



The nonjudicial foreclosure process

Chapter 44

After you read this chapter, you will be able to :

- identify a mortgage or other lien on real estate by its power-of-sale authority to nonjudicially foreclose on the secured property if the owner defaults;
- determine the pre-foreclosure workout process mandated for a first lien, one-to-four unit residential property;
- understand an owner's rights during the different periods in the trustee's foreclosure process;
- determine whether the trustee has abided by recording and posting procedures governing the foreclosure process and rights of residential tenants;
- advise buyers and owners on the procedures for a trustee's sale, including advertising, postponing and accepting bids; and
- distinguish the priority for disbursements of excess proceeds from a trustee's sale.

bona fide purchaser (BFP)
declaration of default and demand for sale
full credit bid
lis pendens
nonjudicial foreclosure
notice of default (NOD)

notice of trustee's sale (NOTS)
power-of-sale provision
pre-foreclosure workout
surplus funds
trustee (on a mortgage)
trustee's sale guarantee

Learning Objectives

Key Terms

Power-of-sale provision

nonjudicial foreclosure

When property is sold at a public auction by a trustee as authorized under the power-of-sale provision in a trust deed.

power-of-sale provision

A trust deed provision authorizing the trustee to initiate a non-judicial foreclosure sale of the described property on instructions from the beneficiary.

A mortgage holder or carryback seller holding a note secured by a trust deed in default has two foreclosure methods available to enforce collection of the mortgage debt. These two foreclosure methods are:

- a **judicial foreclosure** sale, also called a *sheriff's sale* [See Chapter 43];¹ or
- a **nonjudicial foreclosure** sale, also called a *trustee's sale*.²

The key to the mortgage holder's ability to *nonjudicially foreclose* by a trustee's sale on the mortgaged real estate is the *power-of-sale provision* contained in the mortgage, also called a trust deed. [See Figure 1]

Other security devices used to create a lien on real estate to secure a debt which may also contain a **power-of-sale provision** include:

- a land sale contract [See **RPI** Form 165];³
- a lease-option sale [See **RPI** Form 163 §19];
- a homeowners' association (HOA)'s conditions, covenants and restrictions (CC&Rs) regarding assessment liens;
- bonded improvement assessments; or
- a UCC-1 financing statement. [See **RPI** Form 436-1]⁴

The grant of the power-of-sale by the owner of a property provides a private contract remedy for the **recovery of money** by a creditor, typically a mortgage holder. The power-of-sale is voluntarily agreed to by the owner of the mortgaged property, authorizing the mortgage holder on a default to hold a nonjudicial foreclosure sale of the property by public auction.⁵

If the note evidences a **recourse debt** with a remaining balance exceeding the *fair price* of the mortgage holder's security position in real estate, the mortgage holder may want to choose a *judicial foreclosure*. A judicial foreclosure action allows the mortgage holder to seek a money judgment for any deficiency in the property's value to satisfy the debt. [See Chapter 40]

However, by foreclosing under the power-of-sale provision, the mortgage holder avoids a costly (and potentially time-consuming) court action for judicial foreclosure.

Editor's note — When a mortgage holder completes a nonjudicial foreclosure, it cannot later obtain a deficiency judgment against the owner of the mortgaged real estate. Alternatively, the owner cannot redeem the property after the mortgage holder's trustee's sale as they can after a judicial foreclosure sale. [See Chapter 43]

Who conducts the sale

A trust deed is a **security device** which imposes a mortgage lien on real estate. The mortgage wording purports to create a *fictional trust* which is said to "hold title" to the mortgaged real estate for the benefit of the mortgage

¹ Calif. Code of Civil Procedure §726

² Calif. Civil Code §2924

³ **Petersen v. Hartell** (1985) 40 C3d 102

⁴ **Lovelady v. Bryson Escrow, Inc.** (1994) 27 CA4th 25

⁵ CC §2924

3.6 **TRUSTEE'S SALE** — On default of any obligation secured by this Deed of Trust and acceleration of all sums due, Beneficiary may instruct Trustee to proceed with a sale of the secured property under the power of sale granted herein, noticed and held in accordance with Calif. Civil Code §2924 et seq.

