



stewart®

Foreclosure

Seminar Handout and Sample Packet

The information in this handbook is deemed reliable, but not guaranteed. All parties are advised to seek competent tax and legal counsel prior to attempting a Lease Option transaction.

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Our Goal

To give you the tools and information you need to be successful as you begin your Foreclosure transaction.

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Introduction

A foreclosure begins when the lender on a piece of real property has not received a mortgage payment within a specified amount of time (possibly 3-4 months). The lender will then take steps to recover the money owed, and failing that, “take back” the property. The entire foreclosure process is specified by state and federal law, so the exact timelines and steps required may differ from state to state.

Foreclosure Terms

Parties to the foreclosure process have their own terminology. It is helpful to remember:

- **Borrower** = Trustor
- **Lender** = Beneficiary
- **Trustee** = Third Party who will act upon instructions from the beneficiary. This is often a title company or foreclosure company. Other terms used to describe parts of the foreclosure process are included in your Seminar Packet.



Types of Foreclosure

Arizona, California, and Nevada permit two types of foreclosure proceedings. This seminar mainly discusses the non-judicial foreclosure because it is the most common. Non-Judicial means that the process is administered without court supervision, which greatly streamlines the foreclosure timeline while still protecting the rights of the lender and borrower.

A Judicial Foreclosure can be seen as more of a lawsuit. It is a more complicated, expensive and time-consuming route towards the same end. The lender files for foreclosure in court and then records a notice of the pending lawsuit. After service of the lawsuit upon the parties named as defendants, those parties have an opportunity to answer. There will be a trial, and at the conclusion of the trial, the judgment of foreclosure will be issued. Then the judicial auction begins.

Sometime the judicial foreclosure allows a right of redemption period where the borrower is allowed to buy back from the successful bidder, often up to one year following the sale. In Nevada, however, there is no redemption period after the auction is over.



Non-Judicial Foreclosures

Non-Judicial Foreclosures are enabled through the Deed of Trust, which contains a power of sale clause. The Deed of Trust is signed by the borrower at the time the loan is given. The power of sale clause may identify the trustee, plus the timeline and other terms of any foreclosure actions that might take place.

The lender must proceed according to the strict procedures and timeline of notifications and waiting periods, then may take back the home and sell it to recoup the debt. By electing the non-judicial procedure, the sale of the home will completely fulfill all obligations of the debt.



Tip:

Whether your client is a buyer or a seller, an attorney should be involved from the beginning of any negotiation process. As settlement time nears, he or she will assist them through the closing process and help all parties to understand the terms. Remember, no two deals are alike, everything is negotiable, and terms are much more important than price.

Steps to a Foreclosure

Greatly simplified, the non-judicial foreclosure process consists of these three general steps.

Step One: If the lender does not receive loan payments as specified in the deed of trust, it may file a document with the county recorder in which the property is located. The exact document varies by state, but may be a “Notice of Default” (NOD) or “Notice of Sale.” This notice must then be mailed to all parties with a recorded interest in the property (or with a recorded notice requiring said notice) via certified or registered mail or both. The borrower is given a specified time frame in which to bring the loan current.

Note 1: Some real estate agents specialize in assisting borrowers at this stage of the transaction. A sale of the property may be arranged through which the lender will receive the full amount owed on the loan and the foreclosure does not proceed.

Note 2: Some lenders will also allow a “Short Sale,” where the lender agrees to accept less than the full amount of the debt.

Note 3: California law generally requires special handling of sales transactions to protect homeowners in foreclosure. This law, called the Home Equity Sales Contract Act, generally applies to transactions that meet all of the following four conditions: the property is one-to-four family dwelling units; the owner occupies one of the units as his or her principal place of residence; there is an outstanding notice of default recorded; and the buyer will not use the property as a personal residence. The Home Equity Sales Contract Act does not apply if one of these four conditions is unmet.

Step Two: The lender or trustee sets a date of sale and notifies all the parties, including other lien holders, and state and federal taxing agencies. The Notice of Sale must be posted and published for a specified period of time before the sale.

Step Three: The trustee’s sale or auction is held at the steps of the county courthouse, or other designated public location in the county where the property is located. Bidders are generally required to submit certified funds (cashier’s check or money order) in the full amount that they are willing to bid. Exceptions apply in Arizona where the bidder is required to submit a non-refundable deposit of \$10,000.00 with the remainder of funds due by 5:00 PM the next business day. Past due taxes or other senior liens become the responsibility of the winning bidder. If the minimum bid is not met, the property will then revert back to the lender and becomes REO (Real Estate Owned). In this case, the property can be purchased directly from the lender.

