

HOW TO MANAGE FORECLOSURE ISSUES

FORECLOSURE BASICS

What is a foreclosure?

Foreclosure is the most commonly used legal process by which a lender or other real property lien holder tries to repossess your home and sell it to secure repayment of your debt.

Foreclosures most often result when a homeowner fails to make timely mortgage payments causing a default on the home loan. In most states a lender may either foreclose judicially (court action) or non-judicially.

A judicial foreclosure involves a court action. The lender files a complaint called a “notice of default” for an unpaid debt and ask the judge to allow for foreclosure. If the court finds the debt valid, in default, and sufficient for foreclosure, it will issue a judgment for the total amount owed, including foreclosure costs. After the judgment has been entered, a writ will be issued by the court authorizing a sheriff’s sale which is basically a public auction of the home. If the proceeds of the sale do not cover all of the debt, then the lender will seek a “deficiency judgment” against you for the remaining debt, and the court will order you to pay the outstanding balance.

A non-judicial foreclosure relies on a clause in the loan contract. This clause is called a “power of sale.” In such a clause in a deed of trust or mortgage, the borrower pre-authorizes the sale of property to pay off the balance of the loan in the event that the borrower defaults. This power given to the lender to sell the property may be executed by the lender or their representative, typically referred to as the trustee. Typically your loan documents will give the lender the option to proceed either way, and even though lenders give up their right to collect a deficiency judgment against you by using the non-judicial process, lenders generally prefer to proceed non-judicially because it takes about half the time and is less expensive.

Lenders are usually reluctant to proceed with any foreclosure unless it is absolutely necessary, which generally means you have missed multiple consecutive payments and have not communicated with the lender. The foreclosure process in most states is very technical and will take at least a couple months. If the lender does not strictly adhere to the technical, statutory requirements, then the foreclosure may be set aside or the lender may have to start over.

It is common for statutes to provide a redemption period for homeowners, whereby an owner who is being foreclosed on may stop the foreclosure at any time by paying all amounts owed on the loan, including late fees, accrued interest, and the lender’s costs of foreclosure up to that point. California’s statutory redemption period ends “(a) Three months after the date of sale if the proceeds of the sale are sufficient to satisfy the secured indebtedness with interest and costs of action and of sale, [or] (b) one year after the date of sale if the proceeds of the sale are not sufficient to satisfy the secured indebtedness with interest and costs of action and of sale.” (Cal Code Civ Proc 729.030 (2009))

	Non-Judicial	Judicial
Requires Court Trial	No	Yes
Expedited Timeframe	Yes – 111 Days	No
Right of Redemption	No – except HOA Liens have a 90 day period	Yes – 1 year
Deficiency Judgment	No	Yes

After Foreclosure Sale

Upon the successful completion of a foreclosure sale by the lender, you will no longer own the home, and if you do not vacate it, you will be subject to eviction proceedings. In California the lender is only required to serve you with a written “three-day notice to quit.” (Cal Code Civ Proc §1161a(b)). This means you must vacate your former home or be subject to legal proceedings for wrongful possession of the premises. A foreclosure or deficiency judgment will damage your creditworthiness and limit your ability to obtain credit in the future. This credit damage may affect your government security clearance. You should always see your security manager in the event of a potential foreclosure or deficiency judgment, or any credit problems. The best policy is to be proactive about communicating your situation to your commanders.

How can you avoid or delay foreclosure?

Lenders are reluctant to foreclose if there is a less painful option to remedy a default. The key to avoiding or delaying a foreclosure is being up front and communicating with the lender about your specific situation. If you communicate with a lender and explain your circumstances and needs, the lender is much more likely to want to work with you to help you avoid foreclosure than if you are not up front or avoid communication about your circumstances. With that in mind, here are the most common and most successful ways to work with a lender to avoid or delay a foreclosure:

- **Forbearance** –or holding off on foreclosing, for a specified period of time, during which time you pay less than the full amount of your mortgage; however, you will eventually have to pay all amounts owed under the loan with applicable interest and late fees;
- **Reinstatement** – in many states you have a statutory right up to a certain point in the foreclosure process (the redemption period), to reinstate the loan or cure the default on the loan by paying all unpaid monthly payments with applicable interest and late fees, in which case your loan is reinstated, the foreclosure is stopped and you have the right to continue making monthly payments on your loan as if a default had not occurred;
- **Repayment Plan** – agreed upon regular monthly payments with additional amounts each month to repay previously missed payments, interest and late fees;
- **Mortgage Modification** –refinance or modify your loan so that you pay smaller amounts over a longer period of time. This option works well if your loan amount is less than the value of your home or interest rates are currently lower than your existing rate;

