

Judicial Foreclosures and Sheriff's Sales: Process and Pitfalls WLTA Fall Education Seminars 2017

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Definition

“Judicial foreclosure is a civil action brought by a creditor to compel a sale of real property to satisfy an obligation of the property owner.”



Obligations Subject to Judicial Foreclosure

Mandatory

- Mortgages
- Mechanics' and materialmen's liens
- Various others (liens for labor on orchard lands or timber lands)

Optional

- Deeds of trust
- Homeowner association liens
- Real Estate Contract

Judicial Foreclosure versus Non-Judicial Foreclosure of Deeds of Trust

	Judicial	Non-Judicial
Cost		✓
Duration		✓
Possession		✓
Finality		✓

Why Choose to Judicially Foreclose a Deed of Trust?

A

May be advantageous in some situations

- Possibility of obtaining deficiency judgment



Why Choose to Judicially Foreclose a Deed of Trust?

B

When non-judicial foreclosure can't or won't deliver desired results

- Deed of trust was not recorded
- Legal description problems
- Non-conforming deed of trust
- Non-conforming property
- Non-joinder of spouse on homestead
- Other owners besides grantor
- Assert priority where not clear
- Change in boundaries
- Prior reconveyance in error
- Omitted junior interest in prior non-judicial foreclosure



An Alternative: Fix Problem Judicially, Then Foreclose Non-Judicially

Two step process

1. File action for declaratory relief to fix issue
2. Proceed with non-judicial foreclosure after obtaining judgment in action

Works best when borrower is the only party being foreclosed

Judicial Foreclosure – Mostly It's Just Like any other Lawsuit

Common elements

- File and serve summons and complaint
- Prosecute the action
- Final judgment
- Possibility of appeal



Judicial Foreclosure – What's Different

Need to provide constructive notice:

- Lis pendens

Specific pleading requirements:

- Waiving deficiency, if seeking reduced redemption period
- Asserting abandonment, if seeking to eliminate redemption period (can't be asserted after the fact by sheriff's sale purchaser)

Reviewing a Judicial Foreclosure A

Several factors can raise concerns regarding the judgment in a judicial foreclosure:

- Parties with interests in the property not made parties to the lawsuit
 - Review both caption and allegations
 - Result: their interests are not affected by the judgment

Reviewing a Judicial Foreclosure B

Factors and concerns (continued):

- Notice of lis pendens not recorded, if new interests appeared of record after lawsuit filed
 - Result: their interests are not affected by the judgment, if lacking actual knowledge
- Notice of lis pendens not timely served
 - Proof of service shows not within 60 days of recordation (personal service or first publication)
 - Result: lis pendens not effective

Reviewing a Judicial Foreclosure C

Factors and concerns (continued):

- Plaintiff did not obtain service on all defendants
 - Court docket lacks proof as to any defendant
 - Result: unserved defendants are not bound by the judgment

Reviewing a Judicial Foreclosure D

Factors and concerns (continued):

- Plaintiff obtained default judgment on some defendants, especially after publication of the summons
 - Review proof of service
 - Result: default judgment subject to being set aside as to those defendants

Reviewing a Judicial Foreclosure E

Factors and concerns (continued):

- One or more defendants appealed the judgment
 - Docket shows notice of appeal, no mandate from Court of Appeals
 - Result: status of property remains unclear until appeal resolved

Reviewing a Judicial Foreclosure F

Factors and concerns (continued):

- You are being asked to insure without exception for redemption rights
 - Review allegations in complaint
 - Review judgment
 - Keep in mind party in possession issues

Bottom line

- You can't look only at the judgment and rely upon it alone
- Court docket and critical individual docket items must be reviewed (pleadings, proof of service)
- Resolution may still be awaiting appellate decision

Sheriff's Sale Process, or, What Happens after Entry of Judgment A

From WLTA Examiner's Manual, Chapter on Foreclosures etc.:

1. The court enters a judgment of foreclosure. This is abstracted in the judgment docket and may be recorded. It generally replaces the lien of the mortgage as a lien on the land.
2. The court instructs the sheriff to sell the property.

Sheriff's Sale Process, or, What Happens after Entry of Judgment

B

3. The public sale by the sheriff takes place. The lender would bid the amount it is owed, and other parties can bid as well.
4. If a third party successfully bids at the sale, excess proceeds, if any, are set aside for the owner/borrower/debtor.
5. The redemption period begins to run.
6. The sheriff returns a report on the sale.

Wait, there's more!



Sheriff's Sale Process, or, What Happens after Entry of Judgment C

7. A certificate of purchase is issued to the successful bidder at the sheriff's sale. (It should be recorded – required by statute in some states.) [RCW 6.21.110(6)]

8. If the borrower redeems, the sheriff issues a certificate of redemption to the borrower. That ends the litigation and the proceeds are turned over to the lender in satisfaction of the judgment.

We're not done yet!