Note 1: Some agents specialize in selling these REO properties. They establish a relationship with the lender providing an important service, which in turn can generate a consistently full pipeline of business for the real estate agent.

Foreclosure Timeline

Calendar	Action
Day 1	Notice of Default is recorded with county recorder
Within 10 business days	Trustee mails and publishes Notice of Default to borrower(s)
Within 1 month	Mail Notice of Default to all parties with an interest in title
After 3 months	Set sale date
25 days before sale date	Send notice of sale to I.R.S.(when necessary)
Within 10 days from 1st publication	Send beneficiary request for property directions
14 days before sale date	Record Notice of Sale with county recorder's office
7 days before sale date	Trustee cannot sell for 7 days after expiration of bankruptcy court order.
5 business days before sale date	The borrower's right to reinstate the loan expires.
Sale date	Property is sold to highest bidder at public auction

For borrowers, foreclosure is a very serious legal procedure which can often be avoided. Housing counseling agencies sponsored by the United States Government offer valuable resources to help you discover special borrower programs. Most of these services are free of charge. Borrowers can contact the US Department of Housing and Urban Development (HUD) for more information.

What to Ask the Lender

If your client cannot meet the mortgage payment, HUD recommends that any letters from the lender be answered immediately with an explanation of the circumstances. Many lenders offer assistance, but only for those who stay in the home and do not abandon it. For example, the lender may have a special forbearance program to rearrange payments, or even reduce or suspend them for a period of time. The lender may also refinance the debt or extend the term of the loan to make the payments lower.

Those with FHA loans may also qualify for a “partial claim” payment. This program provides a one-time payment from the FHA insurance fund to bring the mortgage current. If the loan meets certain criteria, the lender can file a partial claim. The borrower must sign a Promissory Note, and a lien for the amount of the partial claim will be placed against the property. The interest-free amount is due and payable when the first mortgage is paid off or when the property is sold.

Scams

Unfortunately, there are those who prey upon people in financial difficulty. Most likely, anything that sounds too good to be true, is. To avoid scams it is important for the borrower to:

1. Check with a lawyer before entering into any transaction involving the property.
2. Remember that the loan must be paid even if the deed is signed over to someone else. The lender must formally release the mortgage debt.
3. Make sure all promises are made in writing
4. Do not sign anything with blanks to be filled in later.
5. Read and understand all documents before signing.



Buying a Foreclosed Home

Investors everywhere are seeking tips and advice on profiting from foreclosed homes. Bookstores are full of how-to publications and websites promise bargains in hot markets. In reality, there are good buys for those who are willing to work at it, but the process of locating properties and working through the legal and emotional entanglements is not for the faint of heart!

If your client is looking to find a true bargain in real estate by purchasing a foreclosed home at auction, there are some important points to keep in mind:

1. Statistics have often shown that a very low percentage of recorded NOD's result in the owner actually losing the home to foreclosure.
2. NOD/Notice of Trustee Sale lists are available from information service providers or in adjudicated newspapers where they must be published before a sale can take place.
3. Your client must prepare to spend several hours a week doing research of public records and act fast.
4. Mortgage Brokers, attorneys, insurance agents, tax specialists, and accountants can be great authorities on their local foreclosure market. Have your client ask their professional sphere of influence to give them advice.
5. Encourage your client to run ads that may attract the eye of people who must get out from under a home loan, such as "I buy houses."
6. A great deal can be made at a HUD auction, but warn your client that they will not be the only one seeking out a good deal. They must be prepared for bidding wars and competition, and if a property is won, they must pay for part or all of the sum immediately.



ASSIGNMENT OF DEED OF TRUST: a written document, that transfers the beneficial interest in a note and deed of trust from one to another.

AUTHORIZATION TO SIGN AS AGENT AGREEMENT: written document given by a beneficiary authorizing an agent to sign a document on their behalf (such as a notice of default).

BANKRUPTCY: a legal proceeding which allows a debtor to discharge certain debts or obligations without paying the full amount or allows the debtor time to reorganize his financial affairs so he can fully repay his debts. (A bankruptcy does not discharge obligations secured by a deed of trust.)

BENEFICIARY: the lender or their successor in interest for whose benefit a trust is created and to whom the debt is owed.