- **Refinance** – you may be able to find a different lender to provide you with a new loan, which will pay off the existing loan in default. This may be a particularly good option if you have significant equity in the home or if current interest rates are more favorable than your existing loan terms;
- **Home Sale** –delay the foreclosure process to allow you enough time to sell your home and pay off the loan;
- **Short Sale** –sell your property for less than the outstanding loan amount, in which case the lender would keep the sale proceeds and forgive the remaining debt; however, it is worth noting that in a short sale situation you may also experience federal and state income tax liability for the portion of the debt that is forgiven;
- **Loan Assumption** –sell the home and allow a qualified buyer to take over or assume your loan and make the loan payments. However, if you do this, you should make sure that the loan assumption documents specifically release you from any further liability for the loan;
- **Deed in Lieu of Foreclosure** –give the property to the lender by executing a deed in lieu of foreclosure in exchange for the lender forgiving the debt. Signing a deed in lieu of foreclosure means that you are actually conveying all of your ownership of the property to the lender or grantee under the deed. This option can still have a negative impact on your creditworthiness, but may not be as damaging as a foreclosure. If you use this method, you should try to negotiate from the lender a full written release of any further obligation or liability relating to the debt.

SERVICEMEMBERS CIVIL RELIEF ACT (SCRA)

The SCRA was signed into law in 2003 and has provisions which affect mortgage foreclosures on property purchased prior to entry onto active duty. The benefits, protections, and procedures are specifically designed to protect servicemembers against foreclosure of mortgages and other security interests. The mortgage provision protects real property purchased before military service to which the servicemember is still obligated and which is secured by a mortgage or similar security. (50 USCS Appx 533) It allows the court to stay foreclosure proceedings against the servicemember for a period of time as justice and equity require, or to adjust the servicemember's obligation to preserve the interest of all parties. (50 USCS Appx 533(b)) The SCRA protects your home from sale or foreclosure during and after your time of active duty service affecting your repayment, with certain exceptions. (50 USCS Appx 533(c)) Until December 31, 2010 a servicemember's interests are protected for nine months after the affecting active duty obligation. On January 1, 2011 that period will return to ninety days of protection under the law.

**California has similar statutory protection in its law at Cal Mil & Vet Code § 408.

HOMEOWNERS ASSISTANCE PROGRAM (HAP)

The Department of Defense (DOD) is proud to offer the Homeowners Assistance Program (HAP) to eligible service members and federal civilian employees. HAP provides some

monetary relief to eligible service members and federal employees who suffer financial loss on the sale of their primary residences when a base closure or realignment announcement causes a decline in the residential real estate market and they are not able to sell their homes under reasonable terms or conditions. If it is found that an announcement caused a significant decline in a residential real estate market, a HAP program may be established to assist you.

The American Recovery and Reinvestment Act of 2009 (ARRA) temporarily expands the HAP to assist service members and DOD employees who are wounded, injured or become ill when deployed, surviving spouses, and service members required to permanently relocate during the home mortgage crisis.

How HAP assists you

HAP provides assistance in four ways. For eligible applicants, the Government may:

1. Reimburse you for part of your loss from selling your home.
2. Assist you, if you don't have funds from the sale of your home to pay-off your mortgage.
3. Purchase your home by paying off the mortgage.
4. Help, if you default on your mortgage.

Benefits are not taxable. Expanded HAP benefit payments are exempt from taxation. Payments to military members are not subject to social security or Medicare taxes.

How to Apply

To apply, visit the HAP web site at <http://hap.usace.army.mil/> and download the application package. Mail the completed application to the U.S. Army Corps of Engineer District responsible for the area in which your home is located. The office representing California (and most of the western U.S.) is located in Sacramento. Office details are below.

HAP Field Office, Sacramento
U.S. Army Engineer District, Sacramento
1325 J Street
Sacramento, CA 95814-2922
916-557-6850
800-811-5532

Information about the HAP is available online at <http://hap.usace.army.mil/>. Most questions should be easily answered by referencing the frequently asked questions section of the website.

FURTHER HELP IS AVAILABLE

For appointments concerning consumer and other personal legal matters, call the Legal Assistance Branch of the Office of the Staff Judge Advocate located at Building 275, Plummer Street, Defense Language Institute, Presidio of Monterey (831-242-5084 or DSN 768-5084).