

## RESURGENCE OF JUDICIAL FORECLOSURES TO AVOID ROADBLOCKS TO NON-JUDICIAL FORECLOSURES

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Judicial foreclosure actions on residential property are experiencing a renaissance in Nevada. Changes in the non-judicial foreclosure process and complications by Home Owner Association (HOA) liens seem to be driving the increase in judicial foreclosures. In some instances, the judicial foreclosure process has become a faster and safer route than the non-judicial process, especially when dealing with borrowers' counsel familiar with the non-judicial system. While judicial foreclosures have their own dangers, these pale in comparison to the current labyrinth of the non-judicial process when owner-occupied residential property is at issue. With competent legal counsel's assistance in navigating the process, judicial foreclosures can conclude thorny foreclosures much more efficiently than repeated non-judicial foreclosures.

Burdensome legislation and pro-borrower decisions following judicial reviews of mediations are driving the shift to judicial foreclosures. The statutes and rules governing the Nevada Foreclosure Mediation Program (FMP) have undergone numerous iterations, most recently effective January 1, 2013, with each addition demanding more of lenders and their representatives. The most recent changes require pre-mediation conferences regarding the documents to be produced, requiring the beneficiary to produce the original or a certified copy of the Note. Complying is often very difficult because of purchases and mergers of financial institutions and sales and – often unrecorded – assignments of the note and deeds of trust. The new rules also mandate that the beneficiary attend able to negotiate a short sale *during the mediation*. The beneficiary must negotiate the listing prices and sale date and provide sufficient time to evaluate a short sale offer. This requirement can mean a rushed evaluation and exposes a beneficiary to a bad faith finding. A bad faith finding can lead to four and five figure sanctions in addition to the denial of a foreclosure certificate, without which the foreclosure sale cannot go forward. This denial causes further delay and increased costs as the lender must restart the foreclosure process and return to the FMP. Denials are more common as the FMP seems to have a number of “borrower-friendly” mediators, who have forgotten that the program was not intended to keep the borrowers in their homes at the lender's expense but rather to bring the parties to the table to see if a mutually acceptable resolution can be had.

Complications to non-judicial foreclosures are also arising from unexpected sources. A disturbing new development in the foreclosure world is HOA lien purchasers suing to quiet title. In years past HOA's were loath to foreclose, and their liens held little actual value. Recent statutes allowed nine months of the unpaid liens to take a “super-priority” status. Currently, third party buyers are attending HOA foreclosure sales, purchasing the liens and then bringing actions to quiet title, **free of the first deed of trust** and subordinate lienholders. Third party buyers are

claiming title to properties for \$5,000 or less, where the property is worth 10, 20, or 40 times the amount paid to the HOA for the lien. Approximately 20-30 of these quiet title actions are being filed a week, by a small but growing set of investors and attorneys. The Las Vegas Review Journal recently reported that the investors are leasing the properties after the sale, hoping the lease payments cover the purchase price before the lender forecloses and cuts off their interest, knowing that could be months or years away as the lender works through the FMP. Meanwhile, the investors of course are hoping to prevail in the quiet title actions and cut off the lender's interest, reaping a windfall. Thus, even while negotiating at the mediation required in a non-judicial foreclosure, beneficiaries and borrowers run the risk of losing the property to a complete stranger. This is only one way in which beneficiaries are being drawn into court from non-judicial foreclosures. Petitions for judicial review are regularly filed after the mediations by the disgruntled borrower or lender.

Due to delays inherent in the FMP, the judicial reviews of FMP mediations, the quiet title actions by HOA lien buyers and the filing of frivolous wrongful foreclosure claims by borrowers, beneficiaries and their representatives are finding themselves in courtrooms with increased regularity. Thus, the parties to a non-judicial foreclosure are ultimately meeting where a judicial foreclosure begins – in court. A judicial foreclosure differs substantively in both procedure, requirements and possible outcomes. Obviously, a judicial foreclosure is a judicial proceeding, commencing with a complaint by the beneficiary, service of process on all interested parties, and a response by the borrower. Should the borrower not respond, a default is obtained, a sheriff's sale is conducted, likely resulting in a deficiency. Should the borrower respond, a motion for summary judgment based on the breach of the contract can take place quickly. The motion may have to be delayed until after some discovery, should borrower pose counterclaims or deny the allegations. Unlike the FMP, mediation is not required, nor is a rushed agreement to a short sale mandated. While documents may be required to substantiate the complaint or defend a claim of wrongful foreclosure, the borrower's requests for irrelevant documents can be objected to by beneficiaries and produced only if required, thereby reducing time and expense producing irrelevant material.

