

# DID YOU EVER WONDER WHAT IT TAKES TO ENJOIN A FORECLOSURE SALE?

Here's what lenders/servicers should know about TROs and Injunctions

With inflation on the rise and the economy slowing, foreclosures are unfortunately likely to increase. With more foreclosures, there will likely be a rise in borrowers' suing at the last minute to stop the foreclosure. In fact, our firm has already started to see a substantial uptick in requests for the court to issue a Temporary Restraining Order (TRO) to stop an impending foreclosure sale. Since the requirements to obtain a TRO differ in every state, this article will help loan servicers and investors (collectively, "lenders") understand the varying TRO processes.

TROs are rarely issued in judicial foreclosure states because the court is already involved and controls the foreclosure process. Non-judicial foreclosures, on the other hand, do not involve the court system. As a result, borrowers trying to stop the foreclosure sale must file a *separate lawsuit* and then ask the court to enjoin the foreclosure. In some instances, like in California, the borrower can file suit on Monday and get a TRO hearing on Tuesday. This gives lenders very little time to hire counsel, let alone substantively oppose the request for a TRO.

Understanding the TRO process is essential to defeating a TRO or limiting its impact. Below

is an explanation of the TRO process in some of the key non-judicial states out west.

## CALIFORNIA

**Basic Requirements:** To obtain a TRO enjoining a foreclosure sale in California, borrowers (or junior lienholder) must:

- Establish the<sup>1</sup>:
  - » Likelihood of success on the merits;
  - » Possibility of irreparable harm if the relief not granted;
  - » Balance of hardships in their favor;
- Give oral or written notice to the lender or foreclosing trustee by 10:00 a.m. on the day before the TRO hearing.

- Practice Tip—Leaving a message for the SPOC or the foreclosing trustee is often sufficient notice. This simple (and short) way of giving notice severely limits the time in which a lender can hire counsel and oppose the TRO. Adding to the lender's challenge is that most foreclosure firms are not truly litigation firms, i.e., they may not be equipped to handle the TRO or the related new lawsuit.

**What happens if the TRO is granted?** By definition, a TRO is temporary and, generally, only enjoins the foreclosure for 20-25 days. The TRO will set a date for an Order to Show Cause as to why the Preliminary Injunction (OSC re PI), along with a deadline to file a written opposition to the OSC re PI. *This is the big hearing and where the Lender should definitely bring in its legal department and a litigation firm.* If a PI is granted, it will enjoin the foreclosure sale for the duration of the litigation, which could be 1-2 years. Moreover, a granted PI disincentivizes borrowers from discussing settlement or exploring loss mitigation. Borrowers know that they have tons of time. On the other hand, if the lender prevails at the OSC re PI, the TRO will be





dissolved, and the foreclosure can proceed, which often brings borrowers to the table to settle the litigation.<sup>2</sup>

The same factors cited above are required to obtain a PI. Generally, the lender's opposition will focus on the borrower's claims, arguing that the borrower is not likely to prevail on the merits of the claims. As a back-up argument, lenders generally request a sizable bond as a condition of the PI. In many instances, the court will require that the borrower post a bond equal to the reinstatement amount and/or ongoing monthly payments. If the borrower cannot post the bond or make the monthly payments, the PI will dissolve.

Note—if the TRO is granted for violations of California's Homeowner Bill of Rights, the borrower is also entitled to recover the attorneys' fees costs incurred in obtaining the TRO.

Note—While the notice requirements are different in Federal Court, the standard and PI processes are similar.

#### GENERAL TIPS FOR HANDLING TROS:

As explained below in greater detail, the standard to obtain a TRO is substantially similar in most Western U.S., as well as the process to oppose the PI hearing. Below are some general tips to assist in handling TROs in most non-judicial foreclosure states:

- Develop an internal process to expedite getting notice of a TRO from the SPOC or foreclosure trustee to the lender's legal team (or other decision maker) to immediately retain legal counsel to oppose the TRO.
- If appropriate, have counsel immediately see if borrowers' counsel will agree to take the TRO off calendar in exchange for a short postponement of the foreclosure sale.
- If the TRO is granted, stop the foreclosure sale and, if lender has not already, retain appropriate counsel to oppose the PI request.
- Work with litigation counsel to immediately settle the matter or oppose the PI request.
- If the PI is granted, counsel should continue to look for opportunities to dissolve the PI throughout the litigation. Dissolving the PI will often bring the plaintiff/borrower back to the table to modify their loan and resolve the litigation.

