

Texas is one of a few states that permit non-judicial foreclosure. As such, this procedure provides a number of alternatives for lenders who must deal with difficult loans. However, there a number of issues a lender should address throughout the foreclosure process. These are my top **10**:

1. **Document Review**-it is critical that the lender and it's counsel carefully review the notice provisions and foreclosure procedures of the note and deed of trust (our mortgage). While several steps of the process are covered by statute (TPC-51.002 et. seq.) the default provisions must be carefully followed to trigger and acceleration of the note and the sale procedures of the deed of trust. If a foreclosure has been commenced and subsequently postponed for some reason, it may be preferable to restart the process.

2. **Notice**-the lender must make certain that all parties with an interest in the transaction be notified strictly in accordance with the loan documents. In particular, even though a well drafted guarantee will certainly contain a waiver of notice of borrower defaults, it is generally a good practice to notify the guarantor to avoid an argument that the guarantor's exposure/rights have been compromised by the foreclosure.

3. **Title Review**-the lender should obtain an abstract to determine what other matters may be affecting title to the property other than the lender's lien. Foreclosure will wipe out most subordinate matters (such as mechanic's liens etc..) but it will not affect local taxes and, if not handled properly, federal taxes.

4. **Site Review**-it is a good practice to conduct a visual inspection of the property, if possible, to determine if there are any glaring issues affecting the property. For example, several years ago, a client of mine foreclosed on a vacant tract of land in Fort Worth. Subsequent to the foreclosure, we found out that our disgruntled borrower had dumped 25, fifty gallon, drums of toxic waste on the property. Had we made a casual inspection of the property prior to the foreclosure, we would have seen the empty drums strewn all over the property. We were not liable to the state for the clean-up but we had to expend a lot of time and money to clean the mess up to ready the property for re-sale.

5. **Lease Review**-foreclosure wipes out all leases not subordinate in time or by agreement to the deed of trust. Therefore, prior to foreclosure the lender should carefully review the leases to determine which ones it wants to maintain and which ones it wants to terminate in the foreclosure. If the lender is superior to all of the leases and wants to make sure it retains the good ones, it can unilaterally subordinate its interests to any one or more of the leases.

6. **Ownership Preparation**-the lender (especially those who do not have established OREO areas) must make sure it is operationally ready to take back the property. Depending on the size and type of property being foreclosed upon, the lender may want to retain a management company to take over operations immediately upon foreclosure.

7. **Borrower Negotiations**-while this seems obvious, the lender must avoid dealing with third parties who may want to buy the property prior to foreclosure. Unless the loan documents permit otherwise, the borrower has complete control over the property until it is foreclosed and any violation of those rights prior to obtaining title at foreclosure could subject the lender to liability.

8.Foreclosure Process-on the day of foreclosure (first Tuesday of every month in Texas) the lender must be fully versed on the proper procedure to take in selling the property. Normally it must be done on the steps of the courthouse of the county where the property is located and done within the time periods noted in the notice of sale. It is usually easier to have an attorney act as a substitute trustee for this part of the process as this is one of the areas where lenders run into the most trouble.

9.Bid-the lender must be cognizant of its bid for the property. It is usually a good practice (even in this economy) to get a current appraisal and bid in that amount. If the bid is more than what is owed under the deed of trust, the balance must be paid to the borrower. If the amount is less, then the lender retains a deficiency against the borrower/guarantor; however, the borrower has the right to challenge the bid in court if it believes the bid is for below market value.

10.Hire Local Counsel-the best insurance a lender can buy for this process is in the form of local counsel. While the procedure for non-judicial foreclosure in Texas is, by no means, brain surgery, it is full of potholes that can cause an unwary lender major headaches, time delays and, potentially, significant liability. As with most legal matters, if the attorney is retained from the outset, the cost is minimal.

Set forth above are only 10 of literally dozens of issues that need to be addressed in the non-judicial foreclosure process. However, in comparison to the time, cost and exposure of a judicial foreclosure this process is always the preferred route. The key is attention to detail and wise counsel.