

Mortgage Foreclosure

I. Overview

A person who wants to purchase real property, such as a home, will often borrow money from a bank for the purchase. In making the loan, the bank needs assurance that the loan will be repaid, even if the borrower can no longer make payments on the loan. In other words, the bank wants to “secure” repayment of the loan. This “security” for repayment of the loan is created by a written agreement between the borrower and the bank called a mortgage. With a mortgage, the borrower (called the *mortgagor*) promises the bank or lender (called the *mortgagee*), that if the borrower does not repay the loan, the lender can sell the real property and use the money from the sale to pay off some or all of the remaining balance due on the loan. The mortgage is sometimes described as a “lien” against the home. This pamphlet discusses foreclosure of mortgages on residential property.

Foreclosure is the process in which the lender sells or repossesses the real property because of the borrower’s failure to comply with one or more of the agreements contained in the mortgage. This failure to comply is called a breach or default of the mortgage. Common defaults of the mortgage are failing to make payments, failing to pay property taxes, or failing to maintain property insurance. The mortgage lists the steps the lender must follow before starting a foreclosure. The mortgage usually states that when the borrower defaults, such as by missing a payment, the lender must notify the borrower in writing and must give the borrower a chance to correct or “cure” the default (i.e., to pay the missed payment). The borrower has a limited amount of time to correct the problem and avoid foreclosure. This time period is usually stated in both the mortgage and the notice, and is generally not longer than thirty (30) days.

If the borrower does not correct the default within the required time, the lender may start foreclosure proceedings. After a default, the terms of the mortgage typically allow a lender to demand that the borrower pay not just the payments that were missed, but the entire amount of the loan. This concept is called **acceleration** and allows lenders to ‘accelerate’ the entire balance after a default remains uncured. In other words, if the borrower misses a \$500 monthly payment on a loan that has a \$60,000 balance, the lender can demand that the entire \$60,000 balance be paid immediately. While the lender has the right of acceleration only if it is written in the mortgage, almost all mortgages include it.

Sometimes defaulting borrowers are able to avoid foreclosure, even after acceleration of the entire loan balance, by paying only the past due amounts, plus late fees and other costs assessed to the account. This is called **reinstatement** of the mortgage and it allows the borrower to bring the mortgage loan current by paying all past due amounts plus fees and costs, even after foreclosure proceedings begin. Unless the mortgage requires the lender to accept reinstatement funds, the lender will have the option whether to agree to accept a reinstatement payment and terminate foreclosure proceedings. This is generally done through the lender’s “loss mitigation department,” which will inform the borrower of the total amount necessary to bring the loan current and avoid foreclosure. The lender will usually require one large payment to bring the loan completely current. Sometime the lender agrees to work out a payment plan with the borrower through a combination of lump sum payments, or ‘extra’ payments, in addition to the regular mortgage payments.

If the borrower is unable to correct the default of the mortgage, the lender will proceed to foreclosure. There are two types of foreclosures in Michigan: (1) Foreclosure by Advertisement, and (2) Foreclosure by Judicial Sale. The lender’s *right to sell* the real property after a default is the key to both types of foreclosure.

The lender gets the right to sell from the express words in the mortgage (in a foreclosure by advertisement), or from an order of a judge (in foreclosure by judicial sale).

II. Foreclosure by Advertisement

The quickest foreclosure process is foreclosure by advertisement. A lender may foreclose by advertisement only if the mortgage contains a **power of sale**. Most mortgages in Michigan contain a power of sale giving the lender the “power to sell at public sale” or the “power of sale by advertisement.” Most foreclosures today are by advertisement because the process takes less time and is less expensive than a judicial foreclosure.

The lender must first publish a notice that the real property will be foreclosed in a newspaper in the county where the premises are located for four successive weeks, at least once each week. The notice will contain the names of the mortgagor(s), the original mortgagee and any foreclosing assignee, the date of the mortgage and the date the mortgage was recorded, the amount due, the legal description of the real property and the length of the **redemption period**, which is explained below. Within 15 days after the first publication, the lender must also post the notice in a visible place on the real property (usually on the front door) being foreclosed.

The sale of the real property will take place at the courthouse of the circuit court in the county where the property is located. The Sheriff will conduct the sale (also called a **sheriff's sale**). Anyone, including the borrower, can attend the sale and make a bid on the property. However, frequently only the lender makes a bid, and only for the outstanding loan balance or some percentage of the fair market value of the property. If a person bids more than the outstanding balance, the excess goes to the court and may end up going back to the borrower (or other persons who have mortgages or liens on the property – e.g., a second mortgage). If the highest bid is less than the outstanding loan balance, the lender may still sue the borrower for the difference (called the **deficiency**). For example, if the loan balance is \$60,000 and the high bid is \$50,000, the borrower still owes the lender \$10,000 even after foreclosure. If the loan balance is \$60,000 and the high bid is \$60,000, then there is no deficiency and the loan will be considered satisfied as a result of the foreclosure.

