



Home Foreclosure Legal Aid Project

Lawyers Helping Homeowners

Module One:

Home Foreclosure Process, Timeline and Important Initial Questions

Training Materials:

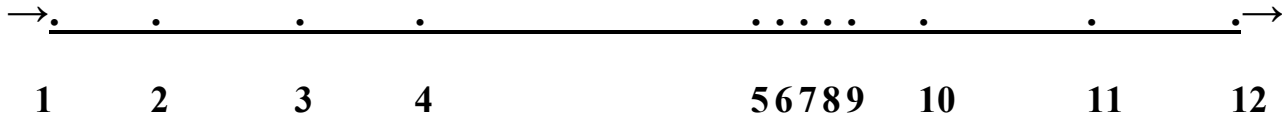
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1. Deed of Trust Foreclosure Timeline
2. Questions That Need To Be Answered When Homeowners Are Facing Foreclosure

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DEED OF TRUST FORECLOSURE TIMELINE (RCW 61.24)



[← At least 190 days between point 2 and point 9 →]

1. **Deed of Trust must be executed and acknowledged.** Deeds of Trust are subject to all laws relating to mortgages on real property. RCW 61.12.010 and .020, 61.24.020, 64.04.010 and .020.
2. **Default.** The foreclosure of a deed of trust cannot occur less than 190 days from the date of default. *See* Subsection (8) of the form for the Notice of Foreclosure as is set forth in RCW 61.24.040(2).
3. **Notice of Default.** A Notice of Default must be given at least 30 days before the Notice of Trustee’s Sale can be recorded or served. RCW 61.24.039(7). A new section of RCW 61.24, effective as of July 26, 2009, applies to deeds of trust, made from January 1, 2003 through December 31, 2007, that are recorded against owner-occupied, residential property. For these deeds of trust, a notice of default may not be issued until thirty days after the beneficiary: (i) attempts to assess the borrower’s financial ability to pay the debt; and (ii) explores options for the borrower to avoid foreclosure. *See*, Engrossed Senate Bill 5810.

4. **Recording of Notice of Trustee's Sale.** At least 90 days before the foreclosure sale the trustee (not the beneficiary) must record, mail, and serve or post the Notice of Trustee's Sale. RCW 61.24.040(1). (This is the first notice related to the foreclosure that is a public record.) In addition to the Notice of Sale, the trustee shall include with the copy mailed to the grantor a Notice of Foreclosure. RCW 61.24.040. Often the trustee doing the foreclosure will be a successor trustee, accordingly before the Notice of Trustee's Sale is recorded a Resignation and Appointment of Successor Trustee should be recorded.
5. **First Publication.** The Notice of Trustee's Sale must be published twice. The first publication must be between the 35th and 28th days before the date of sale. RCW 61.24.040(3).
6. **Opportunity to Cure Default.** At any day prior to the 11th day before the sale, the borrower may cure the defaults and cause a discontinuance of the sale. RCW 61.24.090(1). (Within 11 days before the sale date, the beneficiary has the right to demand payment in full.)
7. **Second Publication.** The second publication of the Notice of Trustee's Sale must be published between the 14th and 7th days before the date of sale. RCW 61.24.040(3).
8. **Deadline for Motion to Restrain Sale.** RCW 61.24.130(2) provides that no court may grant a restraining order or injunction of the sale unless the person seeking the restraint gives five days notice. RCW 61.24.130(2). (Note: Superior Courts could have in some instances exercised their equitable powers and enjoined sales without 5 days notice. Also, if the owner of the property files a bankruptcy petition anytime prior to the sale, the sale is automatically stayed pursuant to 11 U.S.C. § 362).
9. **Foreclosure Sale.** The sale must occur on a Friday, or if Friday is a legal holiday on the following Monday. RCW 61.24.049(5).

10. **Repossession of the Property from Former Owner.** The purchaser at the Trustee's Sale shall be entitled to take possession of the property from the former owner on the 20th day following the sale. RCW 61.24.060.
11. **Repossession of Property from Tenant.** A new section of RCW 61.24, effective as of July 26, 2009, provides additional protections for tenants in possession of residential real property. *See*, Engrossed Senate Bill 5810. These protections include: (i) to terminate the interest of a tenant, the tenant must be given a separate notice, at the time of the Notice of Trustee's Sale is given; and (ii) after the foreclosure the tenant must be given 60 days written notice to vacate the property before he or she may be removed.
12. **Continuance of Sale.** At anytime prior to the foreclosure sale, the sale can be continued by the Trustee for up to 120 days. RCW 61.24.040(6).

