

Foreclosure by Power of Sale

Meredith S. Smith



Foreclosure

Method of enforcing payment of a debt that is secured by real property.

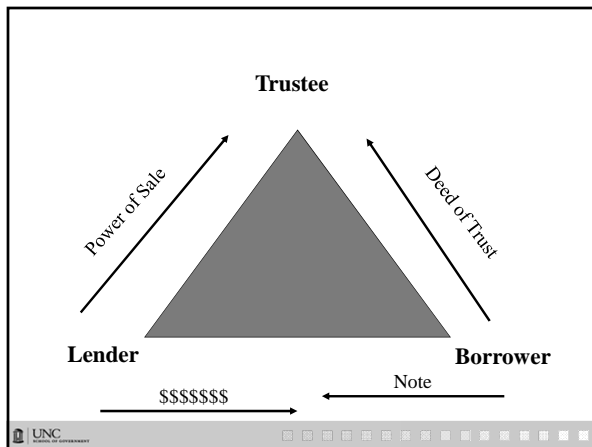


Judicial Foreclosure	Power of Sale Foreclosure
Superior/District Court Judge	Clerk of Superior Court
Civil Action	"Special Proceeding"
G.S. Chapter 1	G.S. Chapter 45
\$\$\$\$\$\$\$\$\$\$\$\$\$\$\$\$	\$\$
2 years or more	4-5 months
Any legal or equitable issue	Limited to 6 legal findings
Lender files compliant and summons.	Lender appts ST and directs to file NOH + cover sheet.



Power of Sale:
Contractual Remedy

Note
Promise to pay
+
Deed of Trust
Security Instrument



Trustee

- Neutral party – no advocating
- Appointed (paid) by the lender
- Conduct the foreclosure sale
- Often referred to as a substitute trustee



Lender

- Person or entity that makes the loan, typically the beneficiary under the DOT
- Original lender typically considered “originator” of the loan
- May transfer or sell the loan, therefore may not necessarily be the party directing the ST to foreclose
 - Holder of the note may change

Borrower

- Borrowed the \$\$,
- May be referred to as
 - Debtor
 - Maker of the Note
 - Grantor of the deed of trust
- May not be the owner of the property, grantor under the DOT

Guarantor

- Person or entity that agrees to pay a debt in the event the original borrower is unable to pay
- Typically sign a guaranty agreement

Review Note and DOT

Identify:

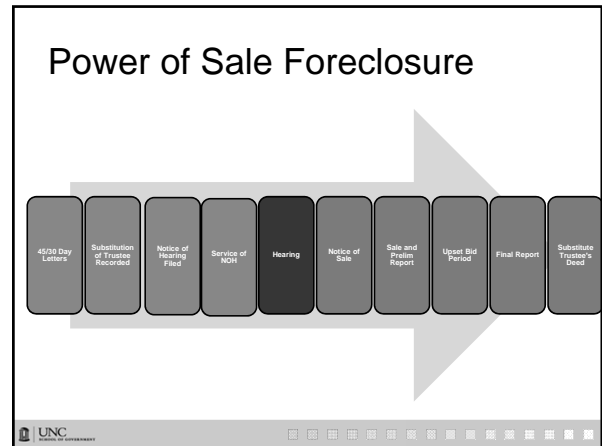
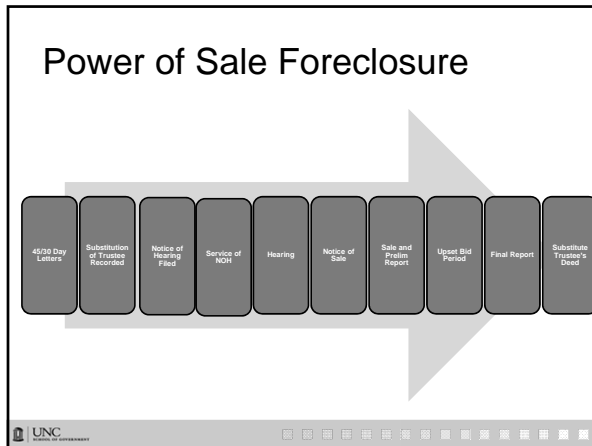
1. Borrower
2. Lender
3. Property owner
4. Beneficiary
5. Amount of the loan
6. Date of the loan
7. Property that secures the note

