foreclosed to reclaim that property by making payment in full of the sum of the unpaid loan, costs and fees. A borrower has ninety (90) days after the recordation of a notice of default to pay any default. This is commonly referenced as the redemption period.

FORECLOSURE SALES

The borrower must receive a twenty (20) day notice before any foreclosure sale. This notice must: (a) be mailed to the defaulting borrower (and other creditors whose liens affect the property) and; (b) be posted at the property being foreclosed upon and in a public place in the county where any sale would occur. The defaulting borrower may prevent the foreclosure sale by paying all arrearages up to five (5) days before the sale. If the defaulting borrower fails to prevent the foreclosure then the sale occurs twenty-one (21) days - or the next business day after twenty-one (21) days - after the first publication.

Foreclosure sales must take place on any business day between the hours of 9AM and 5PM and must occur at the location referenced on the notice of sale. The trustee will auction the property to the highest bidder, including the lender. The borrower is permitted to postpone this sale for one (1) day. As a result of the redemption and publication periods, the minimum time necessary to complete a foreclosure is 120 days.

DEFICIENCY JUDGMENTS IN CALIFORNIA

A deficiency judgment imposes personal liability on a borrower for the unpaid balance of mortgage debt after a foreclosure has failed to pay off the full amount of debt which was due at the time of foreclosure. This is allowed in only certain circumstances. A deficiency judgment may not be obtained when a property in foreclosure is sold through a non-judicial public sale or if the foreclosure relates to a purchase money mortgage. Different rules apply to guarantors of such loans.

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. Using a judicial foreclosure, a lender may recover a deficiency judgment in certain circumstances.

CAN THE SERVICEMEMBER'S CIVIL RELIEF ACT HELP?

Two provisions of the Servicemember's Civil Relief Act (SCRA) may provide some assistance. Both provisions, however, apply only to mortgages that originated before the period of military service. The first provision permits a judge to stay or delay certain foreclosure proceedings as justice requires, or to adjust the obligation to preserve the interest of all parties, if the member's military duties materially affect his mortgage obligations. A foreclosure proceeding may be stayed when a borrower is deployed or stationed overseas. The second provision allows members who acquire their mortgage before coming on active duty to receive a reduction in their interest rate to 6 percent.

LEGAL ASSISTANCE SERVICES

A legal assistance attorney is available by appointment Monday from 0800 - 1100 and 1300 - 1500, Tuesday through Thursday from 0900 - 1100 and 1300 - 1500, and Friday from 0900 - 1045. Powers of attorney and notaries are available Monday through Friday at the same times. For more information, please contact the Legal Assistance Office, located in Building 56, 32nd Street Naval Station, San Diego, CA, by telephone at (619) 556-2211, or our office at Naval Air Station North Island – Coronado, Building 318 – Second Deck, above the Fleet and Family Support Center, Saufley Road, by telephone at (619) 545-6437.

RESOURCES:

Department of Veterans Affairs Home Loans: www.homeloans.va.gov

California Courts Self-Help Center: www.courts.ca.gov/1048.htm

Legal Aid Society of San Diego, 110 S. Euclid Ave., San Diego, CA 92114; (877) 534-2524; www.lasds.org

HOPE Line: (888) 453-3102; www.hopenow.com

California Foreclosure Laws, Cal. Civil Code §§ 2924 et seq. (2013)

Servicemembers Civil Relief Act, 50 U.S.C. App'x §§ 501 et seq. (2012)

Mortgage Forgiveness Debt Relief Act of 2007, Publication 4681 (2014).

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