QUESTIONS THAT NEED TO BE ANSWERED WHEN HOMEOWNERS ARE FACING FORECLOSURE¹

1. How far along is the foreclosure process? A foreclosure sale cannot occur any sooner than 190 days from the date of default. See Subsection (8) of the Notice of Foreclosure as set forth in RCW 61.24.040(2). However, if much of that time has already passed, decisions may have to be made quickly. For example, if there is equity to save, and the foreclosure is less than five days away, it may be necessary for the homeowner to file a bankruptcy in order to stay the foreclosure. Also, some of the claims that a borrower may have against the trustee and lender are waived if not raised prior to the foreclosure. See RCW 61.24 as amended in 2009. (A deed of trust foreclosure timeline is attached as Appendix A.)

2. What is the home worth? At the outset, it is important to recognize if there is any net value to save. One of the two components needed to make that calculation is the gross value of the home. Some methods that can be used to estimate the gross value include:

- a. Look for the value using www.zillow.com. Zillow works for Seattle, Spokane, and some other areas in Washington, and provides a rough estimate of value.
- b. Check the tax assessed value. With the tax parcel number, which often is identified on deeds of trust near where the legal description is inserted, online services can be used to find the tax assessed value for most properties located in Washington. For example, in King County the information can be accessed at www.metrokc.gov/assessor/. Information about public records in other counties can be accessed at <http://publicrecords.netronline.com/>. Also, take note that even though the tax assessed value is supposed to be equal to the full market value, the assessed value is frequently at about 75-90% of market value.
- c. Check on the last price paid for the property and then adjust for inflation. (From 1963 through 2004, the average median house price in the United States increased 6.26% per year).
- d. Gather and review appraisals issued in connection with the purchase or refinance of the home.
- e. Contact a real estate agent for a free market analysis.
- f. Check on the prices recently paid for comparable homes.

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3. What is the total amount secured by liens that are senior to the interest of the homeowner?² The answer to this question provides the second of the two components needed to figure out the net value of what the homeowner has to protect.³ To find this component, answers are needed to the following subset of questions:

- a. How much debt is secured by the lien being foreclosed?⁴ In the case of a deed of trust foreclosure, this amount will be specified in the Notice of Trustee's Sale that must be mailed to the borrower in accordance with RCW 61.24.040(1)(c).
- b. How much debt is secured by other mortgages or deeds of trust?
- c. Are there any past due real estate taxes?
- d. Are there any homeowner's association assessments secured by a lien?
- e. Are there any debts secured by mechanic's or laborer's liens?
- f. Are there any tax liens?
- g. Are there any liens for past due child support?

4. Where does one go to find answers to questions 3.a. through 3.g.?

- a. The answer to question 3.a. may be obvious from the notices that the homeowner receives in connection with the foreclosure, but the answers to the other questions are not.
- b. Some information about liens, but not necessarily the amount of debt presently covered by those liens, can be gathered from public records that are available online. For example, some records in the King County Records Office can be accessed at www.metrokc.gov/recelec/records/. (As mentioned above, you can get access to public records in other counties at <http://publicrecords.netronline.com/>.)
- c. If the homeowner has not been extremely careful and well organized when it comes to keeping track of his or her records, it is difficult (if not impossible) to get a full understanding of the liens against his or her home

² It is beyond the scope of this outline to discuss disputes about liens. However, the calculation regarding the amount of available equity changes if a lien is defective or the amount secured by a lien is overstated by the creditor.

³ To calculate what a homeowner will receive if it is necessary to sell his or her home, it is necessary to consider the costs of sale that are likely to be incurred. With real estate commissions and other costs, the total costs could be as high as 10% of the sales price.

⁴ In Washington, the vast majority of home foreclosures are nonjudicial foreclosures of obligations secured by deeds of trust. In a deed of trust, the homeowner is referred to as the "Grantor," the entity that is responsible for the foreclosure process is the "Trustee," and the lender is the "Beneficiary."

without having some form of title report issued from a title insurance company. (Most title companies can provide a “Lien and Encumbrance” report, which has no insurance component, for about \$75.)

