

## Foreclosures and Deficiency Judgments

In California, most residential foreclosures are handled by a trustee appointed by the lender. After a homeowner falls behind on mortgage payments, the lender begins the foreclosure process by recording a Notice of Default with the County Recorder. (This is usually recorded after the borrower is three months behind on mortgage payments.) The lender must wait for 90 days after the recording before scheduling a sale date, and then follow a series of additional requirements, which take about three weeks, before holding the sale. The homeowner can stop the sale by paying the delinquent payments at any time in the process up until five days before the sale date. The sale can also be delayed - and possibly stopped altogether - if the homeowner files a Chapter 13 bankruptcy case.

When a lender forecloses on a mortgage, the total debt owed by the borrower to the lender frequently exceeds the foreclosure sale price. The difference between the sale price and the total debt is called a "deficiency." For example, if the total amount owed is \$200,000, but the home only sells for \$150,000 at the foreclosure sale, the deficiency is \$50,000.

In some states, the lender can seek a personal judgment against the borrower to recover the deficiency. Generally, once a deficiency judgment has been obtained, the lender may collect this amount from the borrower by doing such things as garnishing wages or levying a bank account.

In California, foreclosures can be either judicial (through the state court system) or nonjudicial. Most residential foreclosures in California are nonjudicial. A lender cannot get a deficiency judgment after holding a nonjudicial foreclosure in California (Cal. Code Civ. Proc. §580d).

However, when a senior lienholder forecloses, junior lienholders (such as home equity lenders) lose their security interest in the real estate. If a junior lienholder has been sold-out in this manner, that junior lienholder can sue the borrower personally for the amount owing, unless the junior loan was obtained only to purchase the home. However, if a home is "short" sold (sold for less than the total amount owing), both the senior lienholder and junior lienholders are prohibited from pursuing a deficiency judgment if they have agreed to the short sale (Cal. Code Civ. Proc. § 580e).

A deed in lieu of foreclosure occurs when a lender agrees to accept a deed to the property instead of foreclosing in order to obtain title. With a deed in lieu of foreclosure, the deficiency amount is the difference between the fair market value of the property and the total debt. To avoid a deficiency judgment with a deed in lieu of foreclosure, the agreement must expressly state that the transaction is in full satisfaction of the debt. If the deed in lieu of foreclosure agreement does not contain this provision, the lender may file a subsequent lawsuit to obtain a deficiency judgment.

By: Cathay Fulton Ericksen  
Attorney at Law  
142 George St.  
San Jose, CA 95110

Tel: 408-287-7717 Ext. 11