

The Mortgage Foreclosure Process in North Carolina

General Information, Tips for Avoiding Scams and Key Stages in the Foreclosure Timeline

NOTICE

This is intended for general information only and may not apply to a homeowner's specific circumstances and is not a substitute for consulting with an attorney about a homeowner's individual case.

Foreclosure General Information

While the process is set by North Carolina law (*N.C. Gen. Stat. § 45-21.16, et. seq.*), this is intended to provide general information about the mortgage foreclosure process in North Carolina.

The Parties: Who is Involved?

The mortgage holder is usually not the party who brings the foreclosure proceeding against a homeowner. The foreclosure proceeding is filed by a **Trustee or Substitute Trustee** appointed under a homeowner's deed of trust (mortgage loan) at the request of the mortgage holder. The Trustee is usually represented by a law firm.

The mortgage holder can be a different company from **the mortgage servicer**, the company the homeowner makes payments to and the company who sends statements to the homeowner. Sometimes the mortgage holder and servicer may be the same company.

The foreclosure proceeding is different from a typical lawsuit. It is a "quasi-judicial" proceeding in which **the Trustee (the Petitioner)** files the foreclosure and petitions the **Clerk of Court** for an order allowing a foreclosure sale of the homeowner's home. The Trustee is usually represented by a law firm.

The **homeowner** is known as **the Respondent** in the foreclosure proceeding (similar to a defendant in a lawsuit).

The Issues in a Foreclosure Hearing

The Clerk Determines Whether to Issue an Order Allowing Foreclosure Sale

The Clerk by law can only consider very specific and limited issues under *N.C. Gen. Stat. § 45-21.16(d)* (such as **proper notice** of the hearing, **valid debt**, **default** by the homeowner, etc.) in determining whether to issue an order allowing foreclosure sale. If such an order is entered, the home can be sold at auction no sooner than 20 days from the date of the hearing.

Appeals

- A judge does not review the Clerk's order allowing a foreclosure sale unless the homeowner appeals the Clerk's order to the Superior Court within 10 days after the Clerk issues an order allowing foreclosure sale.
- Likewise, a Trustee has 10 days to appeal a Clerk's order denying foreclosure sale.

Notice of Foreclosure Hearing

Once a foreclosure has been filed against a homeowner, the homeowner will be served with a Notice of Foreclosure Hearing by the Sheriff's Department and/or by Certified Mail. The Sheriff may also post the Notice of Hearing on the homeowner's door. The Notice of Hearing sometimes also includes a Notice of Sale with a proposed foreclosure sale date in the same document or packet of documents. This can be confusing to homeowners, who may think that the decision to sell the house has already been made. It is important to know that this sale date does not become official unless a Clerk enters an Order at the hearing authorizing that sale date.

About the Stages of Foreclosure

There are 4 basic stages in the timeline of a foreclosure proceeding once the mortgage company/holder has filed a foreclosure against a homeowner.

The homeowner has rights and possible options to avoid foreclosure and save their home, until a foreclosure sale becomes final: once the foreclosure sale is conducted and the 10-day upset bid period expires without an upset being filed (Stage 4 below).

Consulting with a Lawyer

It is always best for a homeowner who has been served with foreclosure papers to consult with a lawyer for advice.

A homeowner may be eligible for advice or representation from one of the legal aid organizations located across North Carolina.

A homeowner may contact the North Carolina Legal Resource Finder for help in finding free or low cost legal assistance: <https://nclrf.org/en/home>

Tips to Avoid Foreclosure Scams

Once a foreclosure is filed against a homeowner it is a matter of public record. A homeowner may get letters, texts, phone calls or social media messages from people and companies who say they want to buy the homeowner's home or help the homeowner avoid foreclosure by offering various services.

While some solicitations may be legitimate (for instance, NC licensed attorneys may send letters advertising their services) a homeowner should be very cautious about any solicitations from people or companies they do not know, such as:

- From a person or company saying they can help the homeowner get a loan modification or resolve the foreclosure if the homeowner pays fees to the person or company upfront
 - A certified HUD housing counselor will not charge a homeowner for assistance with loan modification applications or loss mitigation
 - Some homeowners may be eligible for free advice or assistance from Legal Aid of North Carolina or one of the other legal services organizations in North Carolina
- From an out of state law firm or group saying they can resolve the foreclosure but requiring the homeowner to pay upfront fees
- From a person or company who says they want to buy the property. Many of these are scammers or “buyers” who try to buy the home very cheaply knowing the homeowner is in financial distress and may feel desperate
 - For a homeowner interested in selling their home to pay off the mortgage and get their equity out of the home, a homeowner should consult with a licensed real estate broker in their area
- From a person or company asking a homeowner to sign any documents so that the person or company can “help” the homeowner catch up the mortgage or save the home from foreclosure
 - A homeowner should never sign any document they don't understand – they may be giving up ownership in the property or their equity in the home
 - A homeowner should always seek the advice of a NC licensed lawyer before signing any documents presented to them

Stage 1: A Foreclosure Hearing is Scheduled but Has Not Taken Place Yet

- A homeowner should consult with an attorney as soon as possible after being served with a Notice of Hearing, for advice and possible representation in the foreclosure.
- Most homeowners do not have a lawyer representing them in a foreclosure proceeding. A homeowner has the right to appear and represent themselves to protect their rights and ownership!
- It is important for a homeowner to attend every hearing and to visit or call the Clerk of Court (Special Proceedings Division) to check on the status of the foreclosure
- A homeowner can appear for themselves at a hearing and can request a continuance from the Clerk if
 - It is the homeowner's personal residence
 - The homeowner has a plan for resolving the delinquency