Review Note and DOT

Identify:

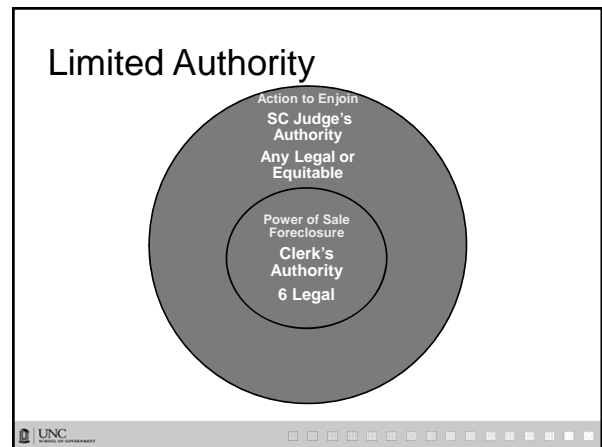
1. Borrower – Bob and Belinda Barker
2. Lender – Countrywide Loans LLC*
3. Property owner – Showcase Showdown, LLC*
4. Beneficiary – Countrywide Loans, LLC
5. Amount of the loan - \$417,000
6. Date of the loan – December 5, 2006
7. Property that secures the note – 2334 Price is Right Way, Showdown, NC 25468

Chapter 45 controls in procedure* and substance.



The clerk's authority is limited but it is not a rubber stamp.

UNC



Not a Rubber Stamp

The order authorizing sale must be based on competent evidence and is a judicial act of the clerk.

UNC

How Searching of an Inquiry?

Competent evidence to authorize the sale

Regardless of whether it is contested or uncontested

Clerk may consider affidavits and certified copies.

UNC

The Big Six: Conclusions of Law

1. Holder of a valid debt
2. Right to foreclose
3. Default
4. Notice
5. Home Loan
6. Military Service

Plus one, loss mitigation.



Clerk must ask:

1. Do you currently live at the property?
2. Is it your primary residence?
 - Does not say home loan.
 - Must only appear that they do.

If Yes to both.....



Loss Mitigation – Clerk Inquiry

1. Efforts to resolve
2. Likelihood of resolution without foreclosure

Good cause?

Then, continuance (not dismissal).



What do you ask?

- Did you submit an application?
- Did you receive notices from the lender?
- What is your monthly income?
- What is your current mortgage payment?
- How far behind are you?
- What can you afford to pay each month?
- Have you had a modification before?
- Did you attempt to contact servicer for modification? What did they say?
- Did you submit an initial package of documents?
 - Did you hear back?
- Are you in a trial period plan? Are you making payments?



Make your job easier

If, Lender files affidavit of compliance.

- Describe efforts to resolve the default
- Results of the efforts to resolve

Then, You don't have to ask

*As long as you are satisfied with the affidavit.



Document

Loss Mitigation Affidavit



The Big Six: Conclusions of Law

1. Holder of a valid debt
2. Right to foreclose
3. Default
4. Notice
5. Home Loan
6. Military Service

Plus one, loss mitigation.

#1: Holder of a Valid Debt

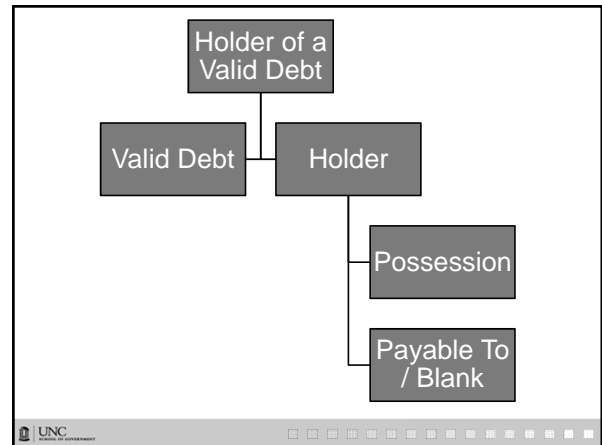
Clerk must find Competent Evidence of:

1. A Valid Debt
 - Usually evidenced by the note, copy ok
 - Hard to dispute
2. Party seeking to foreclose is the Holder of the note that evidences the debt

#1: Holder of a Valid Debt

Holder - Two Prong Analysis

1. Physical Possession
 - Copy can suffice unless borrower provides evidence that copy is inaccurate
2. Payable to specific person OR Indorsement in Blank



Bob Barker, Note Page 1

1. BORROWER'S PROMISE TO PAY

In return for a loan that I have received, I promise to pay U.S. \$417,000.00 (this amount is called "Principal"), plus interest, to the order of Lender. Lender is Countrywide Loans LLC.