Figure 1

Excerpt from
Form 450

Trust Deed and
Assignment of
Rents

holder. As you will observe, the trustee holds no interest in the property and has no duty owed to anyone, until they voluntarily undertake to reconvey or foreclose on a declaration by the mortgage holder.

Thus, a mortgage has three parties:

- at least one **trustor** (the owner(s) of the mortgaged real estate);
- a **trustee** who need not be named; and
- at least one **beneficiary** (a lender, carryback seller, HOA, bonded assessment or other mortgage holder).

The trustee's sale is conducted by the *trustee* who is either:

- named in the mortgage; or
- appointed by the *beneficiary* of the mortgage at the time the beneficiary initiates the foreclosure process.

A broker, attorney, mortgage servicer, subsidiary of the mortgage holder, or the mortgage holder itself may be appointed at any time as the trustee.

The trustee begins the nonjudicial foreclosure process by recording a **notice of default (NOD)**. The trustee ends the process on delivery of the trustee's deed and disbursement of any sales proceeds.⁶ [See Figure 2]

Generally, trust deed forms are prepared and distributed by title or escrow companies naming their corporation as the trustee. However, a trust deed or other security device does not need to name the trustee at all. The mortgage holder later simply appoints a trustee to handle the *NOD* or reconveyance. [See **RPI** Form 450]

Also, the mortgage holder may appoint a substitute trustee to replace the trustee named in the trust deed.

Before recording an NOD on a first lien mortgage securing a purchase-assist loan on a *principal residence*, a mortgage holder needs to conduct a **pre-foreclosure workout** with the homeowner.

trustee (on a mortgage)

A party to a mortgage who, as a legal fiction, holds title to property as security for the performance of an obligation with the authority to sell the property or reconvey the trust deed on instructions from the mortgage holder.

notice of default (NOD)

The notice filed to begin the nonjudicial foreclosure process. Generally, it is filed following three or more months of delinquent mortgage payments.

Pre-foreclosure workout prior to NOD

⁶ Bank of America National Trust & Savings Association v. Century Land & Water Co. (1937) 19 CA2d 194

Figure 2
Form 471
Notice of
Default

INDEMNITY ASSUMED BY- AND/OR ASSIGNED TO:	
Name F	b
Street address	
City L	J
INDEMNITY TO BE ASSUMED BY:	
<div style="border: 1px solid black; padding: 5px; margin: 10px auto; width: 80%;"><p style="text-align: center;">NOTICE OF DEFAULT City of San Francisco California State Bar Association</p><p>NOTE: THERE IS A SUMMARY OF THE INFORMATION IN THIS DOCUMENT ATTACHED TO THE BACK OF THIS DOCUMENT.</p><p>NOTE: NO RELEASE OR RECEIPT FOR THIS DOCUMENT IS REQUIRED.</p><p>NOTE: INFORMATION ABOUT THE INFORMATION ON THIS DOCUMENT IS ON ANNUAL CITY-1. NEW INFORMATION IS REQUIRED TO BE PROVIDED TO THE CITY-1.</p></div>	
IMPORTANT NOTICE	
<p>IF YOUR PROPERTY IS IN FORECLOSURE BECAUSE YOU ARE BEHIND IN YOUR PAYMENTS, IT MAY BE SOLD WITHOUT ANY COURT ACTION, and you may have the legal right to bring your account to good standing by paying off or your past due payments plus permitted costs and expenses within the time permitted by law for reinstatement of your account, which is normally two business days prior to the date set for the sale of your property. No sale date may be set and three months from the date this notice of default may be recorded (which date of reinstatement appears on this notice).</p> <p>This amount is \$ _____ as of _____ and will increase until your account becomes current.</p> <p>While your property is in foreclosure, you will must pay other obligations (such as insurance and taxes) required by your note and deed of trust or mortgage. If you fail to make future payments on the loan, pay taxes on the property, provide insurance on the property, or pay other obligations as required in the note and deed of trust or mortgage, the beneficiary or mortgagee may state that you do so to order to reinstate your account in good standing. In addition, the beneficiary or mortgagee may require as a condition to reinstatement that you provide reliable evidence that you paid off taxes, property taxes, and hazard insurance premiums.</p> <p>Upon your written request, the beneficiary or mortgagee will give you a written itemization of the entire amount you must pay. You may not have to pay the entire unpaid portion of your account, even though full payment was demanded. But you must pay all amounts in default at the time payment is made. However, you and your beneficiary or mortgagee may mutually agree or settling prior to the time the notice of sale is posted (which may not be earlier than the end of the three-month period stated above), to amend other things: (1) provide additional time to which to cure the default by transfer of the property or otherwise; or (2) establish a schedule of payments in order to cure your default; or both (1) and (2).</p> <p>Following the expiration of the time period referred to in the foregoing paragraph of this notice, unless the obligation being foreclosed upon or a separate written agreement between you and your creditor permits a longer period, you have only the legal right to stop the sale of your property by paying the entire amount demanded by your creditor.</p> <p style="text-align: center;">(City of San Francisco)</p>	