#### NEVADA

**Basic Requirements:** Governed by NRC 65, NRS 33.010, and case law, a borrower must:

- Establish the:

- » Likelihood of success on merits.
- » Irreparable injury will result.
- » Provide notice is given.
- Note—Notice is not required *if immediate irreparable injury, loss or damage will result before Notice can be given and contains an affidavit of the attorney re notice and to this effect.*

**What if the TRO is Granted?** If the TRO is granted without notice, a motion for preliminary injunction shall be set within 15 days in state court and 10 days in federal court. If the TRO was granted with notice, the court has greater flexibility in setting the PI hearing. In either event, the TRO will specify the hearing and opposition dates. Like in California, a PI, if granted, will enjoin the foreclosure for the duration of the lawsuit, potentially 1-2 years. The PI is the lender's opportunity to file a written opposition and argue against the issuance of a PI.

#### ARIZONA

**Basic Requirements<sup>3</sup>:** Like in California and Nevada, Arizona requires that borrowers:

- Establish:
  - » A strong likelihood of success on the merits;
  - » The possibility of irreparable injury if the requested relief is not granted;
  - » A balance of hardships in their favor; and
  - » Public policy favoring a grant of the injunction.
- Notice to the Lender or foreclosure trustee. However, notice is not required if: (a) borrowers provide an affidavit or verified complaint with specific facts that clearly show that immediate and irreparable injury, loss, or damage will result before the adverse party can be heard in opposition; and (b) the borrowers' attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.<sup>4</sup>

**What Happens if the TRO is Granted:** As with any TRO, the foreclosure process must stop. Fortunately, in Arizona, the TRO may not exceed 14 days. While a short TRO is generally good, it also shortens the time period for the Lender to hire counsel and file a written opposition. Again, the best opposition will generally involve showing the court that the borrower is not likely to prevail on the claims in the complaint. If that fails, a lender should push for a bond to protect it from damage caused by the issuance of the PI.<sup>5</sup>

#### HAWAII

##### Basic Requirements:

In Hawaii, the borrowers must also establish the following:

- Likelihood of success on the merits;
- Balance of irreparable damage favors the issuance of a temporary injunction; and
- public interest supports granting an injunction.
- These factors are fluid and the more the balance of irreparable damage favors issuance of the injunction, the less the party seeking the injunction has to show the likelihood of success on the merits.

A TRO may be granted without written or oral notice if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the borrower before the adverse party or that party's attorney can be heard in opposition, and (2) the borrower's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required.

**What Happens if the TRO is Granted:** As with any TRO, the foreclosure process must stop. However, in HI, a TRO may not exceed 10 days (unless extended) and the matter will be set for a hearing on motion for preliminary injunction. The court also has discretion to impose a bond as a condition for TRO or a preliminary injunction, so the lender should push for a bond to protect it from damage caused by the issuance of the PI.

#### OREGON

**Basic Requirements:** Oregon follows the federal 9th Circuit standards for a TRO rather than having its own standard.

In considering whether to grant a TRO, the court will consider whether:

1. the moving party will suffer irreparable injury if the injunction is not granted;
2. the moving party will probably prevail on the merits;
3. in balancing the equities, the adverse party will not be harmed more than the moving party will be helped; and
4. granting the injunction is in the public interest.

##### What happens if the TRO is granted?

A court may grant a TRO without notice if the application clearly shows from affidavits or declarations that **immediate and irreparable**

**injury, loss, or damage will result** to the applicant before the adverse party can be heard in opposition, *and* the applicant submits an affidavit setting forth the efforts, if any, which have been made to provide notice to the opposing party.

