

## The Pros and Cons of “Judicial” vs. “Non-Judicial” Foreclosure Actions

Texas law recognizes the vital role that property owners associations play in their communities. Community associations provide valuable benefits, including common area (often pool, park, landscaping, etc.) maintenance, insurance, courtesy patrols, street lighting, deed restriction enforcement to help maintain neighborhood aesthetics and property values, and a myriad of other benefits. Owners are required, by virtue of deed restrictions (normally called the “declaration” or “covenants, conditions and restrictions”) to pay dues to the association to fund these services.

A declaration commonly enables an association to exercise a lien and ultimately foreclose against a lot for nonpayment of dues, if all other statutorily-required warnings and opportunities to pay dues in full go unanswered. This article will briefly describe the differences between judicial and non-judicial foreclosure and the benefits of each. Some covenants, conditions and restrictions of property owners associations require judicial foreclosure, while some allow judicial or non-judicial foreclosure.

When a property owner becomes delinquent in payments due to his or her association for which the association has a lien, and all preliminary efforts at collection have been fruitless, the final remedy is foreclosure (assuming the governing documents of the particular association allow it.)

**Judicial foreclosure** involves the filing of a lawsuit, going to trial, proving that the person owes the money, and asking a judge to rule in the association’s favor. If the judge rules in the association’s favor, the judge normally orders the constable to auction the property off in a foreclosure sale at the courthouse on the first Tuesday of the month, with the proceeds going to pay off the debtor’s delinquency with the association.

In order to file suit, a lawsuit must be prepared, the defendant must be found and served with process, a trial must be held, and all the bells and whistles (such as discovery as necessary -- for example depositions, interrogatories, etc.) that go with lawsuits followed. This is *much* more expensive than non-judicial foreclosure (more legal fees and court costs) and more time consuming (often a trial date can't be obtained until several months after one is requested.) The advantage of judicial, some argue, is that the debtor “gets his day in court” before a judge and potentially a jury.

Many would argue that judicial foreclosure does the debtor no favors. If the debtor wants to redeem his home (buy it back after the foreclosure as he has the statutory right to do in most cases), or pay all amounts due prior to the foreclosure in order to avoid the foreclosure sale entirely), a judicial foreclosure makes for *much* more in extra attorneys fees that the owner will have to pay. In most cases, unless the association has made a mistake in the accounting, the debtor has no legal defense against the foreclosure of the debt, so there is arguably little advantage to a debtor in “having his day in court.”

**Non judicial foreclosure** requires that at least two certified letters be sent to the last known address of the debtor, and these letters are sent at least 30 days apart. The debtor doesn't technically need "actual notice" (he need not actually get the letters) in order to proceed, but an association and its law firm should do everything they reasonably can to track down the debtor and make sure he or she gets actual notice.

Finally, another potential disadvantage of judicial foreclosure and the higher attorneys fees associated with it is that sometimes the association will not be able to recover the attorney’s fees from the delinquent owner. In most cases, the owner is responsible for all attorney’s fees, so the association will be

reimbursed for the attorneys fees it pays to its attorney for the collection action. However, when an owner declares bankruptcy, or a first lien mortgage company forecloses its lien (this lien is normally “superior” to the association’s lien, thus foreclosure of it “wipes out” the associations lien for amounts due prior to the first lien foreclosure date), the association is left holding the bag so to speak, and must normally absorb all of the attorneys fees.

### ***Firm information***

Niemann & Heyer LLP has been representing POAs and specializing in POA law for more than 20 years. Our lawyers have been instrumental in drafting virtually all POA law in Texas, including the Texas Uniform Condominium Act (Property Code Chapter 82) and the Texas Residential Property Owners Protection Act (Property Code Chapter 209). Connie Niemann Heyer is a past president and current board member of the Austin chapter of the Community Associations Institute, and is a lobbyist for the Texas Community Associations Institute Legislative Action Committee.

*This article represents the opinion of our attorneys. Other attorneys may have different opinions.*