

Closing for Sure—A Practical Checklist for Foreclosure Property

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Virginia Foreclosure Procedure and Practice

- Governed by both the terms of the deed of trust and applicable state statutes
- Federal and state consumer protection laws, incl. FDCPA, apply
- Notice of default and pre-acceleration notice may be required by deed of trust
- Secured party exercises right to foreclose
 - Trustee's power to sell is implicit
 - Substitute trustee usually appointed
 - Timing of substitution

Foreclosure Notices



- Owner(s)—not borrower(s)
 - at last address in secured party's records
 - prudent to notify owners of record
- Noteholders of record secured by subordinate deeds of trust*
- Owners associations that filed notices of lien*
- Internal Revenue Service if notices of federal tax lien*
(* of record 30 days before foreclosure sale)

Foreclosure Advertisements

- As required by terms of deed of trust
- Minimum statutory requirements
 - if deed of trust requires advertisement
 - if deed of trust does not require advertisement



Foreclosure Sale

- At public auction with foreclosing trustee present
- Secured party usually bids
- Subject to prior liens
- Terms as permitted by deed of trust; mutuality may be an issue
- Written memorandum satisfying statute of frauds



Settlement of the foreclosure sale and post-closing



- Special warranty deed
- Disbursements according to statutory requirements
- Accounting
 - Unrelated to title
 - Cooperation with Commissioner of Accounts
 - Reasonableness of commission

Effect of foreclosure sale

- The foreclosed deed of trust becomes a link in the chain of title; don't release it!
- Subordinate liens are extinguished (but probably not satisfied and therefore not released of record)
 - Subordinate deeds of trust
 - Judgment liens *attaching* subsequent to recordation of foreclosed deed of trust
- IRS right of redemption
- Purchase money priority

Foreclosed Property Transaction Issues

- Foreclosure deed to trustee for MBS trust
- Execution of REO deeds
- Unreleased prior liens and title insurance indemnity letters
- Closing protection requested by seller
- Defective deeds of trust
- Identification of secured party with authority to foreclose

Servicemembers Civil Relief Act



- Only applies to loans originated before period of full-time military service
 - Especially applicable to reservists and National Guard called to active duty
- Invalidates foreclosure during military service or 9 months afterward w/o court order or waiver
- Applicable to BFP?

Foreclosure Purchase Checklist

Deed of trust

- Executed by *all* owners at the time of execution and recording
- Adequate property description in body of deed of trust or attached
- Properly notarized
- Priority based on recording order or otherwise
- Proper trustee(s) named [but, secured party may appoint substitute trustee(s) as necessary in any case]
- Identity of secured party
 - Lender
 - MERS as beneficiary and/or nominee for lender
 - Successors and assigns

Foreclosure Purchase Checklist

Assignment(s) of deed of trust (if any)

- Executed on behalf of secured party of record
 - o Duly-authorized officer of secured party or other official with apparent authority
 - o Agent/attorney-in-fact with authority (of record if assignment is recorded)
 - o Mortgage servicer for assignor
- Executed/effective before assignee exercises secured party rights

Foreclosure Purchase Checklist

Appointment of substitute (foreclosure) trustee (Va. Code §55-59, clause 9)

- Executed on behalf of secured party *when executed*
 - o Identity of secured party known
 - Of record by deed of trust or recorded assignments
 - Other satisfactory evidence
 - o Satisfactory evidence of authority to execute
 - Mortgage servicer for secured party
 - MERS
 - Foreclosure firm (self-dealing?)
 - Duly-authorized officer of secured party or other official with apparent authority
- Executed before foreclosure trustee exercises authority under deed of trust or law
 - Notice to borrowers/owners/others
 - Advertisement
 - Sale
 - Trustee's deed
- Recorded before or with trustee's deed (Va. Code §55-59, clause 9)

Questions or Comments?

- “All real estate is local”
- Each real estate transaction is unique
- When did the real estate market become a financial market?
- “It ain’t over ‘til the paperwork is done!”