BID AUTHORIZATION LETTER: your written authorization instructing the trustee to make the initial opening bid at the trustee's sale on the lender's behalf. This form will also advise our office of any additional amounts to be included in the opening bid, (total Debt), such as funds advanced by you to pay delinquent real estate taxes, etc.

BREACH: the failure without legal excuse to perform any promise made in a contract. A breach is stated in the notice of default.

DECLARATION OF DEFAULT: a written document that instructs the trustee to prepare and record a notice of default and if necessary, to sell the secured property in order to satisfy the unpaid obligation. This document does not require the acknowledgment of a notary public or recording and is merely retained by the trustee in their foreclosure file.

DEED OF TRUST: a written document, describing the real property that is being given as security for the repayment of an obligation.

EVICTION: See "Unlawful Detainer."

EXTENSION AGREEMENT: an agreement (normally written) giving additional time to pay an obligation.

FEDERAL TAX LIEN: an obligation to the United States government as a result of nonpayment of federal income taxes.

FORECLOSURE: (non-judicial): a popular term used to describe the procedure followed in enforcing a creditor's rights when a debt secured by any lien on property is in default; however, the correct term for a "Foreclosure" involving a deed of trust is a "Trustee's Sale Proceeding."

ENDORSEMENT/DATEDOWN: A continuation of the trustee's sale guarantee that reports any changes in the status of the property being foreclosed. Such "date downs" are requested from the title company prior to preparation of the notice of trustee's sale and prior to the trustee's sale.

Glossary Continued

IMPORTANT NOTICE: A written document required by California law to be a part of the recorded Notice of Default. This document is completed by our office and attached to the Notice of Default (as page 1) prior to recording. It sets forth the reinstatement amount as of a specific date and contains certain language directed to the borrower and emphasizes the fact that a foreclosure proceeding has been initiated.

INVALID: not legally sufficient; no binding force.

JUNIOR LIEN: a legal claim upon real property recorded subsequent (or recorded prior but has subordinated) to another legal claim upon the same real property.

LIMITED POWER OF ATTORNEY: a recorded document which authorizes someone to act as attorney-in-fact in a specific manner for someone else.

LIS PENDENS: a recorded notice of pending legal action, which notifies prospective purchasers and encumbrances that any interest acquired by them in a property litigation is subject to the decision of the court.

MODIFICATION AGREEMENT: a written document, signed by the beneficiary and the borrower that alters the terms of either the note of deed of trust.

NONMILITARY AFFIDAVITS: a sworn statement, in writing from the beneficiary or his agent which declares that the property owner is not entitled to any rights under the Soldier's and Sailors Civil Relief Act of 1940.**NOTE:** a written document, (promise to pay), that sets forth the amount of the obligation and the terms of repayment.

NOTICE OF DEFAULT: a written document that gives constructive notice of a trustor's failure to perform his obligation under a deed of trust. This document does not require the acknowledgment of a notary public and must be recorded.

NOTICE OF RESCISSION: a written document that cancels or annuls the effect of a notice of default when a default has been cured (reinstated). This document does not require the acknowledgment of a notary public, but must be recorded with the county recorder in the county in which the property is located.

NOTICE OF TRUSTEE'S SALE: a written document that sets forth the day, date and time of the trustee's sale, describes the property to be sold and gives an estimate of the unpaid debt as of the first publication debt. This document is prepared by the trustee and does not require the acknowledgment of a notary public and must be recorded with the county recorder in the county in which the property is located at least 14 days prior to the scheduled sale date. We must arrange for the notice of trustee's sale to be published in a qualified newspaper in the city (or judicial district), in which the property is located. This publication must appear for 3 consecutive weeks, with the first publication date being at least 20 days prior to the sale date.

POSTPONEMENT: a verbal announcement made at the time and place of the scheduled trustee's sale that establishes a new date or time for the trustee's sale. The sale cannot be changed from the originally noticed location.

Glossary Continued

PRELIMINARY INJUNCTION: A judicial order granted by a judge of the Superior Court, which prohibits the trustee from proceeding with any further action on a specific foreclosure file until a trial is held or settlement reached. This occurs when there is a dispute between the owner of a property and the beneficiary. A Trustee's Sale cannot be held any sooner than seven (7) days from the dismissal of the action or the expiration of a restraining order, injunction or stay from any court of competent jurisdiction. However, the order or any amendment thereto may expressly provide for an earlier sale date.

PRE-PUBLICATION PERIOD: the three month period following the recording of the notice of default. Prior to 1986 this period was called the reinstatement period.

PRESENT OWNER, CURRENT OWNER, NEW OWNER: the successor to the trustor named in the deed of trust and now the owner of the property.