5. What about judgment liens? Because of the homestead exemption most judgment liens are not included in calculating how much equity there is to save for the homeowner.⁵

- a. The “homestead” protects a portion of the home equity from foreclosure of judgment liens.⁶
- b. In Washington the homestead exemption is limited to \$125,000 of value.⁷ RCW 6.13.030.
- c. Pursuant to RCW 6.13.080, the homestead does not protect a homeowner from:
 - i. Mechanic’s or laborer’s liens;
 - ii. Debts secured by mortgages or deeds of trust;
 - iii. Claims arising in a bankruptcy if the homeowner selected exemptions available under Federal law;
 - iv. Orders to pay child support;
 - v. Debts owing to the state of Washington for recovery of certain types of medical assistance;
 - vi. Certain types of claims secured by condominium or homeowner associations’ liens; and
 - vii. Certain types of tax claims secured by a lien.
- d. The homestead can protect the homeowner even if the house is destroyed or has to be sold. The proceeds from the voluntary sale of the homestead

⁵ For example, assume that the gross value of a home is \$300,000. Also, assume that there is a first mortgage debt of \$150,000, a secured line of credit with a balance of \$50,000, a valid laborer’s lien for \$20,000, and judgments liens obtained by credit card companies that total \$100,000. In this example, the total amount of the liens exceeds the total value of the house by \$20,000; however, since the judgment liens do not impair the homestead exemption, there is \$80,000 of value in the home that can be protected for the homeowner.

⁶ Some states, like Florida, have unlimited homesteads. However, in the states with unlimited homesteads, if the homeowner goes into bankruptcy the exemption on recently acquired homes is limited to \$125,000. 11 U.S.C. § 522.

⁷ In Washington an individual, or a marital community, is entitled to one \$125,000 homestead. Married couples cannot “stack” homesteads in order to protect \$250,000 of equity.

property, or the proceeds from insurance covering destruction of homestead property, are exempt for one year and will continue to be exempt if used to acquire a new homestead prior to the end of that period. RCW 6.13.070.070.

6. Is there anything to save?

- a. If there is no evidence to support claims of wrong doing on the part of the lender or trustee, the question about what can be saved is likely answered by determining if the homeowner has any equity. To eliminate the available equity, subtract the total of the encumbrances calculated in section 3 from the gross value of the property calculated in section 2. (If the answer is a large negative number, turn to section 7. If the answer is a large positive number, turn to section 8. If the answer is a small negative or small positive number, turn to section 9.)
- b. If there are substantial irregularities in how the deed of trust was created, or is being foreclosed, it may be appropriate for the homeowner to file suit.⁸

7. What can a homeowner do if the house if the house is “underwater”? (A house is said to be “underwater” if the amount of the secured debt exceeds its value.)

- a. The homeowner should take advantage of the opportunity to live in the house without making mortgage payments or paying real estate taxes.
 - i. By statute, the foreclosure sale cannot take place until after 120 days from notice of the first default. RCW 61.24.030.
 - ii. Moreover, if the lender is prompt in issuing the first notice default there is a 190 day rule that applies. As set forth in subsection 8 of the Notice of Foreclosure, the form of which is set forth in RCW 61.24.040(2), the foreclosure sale cannot take place until at least 190 days from the date of default.
 - iii. Also, the homeowner can stay in the house for up to 20 days after the foreclosure sale. RCW 61.24.060.
- b. Attempt to negotiate a discount. (Lenders are usually very reluctant to negotiate a principal discount with the homeowner even if the house turns out to be worth less than the mortgage.)
- c. Consider giving the lender a “deed in lieu” but only if doing so does not compromise the homeowner’s rights of possession as described above.

⁸ It is beyond the scope of this outline to describe the claims that a borrower may have against the lender or the trustee. Nevertheless, in some instances there may be claims based upon fraud, misrepresentation, breach of contract, or breach of applicable statutes (the Trust in Lending Act for example).

