

## Commercial Real Estate Foreclosure Process in Texas

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A reader recently asked for a basic outline of the commercial real estate foreclosure process in Texas. Hope this helps. Also, in light of the President's Day holiday, I would like to share some advice from President Lincoln that still rings true today.

In this post I will focus on non-judicial commercial real estate foreclosures in Texas, which is the typical foreclosure where someone auctions off the property outside the courthouse. A lender can also go through a court, which is more like a regular lawsuit. A non-judicial foreclosure is much faster and cheaper and can generally be completed within 45 to 60 days of a default.

Here are the general steps for a typical non-judicial foreclosure in Texas:

1. Pre-Foreclosure Notices – Before a lender can foreclose, the borrower has to be in default and the loan balance should be accelerated. Thus, the lender will send various notices dealing with the default, the lender's intention to accelerate the loan balance and then notice that the loan balance has been accelerated. Depending on the terms and waivers in the mortgage (or deed of trust), these may be in separate notices or in a single notice.
2. Mail IRS Notice – If the IRS has a tax lien against the property, you have to send the service a notice at least 25 days before the foreclosure. The IRS then has 120 days from the foreclosure to buy the property for the foreclosure purchase price, plus 6% interest and operating expenses (less any operating income). If you do not send this IRS notice, the tax lien continues even after the foreclosure.\* So, *caveat emptor*. Another option is to have the IRS consent to the sale and release its lien. However, you will be shocked to learn that this can often take so long that it's faster to just foreclose and wait out the 120-day redemption period.
3. Foreclosure Notice – Twenty-one days before the sale, the foreclosure notice must be (i) mailed to the borrower, (ii) physically posted at a designated bulletin board at the courthouse, and (iii) filed with the county clerk.
4. Conduct the Auction – Non-judicial foreclosures in Texas are always on the first Tuesday of the month, even if it's a holiday. The commissioners court designates a specific area at the courthouse for foreclosures. The trustee named in the mortgage conducts the sale and sells the property to the highest bidder.
5. Payment – On commercial deals the lender is usually the high bidder because other bidders need cold hard cash or a cashier's check, while the lender can bid up to the amount of the debt before needing to put up any cash.
6. Trustee's Deed – Finally, the trustee gives the winning bidder a deed to the property to record in the real property records.

It is also important to review the mortgage carefully because it may include additional requirements and steps for the lender to foreclose.

On President's Day 2011, I think the following advice from President Abraham Lincoln still rings true, especially in our current business and economic climate:

“Things may come to those who wait, but only the things left by those who hustle.”

“You cannot escape the responsibility of tomorrow by evading it today.”

I hope everyone has an enjoyable President’s Day.

\* Nerd Note – See 26 U.S.C. § 7425 and 28 U.S.C. § 2410(d).