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pre-foreclosure workout

Negotiations between a mortgage holder and defaulting property owner with the purpose of exploring options to avoid foreclosure.

At least 30 days prior to recording an NOD, the mortgage holder needs to contact the homeowner to:

- assess the homeowner's financial situation;
- explore options for the homeowner to avoid foreclosure;
- advise the homeowner of their right to an additional meeting within 14 days to discuss their financial options; and
- provide homeowners with the toll-free Department of Housing and Urban Development (HUD) phone number to find a HUD-certified housing counseling agency.⁷

Further, after attempting the initial contact, the servicer must send a written statement to the owner informing the owner of their right to:

- additional protections and services if they are a servicemember or a dependent of a servicemember; and
- request the note, trust deed, assignment and payment history.⁸

7 CC §2923.5(a)

8 CC §2923.55

If the mortgage holder is unable to make contact with the homeowner, the mortgage holder:

- sends the homeowner a first-class letter containing a toll-free number for a housing counselor certified by the *HUD*; and
- calls the homeowner by the primary telephone number on file at least three times at different hours on different days.⁹

The mortgage holder may record an NOD on a mortgage without complying with any of these 30-day pre-foreclosure requirements when the homeowner has:

- surrendered the property to the mortgage holder either by a letter confirming the surrender or by delivery of the keys to the mortgage holder;
- contracted with a person who facilitates a homeowner's decision to leave their home by extending the foreclosure process and avoiding the mortgage holder's enforcement of the loan; or
- filed a bankruptcy petition which is pending.¹⁰

To successfully complete a trustee's foreclosure sale under a *power-of-sale provision*, the trustee and mortgage holder need to adhere to the procedures detailed in the California foreclosure statutes for handling a trustee's sale.¹¹

The nonjudicial foreclosure process has three stages:

1. the **NOD** is recorded and mailed;
2. the **notice of trustee's sale (NOTS)** is recorded, posted and mailed; and
3. the **trustee's sale** of the real estate by auction occurs, followed by the execution of the trustee's deed and distribution of sales proceeds.

*Editor's note — Mortgage servicers are required to wait until a mortgage is at least 120 days delinquent before commencing foreclosure on a first lien mortgage secured by an owner's principal residence.*¹²

While the trustee is concerned about the three stages for processing the foreclosure, the owner of the real estate and the mortgage holder are concerned primarily with two different periods of time which control payment of the debt:

- the **reinstatement period**, which runs from the recording of the NOD and ends prior to five business days before the trustee's sale; and
- the **redemption period**, which also runs from the recording of the NOD but ends with the completion of the trustee's sale of the secured property. [See Chapter 42]

The owner of a unit in a **common interest development (CID)** has 90 days after the trustee's foreclosure sale on an HOA assessment lien to redeem

The nonjudicial stages of foreclosure

notice of trustee's sale (NOTS)

The notice recorded, posted and mailed to evidence an impending trustee's sale to the property owner and potential bidders.

⁹ CC §2923.5(e)

¹⁰ CC §2920.5(c)(2)

¹¹ *Garfinkle v. Superior Court of Contra Costa County* (1978) 21 C3d 268

¹² 12 Code of Federal Regulations §1024.41(f)(1)

How does California's Homeowner Bill of Rights affect the foreclosure process?

