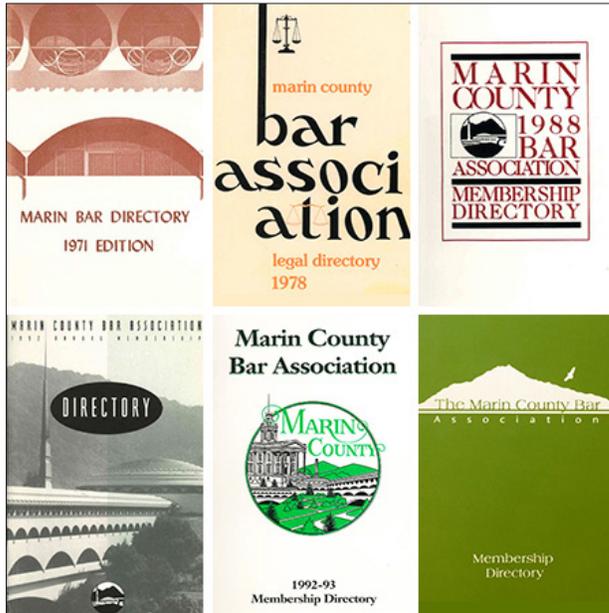


The Marin Lawyer

An Official Publication of the Marin County Bar Association



SEPTEMBER MEMBERS LUNCH

WED, SEPT 30 | 12 – 1:30 pm

Fenix San Rafael

\$40, MCBA members / \$45, nonmembers

[Details & Registration](#)

Six Decades | Six Speakers

MCBA Past Presidents Luncheon

MCBA brings together six Past Presidents to discuss cross-generational topics about practicing law in Marin. The program provides a forum to rekindle acquaintances and for young professionals to ask questions of those with many years of legal practice experience.

Our speakers represent six wildly different decades: the 60s, 70s, 80s, 90s, 2000s and the year 2010. They will share their experience-laden tips for career advancement, successful approaches in business development, and their own personal sacrifices in balancing professional and personal lives.

Six President Panelists: Jerry Ackeret, Hon. Michael Dufficy (Ret.), Joel Gumbiner, Mary McLain, Hon. Peter Allen Smith (Ret.) & Wanden Treanor.

Mediation: Acts Two & Three of the Three-Act Play

Second in a two-part series by Phil Diamond

Inside on Page 3

The Marin Lawyer editorial team thanks August Guest Editor Phil Diamond.

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Calendar of Events

Wed, September 10: 12 – 1:30 PM
 Real Property Section Meeting

Fri, September 11: 2– 5:00 PM
 Fee Arbitration Training

Tue, September 15: 12 – 1:30 PM
 Labor & Employment Section Meeting

Wed, September 16: 12 – 1:30 PM
 ADR Section Meeting

Wed, September 16: 12 – 1:30 PM
 Probate & Estate Planning
 Section Meeting

Fri, September 25: 12– 1:30 PM
 Construction Law Section meeting

Wed, September 30: 12 – 1:30 PM
 September Members Meeting

Thu, October 1: 5:30 – 7:00 PM
 Diversity Section Roundtable Program

Fri, October 9: 12:30 PM
MCBA Annual Golf Tournament

See page 11 for details & more events.



The Lender's Foreclosure Bid: More Art than Science

By Scott D. Rogers, © 2015

The lender's bid at the trustee's foreclosure sale is often given inadequate consideration and determined at the last minute. The all too common practice by many lenders of entering a "full credit bid" of all amounts owed to the lender is ill advised. The failure to carefully and timely prepare for the trustee's sale and craft a deliberate bidding strategy can lead to costly, embarrassing and irreversible mistakes.

A comprehensive foreclosure bid strategy is multi-dimensional. It is part science, part policy, and part poker. The science is in knowing the true realizable value of the property being foreclosed and accurately computing the debt secured. The policy is the lender's willingness to accept, avoid, or defer additional write-downs or gains and its appetite for or ability to handle foreclosed real property. The poker is in gauging the interest of potential third party bidders and how hard to push for higher bids.

To Bid or Not To Bid

The lender's consideration of its bid strategy should also include an evaluation of whether or not to bid at all. There are some properties that a lender will not want to acquire through foreclosure. Environmentally challenged properties may be problematic and should be avoided when the potential liabilities are not well defined and/or the lender is not equipped to manage the environmental challenges. Similarly, properties with significant structural defects or health and safety conditions may pose risks that the lender does not want to assume. Finally, foreclosure of some properties (e.g., churches, historical buildings or community-loved facilities) can be a public relations nightmare which the lender may wish to sidestep.

The most obvious and effective way for the lender to avoid foreclosing is to simply sell the note and deed of trust and leave the foreclosure to its purchaser. Often, however, no buyer is available or the necessary discount is too steep. In those circumstances, the lender may need to proceed to the trustee's foreclosure sale in hope that a third party may bid and take the property. In such cases, the lender may wish to avoid actually placing the customary opening credit bid and instead finesse a third party bid. The lender's concern's is that every bid (including any credit bid) is deemed an irrevocable offer to purchase the property. Civil Code Section 2924h(a). Although all bids are deemed cancelled upon any postponement or discontinuance of the sale (Civil Code Section 2924h(e)), the auctioneer for the trustee cannot always be counted upon to cooperate and/or follow the lender's instructions to cancel or postpone the sale in the absence of third party bidding.