Unless extended by the court, the TRO will automatically expire after 10 days. During that time, the court will hold a PI hearing. This gives lenders a very short window to hire counsel and oppose the PI.

### UTAH

The plaintiff/borrower must demonstrate all four elements to successfully request a TRO or PI:

1. a substantial likelihood of prevailing on the merits;
2. irreparable harm unless the injunction is issued;
3. that the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and
4. that the injunction, if issued, will not adversely affect the public interest.

#### What happens if the TRO is granted?

The PI hearing must be set at the earliest available opportunity. Lenders are able to file a written opposition and appear at a hearing to oppose the PI request.

### WASHINGTON

**Basic Requirements:** Generally, a party seeking preliminary injunctive relief must establish:

1. a clear legal or equitable right;
2. a well-grounded fear of immediate invasion of that right; and
3. that the acts complained of either have or will result in actual and substantial injury.

"In deciding whether a party has a clear legal or equitable right, the court examines the likelihood that the moving party will prevail on the merits." Washington Civile Rule 65 provides that no TRO or preliminary injunction shall be issued without security provided, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined.

When enjoining a trustee's sale under the Deed of Trust Act, 5 days' notice to only the trustee is required. Otherwise, generally, a TRO can be issued without notice for up to 14 days to allow proper notice to the adverse parties for a hearing on a preliminary injunction.

#### What happens if the TRO is granted?

If the TRO was granted without notice, the issuing court must define the injury and state why it is irreparable and why the order was granted without notice, and that the TRO shall expire within 14 days unless good cause is shown for longer or the adverse party consents to longer. If extended, the reason for the extension will be put on the record. The motion for the preliminary injunction must be set for hearing ASAP and takes precedence. If the party who obtained the TRO doesn't bring the motion for the preliminary injunction, the TRO is automatically dissolved. If enjoined under the Deed of Trust Act (DTA), the borrower is generally required to pay the amount of the monthly payments into the court registry every 30 days.

If the injunction is dissolved because the injunction was improperly obtained or ultimately unwarranted, then the funds paid into the registry must be released to the lender upon motion.

Applications to restrain a trustee's sale in Washington are often joined with claims for damages under Washington's Consumer Protection Act (CPA), which provides damages awards and attorneys' fees to plaintiffs who show that a defendant has committed an unfair or deceptive act. If the applicant prevails in showing that the foreclosure was wrongfully commenced in violation of the DTA, Lenders may also end up on the hook for damages and attorneys' fees incurred in seeking the injunction.

### SOUTH DAKOTA

In South Dakota, if a borrower defaults on their mortgage payments, the lender may foreclose using a judicial or nonjudicial method. The nonjudicial foreclosure process is pretty straightforward: i.e., the lender serves the borrower a notice of sale at least 21 days before the sale date and publishes the notice in a newspaper once a week for four weeks. S.D.C.L., 21-48-6.1, 21-48-6. However, if a lender starts a nonjudicial foreclosure, a borrower can easily enjoin it and force the lender to foreclose judicially by applying for such relief with the court. S.D.C.L., 21-48-9.

### NEW MEXICO

**Basic Requirements:** To obtain a TRO, the borrower must show that:

- He/she will suffer irreparable injury unless the injunction is granted;
- The threatened injury outweighs any damage the injunction might cause the lender;

- Issuance of the injunction will not be adverse to the public's interest; and
- There is a substantial likelihood [movant] will prevail on the merits.

A TRO may be granted without written or oral notice if it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage will result to the borrower before the lender can be heard in opposition.

#### What Happens if the TRO is Granted:

As with any TRO, the foreclosure process must stop. However, in NM, the TRO may not exceed 10 days (unless extended) and the matter will be set for a hearing on motion for PI. The court must impose a bond as a condition for TRO or a preliminary injunction but has discretion as to the amount, so the lender should push for a bond to protect it from damage caused by the issuance of the PI.

If have any questions about this topic, please feel free to contact Robert Finlay at [rfinlay@wrightlegal.net](mailto:rfinlay@wrightlegal.net).



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