8. What if there is substantial equity?

- a. If there is equity, what can be done depends on the homeowner's ability to make mortgage payments.
- b. If there is an ability to pay, and the homeowner wants to keep the house, then:
 - i. As soon as possible, attempt to negotiate a repayment plan with the lender. Most homeowners would be well advised to use the mortgage consulting services offered by HUD-certified housing counselors like Solid Ground. Solid Ground can be reached at 206-694-6766 or 866-297-4300 and other HUD-certified housing counselors can be found at www.hud.gov.
 - ii. The homeowner can consider a Chapter 13 plan.⁹ In a Chapter 13 bankruptcy a borrower, with a regular source of income, can use a plan of reorganization to cure defaults in his or her mortgage over a 3 to 5 year period. 11 U.S.C. §1322. (The chapter 13 bankruptcy petition provides for an automatic stay of any pending foreclosure action and is useful if the lender will not negotiate a reasonable repayment plan. 11 U.S.C. §362.)
- c. If the homeowner has no ability to pay, or does not want to keep the house, then:
 - i. The homeowner should, as soon as possible, make plans to sell the house. To sell the house, some homeowners need to enlist the help of a reputable real estate agent.
 - ii. If the homeowner needs more time to sell, he or she should contact the lender and request an extension.¹⁰ A HUD-certified mortgage counselor may be of help in negotiating an extension. (The more the borrower can show about his or her efforts to sell the property and the likelihood that a prompt sale can be arranged, the more likely a trustee will continue the foreclosure.)

9. What if the value of the property and secured debts are roughly equivalent, but staying in the house is still the best option for the homeowner?

⁹ In a chapter 13 bankruptcy plan, even if the debtor's home is worth less than the amount owed on the mortgage, the debtor must treat the mortgage debt as fully secured. 11 U.S.C. § 1322(b)(2).

¹⁰ The Washington Supreme Court has held that the Trustee is not required to obtain the best possible price at a sale, but he or she must make reasonable efforts not to sacrifice the debtor's equity. Cox v. Helenius, 103 Wn. 2d 383, 693 P.2d 683 (1985).

- a. If the homeowner has regular income sufficient to service the debt, the options set forth above in section 8.b. should be considered.
- b. If the homeowner cannot service the debt, the homeowner's only option might be living rent fee as long as possible as described above in section 7.a.

10. What does a homeowner do if a foreclosure sale is imminent and the trustee will not agree to a continuance?¹¹

- a. Homeowners have to be weary of the "scam artists." The majority of people that come to the homeowner's door after learning about the pending foreclosure have no value to add. Usually they are not attorneys, HUD-certified counselors, or reputable real estate agents, and many are looking to profit at the expense of the homeowner.¹²
- b. If there is equity in the home, or if the foreclosure is improper, a knowledgeable attorney needs to be contacted as soon as possible to see if the sale can be restrained under applicable state law or if a bankruptcy petition should be filed in order to stay the foreclosure process. See, RCW 61.24.130 and 11 U.S.C. § 362.
- c. If there is no ability for the homeowner to make payments, no significant dispute about the mortgage debt, no equity in the property, and the foreclosure has been properly scheduled, it is time to recognize that the home will soon be lost.

¹¹ Under Washington's deed of trust laws, at any time prior to the 11th day before the date set for the foreclosure sale, the borrower is entitled to have the sale discontinued if he/she cures the defaults. See, RCW 61.24.090(1). For example, if a borrower fails to pay some of the monthly payments that come due in the middle of a 30 year loan, the borrower can reinstate the loan by curing the defaults prior to the eleventh day before the foreclosure sale. However, if the borrower waits until the day before the foreclosure sale to cure the defaults, the lender has the right to reject the cure payment and can demand that the entire balance of the loan be paid in full in order to stop the foreclosure sale. (It is not advisable to rely on the right to cure in order to delay making payments because the cost to cure will also include costs and attorneys fees incurred as a result of the commencement of the foreclosure.)

¹² Scam artists learn about non-judicial deed of trust foreclosures because the Notice of Trustee's Sale must be recorded in the auditor's office. See, RCW 61.24.040(1)(a). Then, some scam artists seek out distressed homeowners and promise to repair their credit for a fee. Those homeowners that have paid such a fee generally receive no benefit. Other scam artists convince the homeowners to transfer title to them by promising to stop the foreclosure and ageing to grant the homeowner an option to repurchase the property; however, the terms of the option are usually so oppressive that they can never be exercised. Finally, some scam artists will make a cash payment to the homeowner when there is an imminent foreclosure sale because they know that someone is willing to bid at the sale more than the amount in foreclosure. For example, if the deed of trust in foreclosure secures a \$100,000 loan, but the bidding at the sale will go up to \$200,000, a scam artist that pays \$10,000 for the title will reap a quick \$90,000 profit.