- Countrywide is the Holder
- Typically proven by Affidavit of Holder

Allonge or Indorsement Transfers the Note

Pay to the order of

Without Recourse

Debra Sierck

Debra Sierck
Assistant Secretary
IndyMac Bank, F.S.B.

Follow the Trail

Document

Affidavit of Holder

- Note + Allonge, if any

Legal or Equitable?

The borrower argues that the lender improperly assigned the note because the borrower did not consent to the assignment.

1. Legal
2. Equitable

Legal or Equitable?

The borrower argues that the lender improperly assigned the note because the borrower did not consent to the assignment.

1. Legal
- ~~2. Equitable~~

Legal or Equitable?

The borrower argues that the lender promised to modify the loan and then proceeded with the foreclosure anyway.

1. Legal
2. Equitable

Legal or Equitable?

The borrower argues that the lender promised to modify the loan and then proceeded with the foreclosure anyway.

- ~~1. Legal~~
2. Equitable

The Big Six: Conclusions of Law

1. Holder of a valid debt
- 2. Right to foreclose**
3. Default
4. Notice
5. Home Loan
6. Military Service

Plus one, loss mitigation.

#2: Right to Foreclose Under the Instrument

Arises from the power of sale provision in the Deed of Trust.

Power of Sale

Grants the authority to the trustee to sell the property to satisfy the debt on behalf of the lender

Bob Barker, Deed of Trust, Page 2

If, however, there shall be any default (a) in the payment of any sums due under the Note, this Deed of Trust or any other instrument securing the Note and such default is not cured within ten (10) days from the due date, or (b) if there shall be default in any of the other covenants, terms or conditions of the Note secured hereby, or any failure or neglect to comply with the covenants, terms or conditions contained in this Deed of Trust or any other instrument securing the Note and such default is not cured within fifteen (15) days after written notice, then and in any of such events, without further notice, it shall be lawful for and the duty of the Trustee, upon request of the Beneficiary, to sell the land herein conveyed at public auction for cash, after having first giving such notice of hearing as to commencement of foreclosure proceedings and obtained such findings or leave of court as may then be required by law and giving such notice and advertising the time and place of such sale in such manner as may then be provided by law, and upon such and any resales and upon compliance with the law then relating to foreclosure proceedings under power of sale to convey title to the purchaser in as full and ample manner as the Trustee is empowered. The Trustee shall be authorized to retain an attorney to represent him in such proceedings.

#2: Right to Foreclose under the Instrument

1. Review the Deed of Trust
 - Valid Power of Sale?
 - Legal description of property attached + matches NOH legal description?
 - Recorded in county where foreclosure pending?
 - DOT secure the note?
 - Signed and notarized by each grantor?
2. Review the NOH and ST
 - Ensure ST recorded before the NOH

Document

Affidavit of Holder

- Copy of the Deed of Trust and Assignments, if any

Legal or Equitable?

The lien of deed of trust is invalid because the grantor under the deed of trust did not own the property at the time the deed of trust was granted.

- 1 – Legal
- 2 - Equitable

Legal or Equitable?

The lien of deed of trust is invalid because the grantor under the deed of trust did not own the property at the time the deed of trust was granted.

- 1 – Legal
- ~~2 – Equitable~~

Legal or Equitable?

The property subject to foreclosure is not encumbered by the lien of the deed of trust because the legal description is incorrect or missing.

- 1 – Legal
- 2 - Equitable

Legal or Equitable?

The property subject to foreclosure is not encumbered by the lien of the deed of trust because the legal description is incorrect or missing.

- 1 – Legal
- ~~2 – Equitable~~

The Big Six: Conclusions of Law

1. Holder of a valid debt
2. Right to foreclose
- 3. Default**
4. Notice
5. Home Loan
6. Military Service

Plus one, loss mitigation.

