

FORECLOSURE: JUDICIAL VS. NON-JUDICIAL

Foreclosure processes vary from state to state—relying either on a judicial foreclosure process, a non-judicial foreclosure process or, frequently, a combination of the two. The system used often depends on whether the state utilizes mortgages or deeds of trust for the purchase of real property. Generally, states that use mortgages tend to conduct judicial foreclosures, while states that use deeds of trust tend to conduct non-judicial foreclosures.

Every state allows lenders to foreclose through the court system. However, in nearly half the states, judicial foreclosure is the only option. A judicial foreclosure process uses the court system to execute the foreclosure and requires the mortgagee to prove in court that the mortgagor is in default. Some argue that this process favors the borrower, as it provides them with an impartial arbiter and allows the outcome to be contested if the borrower believes that the lender did not provide proper documentation or adequately follow state law.

The judicial foreclosure process begins once the mortgagee pursues court action to resolve default on the property. In most cases, the process works like this: the mortgagee contacts the mortgagor to try to resolve the default. If the mortgagor is unable to pay off the default (or otherwise doesn't respond within a given period of time to repeated attempts to contact the mortgagor), the mortgagee files a complaint with the court, stating the debt amount and that the default should allow the mortgagee to foreclose on the property, as security for the loan. The process also seeks to establish the mortgagee's right to have the collateral (home) sold and have proceeds from that sale be applied towards the outstanding loan.

In connection with the lawsuit, the mortgagee also records a notice of *lis pendens* (lawsuit pending notice) with the county clerk or other public property records repository, notifying the public that a pending action has been filed against the borrower in default to collect the defaulted debt, including having the home sold.

The mortgagor will then be served notice of the complaint by mail, direct service or publication. The mortgagor has the opportunity to be heard before the court, and if the court finds the debt valid and in default, it will issue a judgment for the total amount owed, including the costs of the foreclosure process. After the judgment has been entered, a writ will be issued by the court authorizing a sheriff's sale (public auction). Sheriff's sales require either cash to be paid at the time of sale, or a substantial deposit with the balance paid within 30 days after the sale. The highest bidder at the auction will be the owner of the property, subject to the court's confirmation of the sale. After the court has confirmed the sale, a sheriff's deed will be prepared and delivered

to the highest bidder, and when that deed is recorded, the highest bidder becomes the owner of the property.

Non-judicial foreclosure procedures take place outside of court and are based on deeds of trust that contain a power-of-sale clause, which enables the trustee to initiate a foreclosure sale without having to file a lawsuit or go to court. They tend to take place faster than judicial foreclosures because the courts are not involved. In many states, a trustee is required to notify the trustor (homeowner) that they have defaulted on their loan and around the same time, record a notice of default.

If the trustor does not respond or cure the default, the trustee then initiates the steps for foreclosing on the home. A notice of sale will be mailed to the homeowner, posted by public means, recorded at the county recorder's office, and published in area legal publications. After the legally required time period has expired, a public auction will be held, with the highest bidder becoming the owner of the property, subject to receipt and deed recording. Auctions of non-judicial foreclosures generally require cash, or cash equivalent, either at the sale or very shortly thereafter.

AFSA'S POSITION

Judicial foreclosure can be an unnecessary, burdensome and costly process that often does not produce the results desired. This is because the judicial process is cumbersome and complex and often activated far too late in the process to be successful in preventing foreclosure.

The burdensome process of a judicial foreclosure can significantly slow the process, without changing the outcome. This is costly and wearing for the borrower, whose cost of reinstating the foreclosure would increase. It also lengthens the time that a property stays vacant before it can be ready for resale, which carries with it significant consequences for neighborhoods and the properties themselves.

AFSA believes that the non-judicial foreclosure process has proven to be an efficient system that everyone involved understands and that there is no pressing need to change it. This process can be supplemented where necessary by sponsored mediation at the earliest stages of default process which offers more realistic options for homeowners who want to stay in their homes. States that utilize the non-judicial foreclosure process are also supported by statutes and cases that address any defects or mistakes that may exist in the Deed of Trust. In those instances, judicial foreclosure serves as a back-up remedy to cure the defect.

AFSA believes that judicial foreclosure unnecessarily burdens the legal system and slows the foreclosure process, without producing the desired benefit to the consumer. If more laws shift away from non-judicial foreclosure toward more judicial foreclosures, AFSA believes there will be new caseload burdens on the court system, and lawmakers may well then introduce proposals to adjust how these programs are structured and implemented.