MYTHS ABOUT FORECLOSURE

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Anyone who has been on the wrong end of the foreclosure process knows how stressful and unfair it is to the borrower under Missouri law. Even those who have some experience with the foreclosure process believe popular myths about it. In this article, I will bust three key myths about Missouri non-judicial foreclosure.

Missouri, as a non-judicial foreclosure state, has a streamlined process for lenders to recover debts secured by real property. This process bypasses the court system, allowing foreclosures to proceed more quickly and is almost entirely designed for the benefit of the lender, typically, banks. First, let's start with a basic understanding of the process.

Non-Judicial Foreclosure: The Primary Method

Missouri primarily utilizes non-judicial foreclosures, governed by the terms of the deed of trust and state statutes (*See* §443.410 RSMo. *eq seq.*). The process generally begins when the lender determines that the borrower defaulted on the loan and initiates foreclosure proceedings. The following steps outline the non-judicial foreclosure process in Missouri:

1. Notice of Default.

The lender. or its trustee, must provide a Notice of Default to the borrower no less than 20 days before the sale. *See* §443.325 RSMo. This notice informs the borrower of the alleged delinquency and grants the borrower a period to cure the default, as outlined in the terms of the loan agreement.

2. Notice of Sale

If the borrower fails to cure the default, the lender moves forward by issuing a Notice of Sale. Missouri law requires publication of the notice in a local newspaper for the 20 days prior to the sale and on the day of the sale. *See* §443.320 RSMo. Additionally, notice must be sent to the borrower and any other interested parties, such as junior lienholders, as specified in the deed of trust.

3. The Foreclosure Sale

The foreclosure sale is conducted by the trustee at a public auction. It is open to any cash bidder but, typically, the lender is the only bidder at the sale and makes a "credit bid." A "credit bid" is where the lender gives credit against the amount due under the loan rather than paying cash. The fact that the sale is for cash, due at the time of the sale, and there is only 20 days' notice, makes it very unlikely that anyone other than the lender will bid at a foreclosure sale. Third parties do not have time to do inspections or secure financing under such circumstances. The property is conveyed to the winning bidder. As mentioned above, in commercial settings, this is almost always the bank.

Deficiency Judgments

When the foreclosure sale proceeds do not satisfy the outstanding loan balance, the lender may pursue a deficiency judgment against the borrower. In Missouri, lenders have the right to file a lawsuit to recover the difference between the loan amount and the sale price of the foreclosed property.

Under Missouri law, borrowers have limited redemption rights, and lenders may pursue judicial foreclosure. However, neither of those subjects are covered in this article.

Myth #1—The Lender has to Bid a Certain Amount at Foreclosure

In discussions with sophisticated businesspeople, I have often heard them say that if the lender takes your property at foreclosure, it has to pay at least 80% of the fair market value of the property at the sale. This is simply not true.

In Missouri, there is no requirement for the lender to bid a minimum amount at the foreclosure sale.

In *First Bank v. Fischer & Frichtel, Inc.*, 364 S.W.3d 216 (Mo. Banc. 2012), the Missouri Supreme Court held that a foreclosure sale could only be set aside if the sale price is "…so gross that it shocks the conscience." In that case, the price was about 50% of the fair market value. The Court went on to note,

Missouri's standard for proving that a foreclosure sale "shocks the conscience" is among the strictest in the country; more than one Missouri case has refused to set aside a sale that was only 20 to 30 percent of the fair market value because of Missouri's historical practice of requiring an inference of fraud in addition to a sale price that "shocks the conscience."*Cockrell*, 145 S.W.2d at 422;*Judah*,62 S.W.2d at 720;*Harlin v. Nation*,126 Mo. 97, 27 S.W. 330, 331 (1894).

Id at 222. For practical purposes, the requirement to show an inference of fraud, in addition to a shockingly low price, means a lender can bid anything it wants.

The absence of a minimum bid requirement can have significant implications for both borrowers and lenders:

- For Borrowers: This can lead to situations where the property is sold for less than the outstanding loan balance, leaving the borrower liable for a deficiency judgment.
- For Lenders: Lenders may strategically bid low to recover the property and resell it later for a higher value, or they may choose not to bid at all if the property holds little market appeal.

Myth #2—Foreclosure Requires a Court Order

Unlike many states that require judicial foreclosure, in Missouri, a lender can foreclose on your property without a court ever issuing an order or a lawsuit even being filed. This power is granted under the law and in the language of the deed of trust borrowers typically sign along with the promissory note.

Myth #3—If the Lender Resells the Property, it Must Give Credit for the Higher Amount

Here is where things get really interesting. Imagine a situation where a lender takes the borrower's property at foreclosure for less than half of its fair market value and then sues the borrower to collect a deficiency judgment. For ease of understanding, let's give some hypothetical numbers. The amount due on the loan was $5 million and the fair market value of the property secured by the loan was $3 million at the time of the foreclosure sale. Finally, the bank decides to bid $1 million for the property at foreclosure and buys the property. As a result, the bank could pursue a deficiency judgment against the lender, and guarantors, of $4 million.

Now imagine that the bank turns around and sells the property to a third party for $3 million. Under Missouri law, the bank can still pursue a deficiency judgment of $4 million against the borrower and guarantors. None of the windfall, in our imagined case, $2 million dollars is credited to the borrower or guarantors. In this situation, the bank could recover $7 million on a $5 million loan.

Sophisticated borrowers and guarantors need to understand the potential dangers involved in the

foreclosure process and need the protection of zealous and knowledgeable legal counsel to protect their interests.

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