#3: Default

An omission or failure to fulfill a duty, observe a promise, discharge an obligation, or perform under an agreement.

- Note
- DOT
- Other Agreement (Cross-Default)

Default under DOT, Page 2

If, however, there shall be any default (a) in the payment of any sums due under the Note, this Deed of Trust or any other instrument securing the Note and such default is not cured within ten (10) days from the due date, or (b) if there shall be default in any of the other covenants, terms or conditions of the Note secured hereby, or any failure or neglect to comply with the covenants, terms or conditions contained in this Deed of Trust or any other instrument securing the Note and such default is not cured within fifteen (15) days after written notice, then and in any of such events, without further notice, it shall be lawful for and the duty of the Trustee, upon request of the Beneficiary, to sell the land herein conveyed at public auction for cash, after having first giving such notice of hearing as to commencement of foreclosure proceedings and obtained such findings or leave of court as may then be required by law and giving such notice and advertising the time and place of such sale in such manner as may then be provided by law, and upon such and any resales and upon compliance with the law then relating to foreclosure proceedings under power of sale to convey title to the purchaser in as full and ample manner as the Trustee is empowered. The Trustee shall be authorized to retain an attorney to represent him in such proceedings.

#3: Default

Clerk Review

Two Questions:

- 1 – What constitutes a default under the loan documents?
- 2 – Whether the facts prove a default exists?

- Typically shown via Affidavit of Holder

#3: Default

Two General Rules:

1. Day late and a dollar short is enough, unless documents say otherwise
 - Could be anything, depends on the terms of the note and deed of trust
2. Each default is a new cause of action
 - Think: each missed payment

Default under DOT, Page 2

If, however, there shall be any default (a) in the payment of any sums due under the Note, this Deed of Trust or any other instrument securing the Note and such default is not cured within ten (10) days from the due date, or (b) if there shall be default in any of the other covenants, terms or conditions of the Note secured hereby, or any failure or neglect to comply with the covenants, terms or conditions contained in this Deed of Trust or any other instrument securing the Note and such default is not cured within fifteen (15) days after written notice, then and in any of such events, without further notice, it shall be lawful for and the duty of the Trustee, upon request of the Beneficiary, to sell the land herein conveyed at public auction for cash, after having first giving such notice of hearing as to commencement of foreclosure proceedings and obtained such findings or leave of court as may then be required by law and giving such notice and advertising the time and place of such sale in such manner as may then be provided by law, and upon such and any resales and upon compliance with the law then relating to foreclosure proceedings under power of sale to convey title to the purchaser in as full and ample manner as the Trustee is empowered. The Trustee shall be authorized to retain an attorney to represent him in such proceedings.

#3: Default

Types of Default

- Failure to make payments on time
- Failure to pay taxes
- Failure to pay insurance
- Sale/transfer of property without consent
- Misuse/waste on property
- Other liens
- Failure to meet financial covenants

Document

Affidavit of Holder or Affidavit of Default

- Copy of Note and Deed of Trust

Legal or Equitable?

The borrower disputes the amount they are in default.

1. Legal
2. Equitable

Legal or Equitable?

The borrower disputes the amount they are in default.

- ~~1. Legal~~
2. Equitable

Legal or Equitable?

The person who executed the affidavit of default does not have sufficient personal knowledge of the loan to attest to the statements in the affidavit.

1. Legal
2. Equitable

Legal or Equitable?

The person who executed the affidavit of default does not have sufficient personal knowledge of the loan to attest to the statements in the affidavit.

1. Legal
- ~~2. Equitable~~

The Big Six: Conclusions of Law

1. Holder of a valid debt
2. Right to foreclose
3. Default
- 4. Notice**
5. Home Loan
6. Military Service

Plus one, loss mitigation.

#4: Notice

1. What?
2. Who?
3. How?

#4: Notice – What?

Clerk Review

Notice of Hearing:

- Go through NOH and confirm checklist satisfied.

#4: Notice – Who?

Clerk Review

1. Required by Deed of Trust
 - Check the deed of trust for people entitled to notice
2. Record Owner at time NOH filed with present or future interest in the property
3. Any obligor that the holder wants to sue for deficiency

Bob Barker, Notice?

