

Information & Instructions: How to handle real property foreclosure sales

PREVIEW

1. In the event of a default on a real estate lien note, foreclosure allows a pre appointed trustee or a duly appointed substitute trustee to sell a debtor's real property pursuant to the lien rights contained in a Deed of Trust.

2. The Texas Property Code and the Deed of Trust itself outline the foreclosure procedure. The practitioner must follow the procedure set out in the Deed of Trust precisely without any variances.

3. Courts require strict adherence to both the statutory framework regarding foreclosure sales and the terms of the Deed of Trust in order to uphold foreclosures. Simple clerical mistakes or variances may cause the foreclosure to be null and void.

4. Foreclosure sales are governed by Texas Property Code Sections 51.001 and 51.002. Prior to the enactment of the Texas Property Code, the statutory references were Articles 3190, 3326, 3810, 5671 and 5506 of Vernon's Annotated Civil Statutes.

5. Generally speaking, the following procedure should be used. However, the practitioner must consult the Deed of Trust to ensure full compliance with its terms.

6. The practitioner should also check the promissory note to see if the debtor has waived presentment of demand and a notice of acceleration. If not, a demand letter must be sent demanding payment on the note and advising the debtor that the loan will be accelerated.

7. Next, a letter should be sent advising the debtor that the loan has been accelerated. Most practitioners prefer to send a certified letter, return receipt requested, advising the debtor that the loan is in default and that the property will be foreclosed upon even though the promissory note may not require Presentment of Demand and Notice of Acceleration.

8. The next step is to contact a title company and obtain an abstractor's certificate in order to ascertain who the record holder of title is and what, if any, liens have been attached to the property.

9. The abstractor's certificate should also identify any state or federal tax liens attached to the property. If the abstractor's certificate does not include a search of state and federal tax liens, the tax lien records in the county where the property is located should be examined.

10. If a state tax lien has been filed, notice of the trustee's or substitute trustee's sale must be sent to the State of Texas. If a federal tax lien has been filed, the notice must be sent to the Secretary of the Treasury for the Internal Revenue Service. The notice to the Secretary of Treasury must be made 25 days prior to the sale.

a. If this notice has not been given, the property will remain encumbered by the federal tax lien (even if the sale

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b. If the proper notice has been given, however, the federal government has a right to redeem the property from the subsequent purchaser, but this right expires 120 days after the date of the sale.

c. Thereafter, if the government has not redeemed the property, the purchaser takes the property free and clear of the federal tax lien.

11. If a lien for ad valorem taxes exists on real property, it is superior to most preexisting liens; this is an exception to the general rule that the filing date of a lien establishes its order of priority.

12. General tax liens have priority over contractual and other liens only if notice of the general tax lien has been recorded before the prior liens.

13. If the debtor is a corporation, the practitioner must check with the Secretary of State's Office and the State Comptroller's Office to ascertain if the debtor is delinquent in its corporate franchise taxes.

14. If a lien for such taxes exists and is properly recorded, it is superior to the Deed of Trust lien regardless of the date that the franchise tax lien was recorded.

15. If the debt is guaranteed by the Federal Housing Administration, the Veteran's Administration, or a private mortgage insurance company, the practitioner should check with the agency to ascertain if any special notification requirements exist other than those detailed above.

16. Occasionally, such agencies require notice of default or acceleration and are entitled to know the amount of the unpaid balance, the last payment made, number of payments in arrears, and the amount of monies owed to cure the default.

17. Some private mortgage insurance policies may require the mortgagee to tender title after foreclosure sale to the insurer before payment of the policy proceeds.

18. Review the Deed of Trust and outline precisely the steps required for foreclosure. Also outline the steps required for the appointment of a substitute trustee. If the original trustee will conduct the sale, the practitioner may skip the steps referred to below applicable to a substitute trustee.

19. If a substitute trustee, i.e., a person other than the original trustee named in the Deed of Trust, is to act, the following procedure should be used:

a. Send a request, using the form entitled Request to Act, that the trustee exercise his or her duty and sell the property being held as collateral.

b. If the Trustee cannot or does not act, have the Trustee sign the resignation form entitled Resignation of Trustee.

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c. The beneficiaries of the Deed of Trust should sign an Appointment of Substitute Trustee. It is advisable to record with the applicable County the Appointment of Substitute Trustee.

d. Once the substitute trustee has been appointed, he or she may commence the foreclosure proceedings.

20. The trustee prepares and sends to the debtor a Notice of Trustee Sale or a Notice of Substitute Trustee Sale. The notice must state the date, place, and time period during which the sale will occur, and must be mailed to the last known address of the debtor by certified mail, return receipt requested. Furthermore, it must be posted on the courthouse door and recorded in the county clerk's office where the property is situated. All of the above notices to the debtor must be given 21 days prior to the foreclosure sale.

21. In order to guarantee that the notice has been posted properly and to prove the posting has occurred, most conservative practitioners deliver the Notice of Trustee Sale or Notice of Substitute Trustee Sale to the Sheriff's or Constable's department and pay a small filing fee to have the Deputy or Constable post the notice. The posting official then gives the practitioner a receipt, accompanied by a stamp certifying the date the document was posted.

22. After the notices have been posted for 21 days, the next step is to sell the property at the trustee's or substitute trustee's sale. A foreclosure sale may be held only on the first Tuesday of each month between the hours of 10:00 a.m. and 4:00 p. m, during the three-hour time period stated in the notice, and must take place at the county courthouse where the notice was posted.

23. Many trustees as a shortcut in conducting the sale proceed to comply with applicable requirements. The script provides a written summary of the bidding and sale process. A sample form may be found below. The trustee conducts the sale pursuant to the script by reading the Notice of Trustee or Substitute Trustee Sale, asking for bids, and selling the property to the highest bidder pursuant to the terms of the Deed of Trust.

24. The trustee or substitute trustee then prepares a trustee or substitute trustee's deed and files the deed with the County Clerk's Office, accompanied by an attached Affidavit of Service. The Affidavit of Service is a recitation stating that the debtor received proper notice of the foreclosure sale.

25. The foreclosure procedure as discussed above is time consuming and costly. Since foreclosures sales must be conducted in strict compliance with the statute and Deed of Trust, it is potentially a risky area of private practice. If the beneficiary simply wants the property back, and does not intend to pursue a deficiency judgment against the debtor (the difference between the monies owed on the debt and the monies received at a foreclosure sale), and if no other liens have been filed against the property, some practitioners advocate the use of a deed in lieu of foreclosure.

26. A deed in lieu of foreclosure is a voluntary conveyance of the mortgaged real estate by the debtor to the holder of the mortgage. The voluntary deed in lieu of foreclosure avoids the

problem of competitive bidding at a foreclosure sale, as well as future attacks against the sale by way of a wrongful foreclosure lawsuit, may also be easier in such an instance to obtain title insurance. The disadvantage of this type of deed is that it does not extinguish inferior liens, including tax liens.

PREVIEW

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