Protections for homeowners going through the nonjudicial foreclosure process are afforded under The California Homeowner Bill of Rights. These protections are in place through January 1, 2018, and include:

- *Dual track foreclosures are restricted. This prohibits a mortgage holder from continuing the foreclosure process if the homeowner has applied for a loan modification. The foreclosure process may only resume if the loan modification application is formally denied in writing. [Calif. Civil Code §2923.5(B)]*
- *Single points of contact are to be provided by mortgage holders to homeowners pursuing foreclosure alternatives. [CC §2923.7(a)]*
- *Verification of foreclosure documents is required. A mortgage holder who records and files "multiple" unverified foreclosure documents may be fined up to \$7,500 per violation. These documents include an NOD, a Notice of Trustee's Sale (NOTS), assignment of the trust deed or a substitution of the trust deed. Each of these documents needs to be verified for substantial evidence of the mortgage holder's right to foreclose. [CC §2924.17(c)]*
- *Tenants of foreclosed homes are also protected by the Homeowner Bill of Rights. Upon completion of the trustee's sale, the new owner needs to honor an existing lease if it has a fixed-term. If the home is to be occupied as a principal residence, the new owner may serve the tenant with a 90-day eviction notice. [See RPI Form 573; CC §2924.8(a)(1)]*

The Homeowner Bill of Rights also provides relief if a foreclosure sale has already taken place.

Violations of foreclosure law by mortgage holders result in the homeowner receiving money sufficient to cover their economic losses, including attorney fees and court costs. [CC §2924.12]

the unit. This is distinct from the standard redemption period applicable to non-HOA units which expires five business days before the trustee's sale. This HOA-specific legislation was adopted to stymie the efforts of an HOA attempting to initiate foreclosure to collect overdue HOA assessments of minimal value.¹³

Trustee's sale guarantee

declaration of default and demand for sale

A document delivered to the trustee under a power of sale provision by the mortgage holder instructing the trustee to initiate foreclosure on the secured real estate by recording a notice of default (NOD).

When a mortgage is in default and the mortgage holder has chosen to foreclose, the mortgage holder hands a **declaration of default and demand for sale** to the trustee.

The declaration contains instructions directing the trustee to initiate foreclosure on the mortgaged property as authorized under the power-of-sale provision contained in the mortgage. [See Figure 2]

Even though the trustee may have received the mortgage holder's declaration of default, the trustee's foreclosure process and the periods imposing rights and obligations do not begin until the trustee or mortgage holder records an NOD.¹⁴

¹³ CCP §2924.1

¹⁴ *System Investment Corporation v. Union Bank* (1971) 21 CA3d 137

Once the NOD is recorded, the trustee is required to strictly comply with statutory notice requirements. To be assured the required notices are served on all the proper persons, the trustee orders a **trustee's sale guarantee** from a title company before or at the time the NOD is recorded. [See Chapter 42]

The *trustee's sale guarantee* provides coverage to the trustee for failure to serve notices on any party due to an omission of that person's identity in the guarantee.

The trustee's sale guarantee contains:

- the name and address of each person who has recorded a request for a copy of the NOD;
- the name and address of each party with a recorded interest in the real estate securing the obligation in default;
- any junior (later recorded) easements and to whom the easements were granted;
- the property's legal description;
- a plat map locating the property; and
- the names of the newspapers in general circulation in which the NOTS, and the NOD if necessary, are to be published.

When ordering a trustee's sale guarantee from a title insurance company, the trustee instructs the title company to record the NOD in the office of the county recorder in the county where the real estate is located.¹⁵

The NOD contains statutorily mandated statements which set forth the *monetary default* on the note or other obligation secured by the mortgage.¹⁶

The monetary default statement informs the owner:

- they need to continue to pay other obligations required of them by the mortgage, such as hazard insurance premiums and property taxes; and
- if they do not make future payments on the obligations in default, the owner is required to make the payments to reinstate the loan. [See Figure 2]

The NOD does not need to state the actual amounts of the monetary defaults on the recurring obligations. However, the NOD needs to state the nature of the *present defaults* on the mortgage.¹⁷

For one-to-four unit residential property, a summary of key information contained in the NOD needs to be attached to the NOD. The summaries do not have to be published or recorded.¹⁸ [See **RPI** Form 471-1]

trustee's sale guarantee

A policy issued by a title insurance company to a trustee before or at the time the notice of default (NOD) is recorded providing coverage for the trustee should they fail to serve notices on any party of record due to an omission in the guarantee.