PROMISSORY NOTE: See "Note."

PUBLICATION LETTER: this letter is sent to the lender by the trustee. When completed and returned, it authorizes the trustee to proceed with the scheduling of the trustee's sale and preparation of the notice of trustee's sale.

PUBLICATION PERIOD: this is the interval beginning the day after the pre-publication period expires and ending with the conducting of the trustee's sale. During the publication period, the notice of trustee's sale is published, posted, recorded, and copies are mailed to all entitled parties. The publication period is normally 30 to 40 days.

RECONVEYANCE: a recorded document which gives notice that the loan secured by the identified deed of trust has been paid in full.

RESCISSION: See "Notice of Rescission."

REINSTATEMENT: a curing of a default and restoration of the loan to current status through payment of past-due amounts together with the fee and expenses of the trustee.

REINSTATEMENT PERIOD: this is the interval from the date the notice of default is recorded until five business days prior to the date of sale during which time a default may be reinstated/cured.

REQUEST FOR NOTICE: a recorded document which requests a copy of any notice of default and any notice of sale to be sent to the requester at the address shown. See California Civil Code section 2924b(1).

RETURN AND ACCOUNT OF SALE BY TRUSTEE: an itemization prepared by the trustee or his agent and sent to the successful bidder at the sale. It gives a complete accounting of the successful bid.

REQUEST TO PREPARE NOTICE OF DEFAULT: See "Transmittal Form."

Glossary Continued

SOLDIER'S AND SAILOR'S RELIEF ACT: an act passed by Congress in 1940, for the financial protection of those persons serving in the military service. This act is the reason for the completion of the nonmilitary affidavit forms.

STATEMENT/INVOICE: an itemization of the trustee's fee and expenses incurred at the conclusion of the foreclosure proceeding (cancellation, reinstatement, payoff or completed sale).

SUBSTITUTION OF TRUSTEE: a written document that appoints a successor trustee to the trustee named in the deed of trust, (or present trustee). This document must be acknowledged by a notary public and recorded with the county recorder in the county in which the property is located.

TEMPORARY RESTRAINING ORDER (TRO): A judicial order which is granted by a judge of the Superior Court. This order temporarily prohibits the trustee from proceeding with any further action under a specific foreclosure file until a trial is held or settlement reached. A TRO is effective, generally, for a 21 day time period or until a hearing is held and the judge decides whether a preliminary injunction will be granted or denied.

TOLL: to temporarily stop. Frequently used to describe the tolling (stopping) during bankruptcy of any further acts in foreclosure.

TRANSMITTAL FORM (TS138): this is the "Request to Prepare Notice of Default" transmittal form which is completed by the lender and forwarded to T.D. Service Company together with the note, deed of trust, assignments and other necessary loan documents. This form sets forth all pertinent information to enable us to prepare the default documents.

TRUSTEE'S DEED UPON SALE: a written document which is prepared and signed by the trustee when the secured property is sold at a trustee's sale. This document transfers ownership to the successful bidder at the sale; must be recorded with the county recorder in the county in which the property is located.

TRUSTEE'S SALE: the public auction of the real property, described in the deed of trust, to satisfy the unpaid obligation.

TRUSTEE'S SALE GUARANTEE : A Title report given to the present trustee when a trustee's sale proceeding has been initiated. This report provides the names of the current owner, all liens and encumbrances recorded and other information pertinent to the foreclosure process. The information is insured to be correct by the title company.

TRUSTEE'S SALE PROCEEDING (foreclosure): the term used to describe the non-judicial procedure followed by the trustee in enforcing a creditor's rights when a debt secured on real property is in default.

TRUSTOR: the borrower (or property owner) at the time the deed of trust was created. Trustor is often used to refer to the current owner. **TS138:** See "Transmittal Form."

UNLAWFUL DETAINER ACTION (eviction): a legal action to remove someone who has unjustly retained possession of real property after one's right to possess has terminated.

Glossary Continued

VALID: a condition that is legally sufficient; that will be upheld by the courts.

VOID: having no legal force or binding effect. Incurable.

VOIDABLE: a condition capable of being made void, although not necessarily void in itself. **DISCLAIMER:** Presentation of this glossary is for general purposes only. No information on this page is to be viewed as legal advice or as an official description of judicial process. These terms are general and are displayed strictly as a service to consumers. They are not intended to be all-inclusive or to cover default situations in all states. Consumers are advised to seek professional legal counsel in any default proceeding.