Another benefit of a judicial foreclosure comes when problem borrowers demand an accounting and make unsubstantiated claims regarding payments and promises. Those issues can be concisely addressed by demands for documentation. Most document issues can be addressed before a complaint is even filed, with the relevant documents including the note, deed of trust and demand letter being produced early in the litigation.

Another benefit of judicial foreclosure the opportunity by recording a Lis Pendens to dampen the enthusiasm of an HOA foreclosure and a possible quiet title action by an HOA lien purchaser. Indeed, joining an HOA can allow the court hearing the matter to enjoin the foreclosure of the HOA, and avoid the quiet title actions mentioned above.

The main reason non-judicial foreclosures were preferred over judicial foreclosures – till now – is the one-year right of redemption available to the borrower in the latter proceeding. After a judicial foreclosure there is a one year right of redemption period when the borrower can redeem the foreclosure by paying the entire loan amount and interest, plus an additional one percent interest. This right of redemption cannot be waived by agreement. The right can be purchased however. The consideration for the purchase can be a waiver of part, or all, of a deficiency. Indeed, the possible deficiency becomes a significant bargaining chip in addressing a possible appeal, or ensuring that the property is not damaged prior to being secured. But now with the delays inherent in the FMP and the risk of multiple foreclosures if the court does not issue a certificate permitting the foreclosure sale to go forward, and with the timeline and result being more predictable in judicial foreclosures, many lenders are opting for that route.

One added benefit of the judicial foreclosure is that, in some instances, it can result in a deficiency judgment, not available in a non-judicial foreclosure. The specter of this deficiency judgment may encourage borrowers, especially those who are represented, to seek a settlement. This can further expedite the foreclosure process by eliminating costly litigation brought as a stall tactic, making evictions proceedings unnecessary and moving the matter to a final conclusion *much quicker*. This is another reason a judicial foreclosure can proceed faster than a non-judicial foreclosure, even with the one-year redemption period.

The judicial foreclosure process is still litigation, though, and there are ways for delay to arise. The court order can still be appealed to the Nevada Supreme Court. Borrowers can declare bankruptcy, staying the judicial foreclosure and necessitating a motion for relief before the bankruptcy court. Borrowers sometimes participate at first and then fall silent, forestalling a default judgment but not cooperating with the advancement of the case. While judicial foreclosures involve filing fees, process server fees and other litigation costs, these costs are also present in non-judicial foreclosures where the parties appeal, or file a wrongful foreclosure action after the fact. Moreover, the dilatory tactics advanced by borrowers and their counsel in prior mediations will not avail them in judicial proceedings.

For the time being, there have been few legislative changes in the judicial foreclosure process. Not so, for non-judicial foreclosures where the Nevada legislature continues to place additional roadblocks and shows no signs of stopping. When AB 284 became law, in 2011, criminal penalties became possible for recording documents that did not meet the new requirements. Beneficiaries now face borrower's attorneys who are well versed in delay tactics from prior mediations and from a legion of complaints downloaded from the internet.

In the current legislative and judicial climate, judicial foreclosures cannot prevent every problem, but they can shift the playing field. They can discourage HOA liens and third party buyer's quiet title actions. They can proceed faster with a more certain timeline. They can be cheaper. They can result in deficiency judgments against the borrower which may have some

value. Competent counsel can suggest when a judicial foreclosure is a viable alternative to non-judicial foreclosures.

(274 word brief version)

Nevada judicial foreclosures actions on residential properties are increasingly popular in response to the ongoing challenges to beneficiaries posed by new legislation and ongoing delays in the non-judicial foreclosure process. Judicial foreclosures offer the ability to avoid borrower-friendly mediators and burdensome document production by filing and serving a judicial complaint on the borrower instead of recording a Notice of Default to commence a non-judicial foreclosure. By avoiding the legislatively-mandated Foreclosure Mediation Program, beneficiaries do not risk a finding of bad faith, resulting in a monetary sanctions and further delays as the foreclosure process must often be commenced again. Due to recent rule changes, beneficiaries can be sanctioned for being unable to immediately agree to a short sale, or failing to have met the most recent additions to the title recording requirements. However, judicial foreclosures do involve a right of redemption, which can cloud title for a year, and may have increased costs to pursue and other possible delays. Competent counsel can advise on methods to minimize these shortcomings.

With increasing frequency, judicial foreclosures are useful tools for addressing borrowers who are likely to use the mediations as a stall tactic, or otherwise “game” the mediation system. Judicial foreclosures may also allow beneficiaries to obtain deficiency judgments, which can function as powerful bargaining chips in negotiating against appeals and ensuring the property is returned without damage. And judicial foreclosures may deter HOA lien sales, which are currently resulting in third party buyer’s actions to quiet title, which dispossess borrowers and may eliminate first deeds of trust. In conclusion, judicial foreclosures are increasing in popularity as non-judicial foreclosures become more burdensome, costly and plagued with delays.