- Record Owner –
- Borrower (Obligor) -

Bob Barker, Notice?

- Record Owner - Showcase Showdown, LLC
- Borrower (Obligor) - Bob and Belinda Barker, if holder wants to sue them for deficiency
 - Any other guarantor

#4: Notice – How?

Clerk Review

- Notice of Hearing must be served at least 10 days before the hearing
 - If it is served only by posting, must be served at least 20 days prior
- Evidenced by Trustee's Affidavit of Service

#4: Notice – How?

Clerk Review

- 10 Day Service - Rule 4 –
1. Personal by sheriff
 2. Leaving at house with person of suitable age that resides there
 3. Deliver copy to agent authorized to accept service
 4. Registered/certified mail
 5. UPS/FedEx

#4: Notice – How?

Clerk Review

Posting by sheriff

- Look for ST's affidavit
 - Should show actual effort made to locate + serve
- You must be satisfied that they used reasonable, diligent efforts
 - Locate:
 - Google, Lexis, Facebook, VCAP, ROD, tax records, loan docs
 - Serve:
 - Don't have to use all methods before posting
 - Case by case basis

Document

1. ST's Affidavit

- Copy of Recorded Substitution of Trustee
- Title Search – Record Owner

2. ST's Affidavit of Service

- Copies of attempts at service
- Description of efforts to serve

The Big Six: Conclusions of Law

1. Holder of a valid debt
2. Right to foreclose
3. Default
4. Notice
- 5. Home Loan**
6. Military Service

Plus one, loss mitigation.

#5: Home Loans: Clerk Review

Clerk must find Competent Evidence

Not a Home Loan

1. Affidavit:
 1. Look for statement in the affidavits
 2. From party capable of certifying loan status
 3. Give reason why not a home loan
2. Certification from Database

Home Loans

If a Home Loan, servicer must:

1. Send 45 Day letter
2. Register the loan within 3 days of the letter and provide information

Servicer includes any person or entity entitled to receive loan payments.

Failure to register is grounds for dismissal.

Document

1. Copy of 45 Day Letter
2. Home Loan Certification

OR

Affidavit not a home loan or Non-Home Loan Certificate

Clerk Review

Clerk must find Competent Evidence

If a Home Loan:

1. 45 days (or more if required) elapsed before NOH filed
2. Pre-Foreclosure Notice Sent – “All Material Respects”
3. No materially inaccurate statement in certification

Clerk Review

Pre-Foreclosure Notice

1. In writing, by mail
2. To borrower's last known address
3. At least 45 days prior to the NOH filing date
4. Itemize past due amounts
5. Itemize charges to bring the loan current
6. Statement that other options may be available
7. Contact info for servicer
8. Contact info for counseling agency
9. Contact info for SHFPP

**Standard:
All Material Respects**

Clerk Review

Registration Certification

1. Certify 45 day letter sent
2. Name and address of Borrower
3. Last scheduled payment made
4. Date 45 day notice mailed
5. Registered within 3 days of the letter

**Standard:
Materially Inaccurate Statement**

The Big Six: Conclusions of Law

1. Holder of a valid debt
2. Right to foreclose
3. Default
4. Notice
5. Home Loan
6. **Military Service**

Plus one, loss mitigation.

#6: Military Service

Foreclosure barred up to 90 days after active duty.

-- If DOT signed before active duty.

Federal: Servicemember Civil Relief Act
NC: G.S. 45-21.12A

Would you accept it?

Substitute Trustee presents documents to the clerk to obtain an order for sale. Included in them is a copy of the DOD database print out with the electronic signature of the Director of the Manpower Data Center. Is this competent evidence?
- Discuss with your table and provide a group answer.

Document

1. Affidavit as to Military Status, or
2. Waiver

Clerk Review

Competent Evidence the Sale is Not Barred

1. Affidavit
 - Attest not on active duty or within 90 days
 - Facts to support
 - Description of searches: DOD Database search, public records, etc.
 - Copy of searches
2. Waiver
 - Can't waive in the Note or DOT
 - Waiver in 12 pt font
 - Must be specific to the obligation subject to foreclosure, not general waiver
 - Waiver must occur during or after active duty