The notice of default and election to sell

¹⁵ CC §2924(a)(1)

¹⁶ CC §2924(c)(1); CC § 2924(a)(1)

¹⁷ CC §2924(a)(1)(B); CC §2924(a)(1)(C)

¹⁸ CC §2923.3(c)

No address for trustor

The trustee must send a copy of the notice of default (NOD) to:

- *the trustor's address as noted in the trust deed; and*
- *the address given by the trustor in a recorded request for NOD. [Calif. Civil Code §2924b(b)(3)]*

If the trust deed does not contain a request for NOD, or contains a request for NOD but no address for the trustor, the trustee can do one of the following within 10 business days after recording the NOD:

- *publish the NOD in a newspaper of general circulation in the county in which the property is located (the trustee's sale guarantee issued by the title company advises which newspaper to use), and continue publishing once a week for at least four weeks;*
- *personally serve the NOD on the trustor; or*
- *post the NOD in a conspicuous place on the secured property and mail the notice to the last known address of the trustor. [CC §2924b(d)]*

A trustee is not required to discover a trustor's address if the current address is not actually known to the trustee. [I.E. Associates v. Safeco Title Insurance Company (1985) 39 C3d 281]

Unless the trustee has actual knowledge of the trustor's last known physical address, which does not include the use of an email address, the trustee is not liable if the trustor does not receive a copy of the NOD. [CC §2924b(b)(3)]

Further, if the mortgage was originally negotiated in one of five languages other than English, the summary is to be provided in that language. These languages are:

- Chinese;
- Korean;
- Spanish;
- Tagalog; or
- Vietnamese.¹⁹ [See **RPI** Form 474-1 through 474-6]

To determine the amount needed to cure the default, the NOD directs the owner seeking to *reinstate* the mortgage or *redeem* the property to contact the trustee. Thus, the trustee insulates the mortgage holder from all direct contact with the owner or junior mortgage holder after the date the NOD is recorded until cancelled or a trustee's sale occurs.

If the NOD does not list a default known to the mortgage holder at the time of recording, the unnamed default does not need to be cured for the loan to be reinstated.²⁰

¹⁹ CC §2923.3(a)

²⁰ **In re Peters** (9th Cir. BAP 1995) 184 BR 799

However, the mortgage holder may later record a separate NOD to notice the omitted default, and pursue a separate foreclosure based on the omitted default.²¹

Within **ten business days** after recording a NOD, two copies of the NOD are mailed to:

- the owner of the property;
- the administrator of a deceased owner's estate; and
- each person who has recorded a request to receive a copy of the NOD.²²

One copy of the NOD is sent by registered or certified mail, the other copy is sent by first-class mail.²³

Within **one month** after recording the NOD, the trustee sends a copy of the NOD by registered or certified mail and another copy by first-class mail to holders of a **recorded interest** in the mortgaged property, including:

- the owner's successor-in-interest;
- any junior mortgage holder;
- the assignee of a junior mortgage;
- a buyer on a land sales contract;
- a lessee on a lease; and
- the state Office of the Controller, if a *Notice of Lien for Postponed Property Taxes* is recorded against the property.²⁴

Any other person interested in obtaining a copy of the NOD records a **request for NOD**. The request for NOD assures the interested person they will be notified of the default. [See **RPI** Form 412]

A trustee or person depositing the NOD into the mail to give notice to others prepares a *proof of service* and includes a copy of the form with the NOD in each mailing.²⁵

A trustee or mortgage holder may begin noticing the date set for the sale of a property on the day following **three months after** the NOD is recorded.²⁶

The date of the sale may be set for any business day, Monday through Friday, between the hours of 9 a.m. and 5 p.m.²⁷

In general practice, a **date down** of the trustee's sale guarantee issued to the trustee is ordered out from the title company the day before or on the day the title company records the NOTS.

