

PUBLICATION

Before You Foreclose: Planning for Confirmation in Georgia

February 26, 2013

Your borrower defaulted on a debt secured by real property in Georgia, and you are ready to take action. Is immediate foreclosure the best option?

Georgia foreclosure law allows for a swift non-judicial sale of real property subject to a power of sale. Foreclosure sales in Georgia take place on the first Tuesday of every month, and require advertisements to be published every week for the four weeks preceding the foreclosure sale. This process means that once you decide to foreclose, the sale can take place approximately a month later.

However, creditors should not leap at the opportunity to foreclose quickly and inexpensively in Georgia without first taking time to consider what will happen afterwards. Before you foreclose, think through your collection plans.

Prior to foreclosure, a creditor can sue the debtor and guarantors on the promissory note and obtain a judgment for the full amount of the debt. There is no obligation to foreclose before seeking a judgment. In contrast, once a foreclosure sale has taken place, the creditor cannot sue the debtor or guarantors on the deficiency debt (the amount still owed after the property is sold) without an additional, potentially burdensome step-- foreclosure confirmation.

Georgia foreclosure confirmation (O.C.G.A. § 44-14-161) requires a creditor to prove in court that the foreclosure sale process was performed correctly and fairly, and that the property sold for its true market value at the foreclosure sale. Although the issues are limited in a confirmation case, a contested confirmation case can become high-stakes litigation, often requiring discovery (including appraiser depositions) and a lengthy hearing, because *if the creditor does not win the confirmation case, then it may lose the right to pursue the deficiency debt*. A creditor who wins the confirmation case has earned the right to sue for the deficiency-- (yet another lawsuit!). The confirmation process adds risk and expense, and it slows creditor recovery.

Therefore, before foreclosing, a creditor who also wants to collect any deficiency debt should weigh whether there is sufficient recourse and whether the obligors have sufficient assets to warrant pursuing collection in addition to foreclosure. If so, and if immediate foreclosure is not necessary (especially where a receiver can be appointed to protect the security interest in the property during the collection suit), then it may well be a better strategy to obtain a judgment first, and foreclose second, thereby avoiding the confirmation case altogether.