

Property in foreclosure?

Escrow and Title Need to Know!



A pending foreclosure can affect your escrow and the availability of title insurance – you should advise your escrow officer promptly if you are aware or become aware that the property is in foreclosure.

What is “in foreclosure?” The foreclosure process formally begins with the recording of a Notice of Default. A borrower may be behind on payments or in default under their loan agreement, but they are not “in foreclosure” until the lender or trustee records the Notice of Default. The Notice of Default (“NOD”) is then mailed and published as required by law.

Why does the property being “in foreclosure” matter? The recording of the NOD starts the clock ticking down toward the eventual auction of the property, and creates critical time constraints for completing a sale or refinance of the property. The basic foreclosure timeline is as follows:

- ▼ After recording the NOD there is a three month reinstatement period, to give the property owner a chance to cure the default;
- ▼ After the three months has expired, if the default hasn't been cured the trustee can set the auction date and issue a Notice of Trustee's Sale;
- ▼ The Notice of Trustee's Sale is published for three weeks prior to sale date, and is also recorded and mailed as required by law. The sale date, or auction, is typically scheduled for a date three to four weeks following the expiration of the three month reinstatement period;
- ▼ The borrower's right to reinstate the loan expires 5 business days prior to the sale date. This means that after that time, the lender can insist on being paid in full to stop the foreclosure, and isn't required to let the borrower simply cure the default;
- ▼ The trustee's sale is held. The property can be sold at a public auction at that time, or the lender may elect to postpone the sale to another date. The borrower doesn't have the right to have the sale postponed by the trustee.



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As you can see, a foreclosure can be completed, from NOD to trustee's sale, in less than four months. If a transaction is pending, particularly a short sale transaction, this can be a very short timeframe to complete the transaction and get the foreclosing lender paid off before the sale date. Your escrow and title professionals will need to be aware of any pending foreclosure so that these time frames can be monitored, in order to complete the transaction before any sale takes place, if possible. A foreclosing lender may require information from the escrow holder when considering a postponement of the sale. The existence of a foreclosure can also affect payoff demands, or the ability to complete a payoff prior to the scheduled sale.

Other issues when a property is "in foreclosure." When owner occupied residential property is in foreclosure, certain legal requirements may affect the escrow process or availability of title insurance. California has very strict laws dealing with the purchase of the property from a homeowner "in foreclosure" (Home Equity Sales Contracts Law, Civil Code Section 1695, et seq.). Failure to comply with these laws allows the homeowner to void any sale, recover damages, and can even subject the violator to criminal penalties. Therefore, the escrow holder will want to confirm that the buyer is either exempt from these laws or is using the required contracts and disclosures. In addition, the title insurer will want to be comfortable that the transaction won't be subject to later attempts to set it aside.

Bottom Line: You need to keep your escrow and title professionals fully informed about the existence of a pending foreclosure and the status as the foreclosure advances down the foreclosure timeline:



While the title searchers can see the recorded steps of this process in the public records, many important parts of this process take place "off record." In addition, care must be taken by all participants in a transaction involving a seller whose residence is in foreclosure, so that escrow may proceed and title insurance for the buyer and any lender can be obtained.



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