Delivering the NOD

The notice of trustee's sale

²¹ CC §2924(e)

²² *Estate of Yates v. West End Financial Corporation, Inc.* (1994) 25 CA4th 511; CC §2924b(b)(1)

²³ CC §2924b(b)(1), (e)

²⁴ CC §2924b(c)

²⁵ CC §2924b(e)

²⁶ CC §2924(a)(3)

²⁷ CC §2924g(a)

Figure 3
Form 474
Notice of
Trustee's Sale

The form is titled "NOTICE OF TRUSTEE'S SALE" and "NOTICE TO PROPERTY OWNER". It contains various fields for personal information, a warning section, and a bidding section. The form is dated 12/1/01 and is published by RPI Publications, Inc.

The *date down* notifies the trustee of any interests recorded on the title to the property after the NOD is recorded. However, the trustee is not required to give notice of the impending trustee's sale to any person who recorded an interest in the property after the NOD was recorded.²⁸

The trustee prepares an NOTS which contains:

- the trustee's name or their agent's name, street address and telephone number (or toll-free number if located out of state);
- the street address or common designation of the mortgaged property;
- the county assessor's parcel number of the mortgaged property;
- the dollar amount of the debt in default, including reasonably estimated advances for hazard insurance premiums, property taxes due and foreclosure costs; and
- a statutory statement informing the owner they are in default.²⁹ [See Figure 3]

If the billing address of the defaulting owner is different from the mortgaged property's address, an additional notice needs to be posted on the property concurrent with the NOTS. The notice states in English and five other mandated languages that any tenant has the right to a 90-day notice to vacate the property. A copy of the tenant's rights is also to be mailed at the time of posting to the "Resident of property subject to foreclosure sale."³⁰ [See **RPI Form 474-1**]

²⁸ CC §2924b(c)(1)

²⁹ CC §2924f

³⁰ CC §2924.8(a)

Like the NOD, the NOTS needs to contain a summary of key information in the language the mortgage was originally negotiated in.³¹ [See **RPI** Form 474-2]

If the mortgage was negotiated in Spanish, the mortgage may contain a request for a Spanish-language NOD. The trustee is then obligated to serve the owner an NOD in Spanish.³²

At least **20 calendar days** before the trustee's sale, the trustee sends two copies of the NOTS to each party who previously received the NOD.³³

As with the NOD, one copy of the NOTS is sent by registered or certified mail, while the other is sent by first-class mail.³⁴

To ensure the sale at a public auction is properly advertised, the notice requirements for the NOTS are more comprehensive than the notice requirements for the NOD.

In addition to mailing the notice to all interested parties of record, the trustee performs all of the following at least 20 calendar days prior to the sale:

- **post a copy** of the NOTS in one public place in the city of the sale, or if the sale is not to be held in a city, the judicial district in which the property is to be sold;
- **post a copy** of the NOTS in a conspicuous place on the property to be sold; and
- **start publishing a copy** of the NOTS once a week for three consecutive calendar weeks in a newspaper of general circulation in the city where the property is located.³⁵

A trustee's sale is held in the county where the mortgaged real estate is located.³⁶

If the property or properties being foreclosed are located in two or more counties, the trustee's sale may take place in any one of the counties.

For example, consider a trustee who is to conduct a foreclosure sale of two properties which secure the same debt by the same mortgage and are located in different counties. The trustee can sell both properties at one sale, in either county the trustee chooses.

The NOD and NOTS in Spanish

Delivering the NOTS

The location of the sale

³¹ CC §2923.3

³² CC §2924(c)(1)

³³ CC §2924(b)(3)

³⁴ CC §2924(b)(2), (e)

³⁵ CC §2924(f)(1)

³⁶ CC §2924(g)

Postponing the sale

A trustee's sale may be postponed by the trustee at any time prior to the completion of the foreclosure sale. The trustee's sale may be postponed on the instruction of the mortgage holder or by the trustee at their discretion.³⁷

To postpone or reschedule a trustee's sale, the trustee gives a **notice of postponement** at the time and place stated in the NOTS for the sale by a public declaration of:

- the reason for the postponement; and
- the new date and time of the foreclosure sale. [See **RPI** Form 474-8]

The postponed trustee's sale is held at the same place originally stated in the recorded NOTS.³⁸

Effective until January 1, 2018, when a trustee's sale is postponed for ten or more business days, the mortgage holder or trustee is to provide written notice to the owner within five business days following the postponement. This notice is to include the new sale date and time.³⁹

Sold to the highest bidder

A trustee's sale is a **public auction** by private agreement where the property is sold to the highest bidder.⁴⁰