Bidding Strategy

In preparing to bid at the trustee's foreclosure sale, the lender needs to consider both internal and external factors. Internal factors include the value of the loan on the lender's books and the potential for and timing of reportable/taxable losses or gains flowing from foreclosure and the lender's willingness and capacity to take back and manage the security property. External factors include the realizable (as opposed to appraised) value of the security property, the difficulty, cost and time for its management/eventual resale, the direction of the market and availability of additional collateral or other potential sources of recovery. Based upon these factors, among others, the lender should determine its "let-go price"—the bid amount at which the lender would allow a third party bidder to take the property.

Once its "let-go price" is determined, the lender will need to develop its actual bid strategy. The bid strategy will include the lender's opening credit bid and any increased credit bids up to the amount of the lender's "let-go price".

(Continued on page 7)

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(Lender's continued from page 6)

In doing so, the lender needs to keep in mind that for nearly all purposes its credit bid will be treated as the equivalent of cash received from a third party bidder thereby reducing the debt on a dollar for dollar basis. Thus, absent the lender's desire to defer losses or accelerate gains or the existence of Federal tax liens which might be redeemed in which case a higher bid may be justified, the lender's opening credit bid will generally be the lowest defensible amount. There is little downside to a low, or even very low, credit bid by the lender as a regularly conducted, non-collusive trustee's sale in accordance with state law procedures is no longer subject to scrutiny as a possible fraudulent transfer. See *BFP v. Resolution Trust Corporation*, 511 US 531 (1994).

The benefits of a low credit bid, however, are many. The major benefits include (1) avoidance of an inadvertent overbid (e.g., bidding more than is actually owed by the borrower due to miscalculation or subsequent invalidation of interest, late fees, advances or costs) resulting in a cash payment from the lender to the borrower or a junior secured creditor, (2) retention of amounts to offset against future potential claims from the borrower or guarantor, and (3) preservation and maximization of recourse for deficiency amounts against other collateral, guarantors, receivership funds, insurance or condemnation proceeds and the like.

Manage the Bid Process

The bid process itself is often neglected or mismanaged by lenders. Frequently, lenders will only hours before the sale fax or email their instructions to the foreclosure trustee often resulting in miscommunication and errors at the trustee's sale as the lender's instructions are not timely or clearly communicated to the auctioneer. The best practice is to provide detailed written instructions to the foreclosure trustee and obtain written confirmation of the trustee's receipt of the instructions in advance of the sale date. The lender should specify the lender's desired opening credit bid, the increments and total amount of any increases in the lender's credit bid in the event of third party bidding and final "let-go price" beyond which no further credit bids should be entered. For larger loans, it is often advisable for a lender's representative to appear at the trustee's sale, or to at least be available by phone, to direct the trustee's auctioneer in the event unusual circumstances arise.

Avoid Chilling the Bid

In addition, the lender needs to be cautious in its dealings with potential bidders. Often, the lender will be contacted in advance of the sale by a party interested in acquiring the property either at the trustee's sale or after the sale. The lender should be very cautious in such dealings to avoid potentially "chilling the bid." Civil Code Section

2924h(g) specifically prohibits any (1) deal for any party to not bid at the sale, or (2) activity to fix or restrain bidding in any manner. The lender may subsequently be alleged to have "chilled the bid" by discussing its potential credit bid(s) with the interested party, by providing information regarding the condition of the property or by suggesting that the interested party might want to purchase the property from the lender after the foreclosure sale. The lender's contact with such parties should be limited to discussion of possible sale of the secured obligation (only if the topic is raised by the other party), statement that the trustee's sale will be on an as-is basis (as is expressly permitted under Civil Code Section 2924h(g)), and encouragement of the party to appear and bid at the trustee's sale.

After the Sale

Once the trustee's sale is completed, the lender's work is not quite done. All of the lender's effort to carefully and deliberately prepare and execute its credit bid strategy can be quickly undone by errors in the Trustee's Deed Upon Sale (TDUS). As the factual matters recited in the TDUS upon recordation are deemed to be presumptively correct, before it is recorded by the trustee, the lender should review a draft of the proposed TDUS conveying the secured property to the lender or other successful bidder at the trustee's sale. The lender should carefully review the recitation on the TDUS of the amount of the obligation owed at the date of sale, the amount bid and the grantee to be vested with title. Correction of any errors prior to recordation is simple and can be accomplished between the trustee and lender. Correction following recordation may require judicial intervention and reformation.

Conclusion

In conclusion, the lender's trustee's sale foreclosure bid is a process requiring preparation, deliberation and execution of a defined strategy. It is often complex and inexact – more like art than science.

Scott Rogers is a partner in the Palo Alto office of Rutan & Tucker, LLP where he specializes in real estate finance, equity and lease transactions, title insurance and real estate litigation. He is the former Chair of the Real Property Section of the State Bar of California. Scott obtained both a J.D. and M.B.A. from UCLA. He may be reached at (650) 320-1505, or by email at vrogers@rutan.com.