The highest bidder at the sale receives a deed that is effective only after the **redemption period** expires. During the redemption period, the borrower may buy back (or redeem) the property by paying the high bidder (i.e., the buyer, which is often the lender) the amount paid for the property at the foreclosure sale, plus interest, taxes, and insurance paid by the buyer during the redemption period. In other words, if the borrower gathers enough money and pays back the buyer, the borrower gets the property back. Generally, the redemption period is six months after the sale, unless the remaining balance of the loan is less than 2/3 of the original loan amount. In those cases, the redemption period is one year. The borrower may occupy the property during that time. If the borrower does not occupy the property, the property may be assumed to be abandoned and the redemption period may be shortened to as little as thirty days. If the borrower does not redeem the property within the redemption period, the buyer may evict the prior owner and occupants and take possession of the property. Remember, also, that if there is a “deficiency,” the borrower may still owe the lender the difference between the amount bid on the property, and the amount due on the loan, even after foreclosure.

III. Foreclosure by Judicial Sale

Whereas the lender in a foreclosure by advertisement obtains the right to sell the property at a foreclosure sale from the words in the mortgage document, the lender in a foreclosure by judicial sale must first go to court to obtain the right to sell the property after a default. A foreclosure by judicial sale is a lawsuit in which the lender sells the real estate under the supervision of the court. After receiving notice of the default, the borrower will be served with a complaint for foreclosure. In other words, the lender will sue the borrower for the amount due on the loan. The complaint will name the lender as plaintiff and the borrower as defendant, as well as other necessary parties with an interest in the property. It will also state the reason for the default and the total amount due (including taxes, insurance, or other amounts due), and will ask the court for the right to

sell the property if the borrower does not pay. If the borrower pays the total amount owed, the complaint is dismissed and the foreclosure lawsuit is terminated.

If the court finds that the lender should be paid, the court will enter a judgment for the lender and order a sale of the property on not less than 42 days' notice. By law, the sale may not occur sooner than six months after the lender files the complaint. This allows the borrower additional time to pay the amounts due and avoid the foreclosure sale of the property. The judgment from the court will state exactly how much time the borrower has to pay the amounts due. Again, the borrower usually has at least six months from the date the lender filed the complaint to pay off the entire balance, plus costs and fees, and get the property back.

After the time set by the judgment for payment has expired, the lender must publish a foreclosure sale notice with the time, place, manner of the foreclosure sale, and the redemption period, similar to the notice requirements for foreclosure by advertisement. If the borrower does not redeem (or buy back the property) from the high bidder within the redemption period (generally six months), the borrower will lose the house and have to move out or be evicted.

IV. Time Limits on Foreclosure

Michigan Law limits the time during which a mortgage may be foreclosed. This time limitation is found in a statute of limitations which reads, "[n]o person shall bring or maintain any action or proceeding to foreclose a mortgage on real estate unless he commences the action or proceeding within 15 years after the mortgage becomes due or within 15 years after the last payment was made on the mortgage. This section limits foreclosure by advertisement and any other entries under the mortgage as well as actions of foreclosure in the courts." MCL § 600.5803. In other words, foreclosure must be commenced within 15 years after the loan becomes fully due (including if the total amount due is accelerated after default), or within 15 years from the last payment.

V. Servicemembers Civil Relief Act ("SCRA")

If the borrower is in the military, there are special protections against foreclosure provided under the federal Servicemembers Civil Relief Act. Some of these protections include delaying the foreclosure proceedings for one year after the end of the service member's period of military service.

VI. Five Tips for Avoiding Foreclosure

1. Don't ignore the problem! Receiving a default notice from your lender is a serious matter and can lead to losing your home.
2. Be organized. Open all mail from your lender and keep copies of everything. Make notes of the dates and times when you received the mail. Keep notes and records of any telephone calls made to or received from your lender.
3. Know your rights. There are many resources available to you during this process. Contact a certified housing counselor or an attorney to discuss all of your options and to answer any questions you may have. There are also many resources available on the internet; but care should be used before relying on internet information. Only rely on information from a source you know to be trustworthy.
4. Get help and get serious about the problem *early on*. Often, people postpone contacting the lender or getting legal help until it is too late. Timing is crucial when it comes to foreclosure actions. The sooner you begin addressing the problem, the better chance you have to obtain a good outcome.
5. If your payments are too high and you are headed towards a default of your current mortgage loan, consider options such as refinancing or a loan modification. If refinancing, shop around,

compare interest rates, and meet with lenders to discuss whether they can offer you better rates than your current lender. If you are interested in a loan modification, talk to your lender as soon as possible to determine your eligibility. Be proactive about your financial situation and address financial problems before they turn into foreclosure proceedings. Remember, your house is probably your biggest investment – be proactive, persistent, and patient in the process and enjoy your investment for years to come.

**THIS PAMPHLET SHOULD NOT BE USED IN PLACE OF LEGAL ASSISTANCE.
BEFORE FACING FORECLOSURE, SEEK LEGAL ADVICE.**

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