Before the auction begins, the trustee may:

- demand all prospective bidders show evidence of their financial ability to pay as a precondition to recognizing their bids; and
- hold the prospective bidders' amounts to be bid.⁴¹

A bidder at auction can tender their bid amount in U.S. dollars in the form of:

- cash;
- a cashier's check drawn on a state or national bank;
- a check issued by a state or federal thrift, savings bank or credit union; or
- a cash equivalent designated by the trustee in the NOTS, such as a money order.⁴²

Each bid made at a trustee's sale is an **irrevocable offer** to purchase the property. However, any subsequent higher bid cancels a prior bid.⁴³

The trustee's sale is considered final on the trustee's *acceptance* of the last and highest bid.⁴⁴

³⁷ CC §2924g(c)(1)

³⁸ CC §2924g(d)

³⁹ CC §2924(a)(5)

⁴⁰ CC §2924h

⁴¹ CC §2924h(b)(1)

⁴² CC §2924h(b)(1)

⁴³ CC §2924h(a)

⁴⁴ CC §2924h(c)

Once the highest bid has been accepted by the trustee, the trustee may require the successful bidder to immediately deposit the full amount of the final bid with the trustee.⁴⁵

If the successful bidder tenders payment by a check issued by a credit union or a thrift, the trustee can refrain from issuing the trustee's deed until the funds become available.⁴⁶

If a successful bidder tenders payment by check and the funds are not available for withdrawal:

- the trustee's sale is automatically **rescinded**; and
- the trustee will send the successful bidder a *notice of rescission* for failure of consideration.⁴⁷

To hold a new trustee's sale auction, the trustee sets a new trustee's sale date and records, serves and publishes a new NOTS. The new NOTS follows all the same statutory requirements as the original NOTS.

The successful bidder who fails to tender payment when demanded is liable to the trustee for all resulting damages, including:

- court costs;
- reasonable attorney fees; and
- the costs for recording and serving the new NOTS.⁴⁸

The mortgage holder is frequently the only bidder at the trustee's sale. Thus, the mortgage holder automatically becomes the successful bidder.

The mortgage holder may bid without tendering funds up to an amount equal to the debt secured by the property being sold, plus trustee's fees and foreclosure expenses. This amount is called a **full credit bid**.⁴⁹

If the mortgage holder is the successful bidder under a *full credit bid*, the trustee retains possession of the mortgage holder's note (or other evidence of the mortgaged debt) in exchange for the trustee's deed to the property.

The mortgage holder is not required to bid the full amount of the indebtedness to acquire the property at the trustee's sale. The mortgage holder can bid an amount below the full amount of the debt, called an **underbid**.

On the completion of a trustee's sale, the trustee uses a **trustee's deed** to transfer title to the property on to the successful bidder at the auction.

Failure to deliver payment of a bid

Bids by the mortgage holder, a credit

full credit bid

The maximum amount the foreclosing mortgage holder may bid at a trustee's sale without adding cash, equal to the debt secured by the property being sold, plus trustee's fees and foreclosure expenses.

⁴⁵ CC §2924h(b)(2)

⁴⁶ CC §2924h(c)

⁴⁷ CC §2924h(c)

⁴⁸ CC §2924h(d)

⁴⁹ CC §2924h(b)(2)

Conveyance by a trustee's deed

bona fide purchaser (BFP)

A buyer who purchases a property for valuable consideration in good faith without notice or knowledge of pre-existing encumbrances or conditions affecting their right to full ownership.

When a buyer other than the mortgage holder purchases the property for value and without notice of title or trustee's sale defects, the buyer is considered a **bona fide purchaser (BFP)**.

The BFP's interest in the property sold is *perfected* as of 8 a.m. on the date of the trustee's sale, if the trustee's deed conveying the property to the BFP is recorded:

- within **15 calendar days** after the date of the trustee's sale; or
- the **next business day** following the 15th day after the sale if the county recorder is closed on the 15th day.⁵⁰

The title received by the third-party BFP is clear of any interest claimed by the owner, mortgage holders or tenants whose interests are junior to the foreclosed mortgage.⁵¹

However, upon completion of the trustee's sale, the new owner needs to honor an existing residential lease if it has a fixed-term. If the home is to be occupied as a principal residence, the new owner may serve the tenant with a *90-day eviction notice*.⁵² [See **RPI** Form 573]

More importantly, title is taken clear of any *unrecorded prior interests* or **claims** in the property held by others not in possession of the real estate. However, to take clear title free of claims, the BFP needs to have no *constructive notice* or actual knowledge of any existing priority claims when acquiring title to the property at the trustee's sale.⁵³

lis pendens

A notice recorded for the purpose of warning all persons that the title or right to possession of the described real property is in litigation.