Loss Mitigation as Grounds for Continuance

- It is common for a mortgage servicer to send the homeowner an application (often called a Request for Mortgage Assistance) for the homeowner to apply for a payment plan or a loan modification to catch up the mortgage delinquency
- This process of applying for assistance or a resolution with the mortgage servicer is often called "loss mitigation"
- Homeowner can apply for loss mitigation before hearing to have grounds for continuance
- Even if the homeowner has not applied for loss mitigation by the time of the hearing, if the mortgage servicer has sent them an application or invited them to apply for mortgage assistance, a homeowner can still ask for a continuance to have time to complete the application
- The Trustee should pause or continue the foreclosure hearing once the homeowner has submitted a complete loss mitigation application to the mortgage servicer; but a homeowner needs to attend any hearing scheduled, even if they have applied for mortgage assistance
- Sometimes a homeowner will need to request a continuance for reasons other than loss mitigation, for instance, they are gathering the funds together to catch up the mortgage (called "reinstatement") or if they are selling the home to pay off the mortgage
- A Clerk may allow a continuance for other reasons, especially if it is the first time the homeowner has asked for a continuance
 - In some cases, a Trustee may ask for a continuance or postponement of the hearing
- Homeowners can bring defenses to the limited issues before the Clerk but cannot raise issues that go beyond those limited issues

Stage 2: Hearing Has Been Held and the Clerk Entered an Order Allowing Foreclosure Sale

- Once the Clerk enters an order allowing a foreclosure sale to take place, the Trustee will post the date and time of the sale on a bulletin board in the courthouse and will publish the notice of sale in an area newspaper
- **Within 10 days of the Clerk's order allowing foreclosure sale**, a homeowner has the right to appeal the Clerk's order to the Superior Court for a hearing de novo (a new hearing) before a judge
 - The homeowner should have reasons to contest one (or more) of the issues the Clerk determined in allowing the foreclosure sale
 - A homeowner has to post a bond for an appeal and Clerks often require that a homeowner pay the bond within 10 days of Order for appeal in order for the homeowner to file an appeal
 - While the amount of a bond will vary, some Clerk's calculate the bond at 1% of the outstanding principal amount of the loan
- If more than 10 days have passed since the date the Clerk entered an order allowing foreclosure, the homeowner has **no right of appeal** on the issues determined by the Clerk **but the homeowner still has rights in the property and can continue to seek resolution** (through loss mitigation, up to a point; to catch up the mortgage, to file a lawsuit to stop the foreclosure; or, most commonly, to file bankruptcy) up until Stage 4 below.
 - For a homeowner who is trying to sell their property to pay off the loan in full, the foreclosure lawyer may agree to a postponement of the foreclosure sale if the homeowner communicates with the lawyer / law firm to let them know the property is under contract for sale
 - **If a homeowner hasn't already consulted with a bankruptcy attorney, now is the time to do so – before a sale is held** – as it takes time to determine if bankruptcy is a good option for the homeowner and, if it is, to begin preparing a bankruptcy case for filing
- Homeowner who has claims and defenses beyond the limited issues before the Clerk can bring a lawsuit (called an affirmative case) in Superior Court to seek to stop the foreclosure sale from taking place
 - These cases are complex and not typically filed by a homeowner without a lawyer because a homeowner often needs assistance from a lawyer to represent the homeowner in a lawsuit

Stage 3: Foreclosure Sale Has Been Held but 10 Days Have Not Yet Passed Since Date of Sale

- Homeowner doesn't lose rights to/ownership of the property until expiration of 10-day upset bid period after sale
- Upset bid period continues (in some cases, you may have a series of upset bids that keeps the upset bid period alive) until 10 days passes with no further bid – homeowner can file bankruptcy
- A homeowner should never count on an upset bid being filed as some foreclosure sales happen and become final after 10 days because no upset bid is filed
- The most common way for a homeowner to stop a foreclosure during the upset bid period is for the homeowner to file bankruptcy (after consulting with a bankruptcy attorney)

Stage 4: Homeowner Loses Rights to Property Once Upset Bid Period Expires

Homeowner loses ownership in the property once the 10-day upset bid period expires.

The foreclosure sale becomes final, even though the Trustee has not yet given a deed to the successful bidder / the new owner.

At this stage:

- The homeowner no longer has the right to pay off the mortgage to save the home
- It is too late for the homeowner to file bankruptcy for the purpose of keeping ownership of the home, even if the homeowner is still living in the home.

If the homeowner is still living the home, the new owner can evict the homeowner by giving them 10 days' notice to vacate the property. If the homeowner does not leave after 10 days, the new owner can apply to the Sheriff for a Writ of Possession to remove the homeowner from the property and to change the locks. The Sheriff should post this Writ on the door with the date and time for eviction. The eviction date is usually within 5 days of the date the new owner applies for the Writ. The new owner does not have to bring a separate eviction proceeding before the homeowner is removed from the property. A homeowner should remove all of their possessions and personal property from the home before the date and time the Sheriff has given for the eviction.