Sheriff's Sale Process, or, What Happens after Entry of Judgment

D

9. If a junior encumbrancer redeems, the sheriff issues a certificate of redemption to the redemptioner, and the proceeds turned over to the purchaser at the sheriff's sale.

10. If there is no redemption by the borrower, the lender will issue a sheriff's deed to the holder of the certificate of purchase or the holder of the most recent certificate of redemption, as applicable.

Wasn't that simple?

Step #1: Entry of Judgment

A

Judgment must address:

- Length of redemption period, if any

Redemption is right of owner/debtor and other junior interests affected by foreclosure to satisfy the judgment and restore their interests

Step #1: Entry of Judgment

B

Length of redemption period:

Agricultural land – one year

Other property – one year

Deficiency waived – eight months

Abandoned – zero

Possession during redemption period:

Remains in debtor for agricultural and homestead, or tenants under unexpired lease, otherwise to purchaser

Step #1: Entry of Judgment

C

Effect on vesting:

Zero

Owner remains in title (subject to judgment)
until:

- A. Owner deeds to someone else
- B. Sheriff's deed is issued to someone else

Step #7: Certificate of Purchase Issued

After sheriff issues the certificate of purchase to the successful bidder, the court will hold a hearing to confirm the sale

- Opportunity for parties to challenge sale based on irregularities

Step #8 & #9: Redemption

Following can redeem:

- Owner
- Parties with liens by
 - Judgment
 - Decree
 - Mortgage
 - Deed of trust
 - Note: recorded mechanic's lien with no judgment does not provide redemption right

Owner gets full redemption period. Others get 60 days from a prior redemption.

“If the judgment debtor redeems, the effect of the sale is terminated, and the estate of the judgment debtor is restored.”
RCW 6.23.040. (subject to liens junior to the one foreclosed)

Execution upon Judgments that Are not the Result of Judicial Foreclosure

- Money judgments
- Judgment creditor must first attempt to collect against judgment debtor's personal property before seeking to execute on real property. RCW 6.17.090, 6.17.100.
- If seeking to execute against homestead, cannot do so without court-appointed appraisal verifying property is worth more than homestead exemption. RCW 6.13.100 through 6.13.170.
- Once meet these requirements, follow sheriff's sale process described starting at Step #2.

Federal Executions – US Marshal Sales

28 USC §3203

Similar to Washington process, but no redemption

Full might and authority of federal government
doesn't make process go any faster:

US v. Anderson –

2008 – judgment in W.D. of Wash.

Jan. 2009 – US Marshal sale

Apr. 2010 – marshal's deed recorded

Mar. 2015 – order to evict

And Now for Something Completely Different

RCW 6.23.120

- Does not apply to mortgage or deed of trust foreclosures, but does apply in all other situations involving homestead
- During redemption period, any broker can list, no contract with any party required
- If property not redeemed, then must be sold to party who made highest qualifying bid during redemption period
- Qualifying bid: 120% of redemption plus broker commission
- Bid in excess of minimum goes to former owner



PHTS, LLC v. Vantage Capital, LLC

A

HOA judicially forecloses lien on condo

- Default judgments against borrower and lender
- Judgment - \$8,642.54
- Winning bid at sheriff's sale - \$45,500
- Assessed value - \$140,000

Foreclosed owner assigns redemption rights to third party, but does not convey title to property



PHTS v. Vantage Capital

B

Redemption period to expire 12-16-13

On 12-15-13:

- Broker lists property on Zillow
 - No consent, no mention of redemption period
 - Not mention minimum qualifying bid only \$64,859
 - Listing price: \$170,000

On 12-16-13:

- Broker delivers \$70,000 offer from own LLC to sheriff's sale purchaser

PHTS v. Vantage Capital

C

- Sheriff's deed delivered to assignee of former owner's redemption rights
- Broker sues assignee and sheriff's sale purchaser
- Assignee not a valid redeemer, second sheriff's deed issued to sheriff's sale purchaser
- Trial court and Court of Appeals rule in favor of broker



PHTS v. Vantage Capital

D

The final numbers:

- Former owner – \$5,150.83 (plus possible surplus proceeds from sheriff's sale)
- Sheriff's sale purchaser – \$61,187.90
- Broker – \$3,671.27 commission

And broker gets the property



Takeaways

- Judicial foreclosures must be reviewed for issues relating to joinder, service, lis pendens
- Vesting remains unchanged by foreclosure judgment
- Redemption rights must be conveyed in deed, not assigned
- Where foreclosure is not of mortgage or deed of trust, anticipate RCW 6.23.120 process
- Sheriff's deed usually means the process is over, but not always
- Beware the former owner in possession



References

WLTA Examiner's Manual

Foreclosures, Forfeitures and Similar Land Litigation, and Title Insurance

Washington Practice Manual, vol. 27, ch. 3, Judicial Foreclosures

RCW Chapters

- 61.12 Mortgages
- 61.24 Deeds of Trust
- 6.21 Sales under Execution
- 6.23 Redemption

US Code

- 28 USC §3203 Execution



Questions?

Thank you!