A **lis pendens** recorded against the real estate prior to the trustee's sale places bidders on constructive notice of a lawsuit involving a claim to a right in title or to possession of the real estate. If the claim has priority to the foreclosed mortgage, the *lis pendens* destroys the BFP status of the successful bidder.

Surplus funds

surplus funds

Funds remaining when the price paid for property by the successful bidder at a trustee's sale exceeds the amount of debt and costs due the foreclosing mortgage holder.

Occasionally, the price paid for property by the successful bidder at a trustee's sale exceeds the amount of debt and costs due under the foreclosed mortgage. The excess amounts are called **surplus funds**. [See **RPI** Form 479]

The trustee has a duty to distribute the *surplus funds* to the junior mortgage holders and the owner(s).

The gross proceeds from the trustee's sale are distributed in the following order:

- to pay the costs and expenses of the trustee's sale, including trustee's fees or attorney fees;
- to pay the indebtedness secured by the property in default, including advances made by the mortgage holder;
- to satisfy the outstanding balance of junior mortgage holders of the property, distributed in the order of their priority; and

⁵⁰ CC §2924h(c)

⁵¹ **Hohn v. Riverside County Flood Control and Water Conservation District** (1964) 228 CA2d 605

⁵² CC §2924.8(a)(1)

⁵³ CC §§1107, 1214

- to the owner, the owner's successor-in-interest or the vested owner of record at the time of the trustee's sale.⁵⁴

⁵⁴ CC §2924k(a)

A mortgage holder or carryback seller holding a note secured by a trust deed in default has two foreclosure methods available to enforce collection of the mortgage debt. These two foreclosure methods are a judicial foreclosure sale, also called a sheriff's sale, and a nonjudicial foreclosure sale, also called a trustee's sale. A trustee's sale is a public auction by private agreement where the property is sold to the highest bidder.

A mortgage has three parties:

- at least one trustor (the owner(s) of the mortgaged real estate);
- a trustee who need not be named; and
- at least one beneficiary (a lender, carryback seller, homeowners' association (HOA), bonded assessment or other mortgage holder).

The trustee holds no interest in the property and has no duty owed to anyone, until they voluntarily undertake to reconvey or foreclose on a declaration by the mortgage holder.

Before recording an Notice of Default (NOD) on a first lien mortgage securing a purchase-assist loan on a principal residence, a mortgage holder needs to conduct a pre-foreclosure workout with the homeowner.

To successfully complete a trustee's foreclosure sale under a power-of-sale provision, the trustee and mortgage holder need to adhere to the procedures detailed in the California foreclosure statutes for handling a trustee's sale.

When a mortgage is in default and the mortgage holder has chosen to foreclose, the mortgage holder hands a declaration of default and demand for sale to the trustee.

When ordering a trustee's sale guarantee from a title insurance company, the trustee instructs the title company to record the NOD in the office of the county recorder in the county where the real estate is located.

Chapter 44 Summary

A trustee's sale may be postponed by the trustee at any time prior to the completion of the foreclosure sale. The trustee's sale may be postponed on the instruction of the mortgage holder or by the trustee at their discretion.

The mortgage holder is frequently the only bidder at the trustee's sale. Thus, the mortgage holder automatically becomes the successful bidder.

On the completion of a trustee's sale, the trustee uses a trustee's deed to transfer title to the property on to the successful bidder at the auction.

Occasionally, the price paid for property by the successful bidder at a trustee's sale exceeds the amount of debt and costs due under the foreclosed mortgage. The trustee has a duty to distribute the surplus funds to the junior mortgage holders and the owner(s).

Chapter 44
Key Terms

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Quiz 13 Covering Chapters 43-45 is located on page 633.