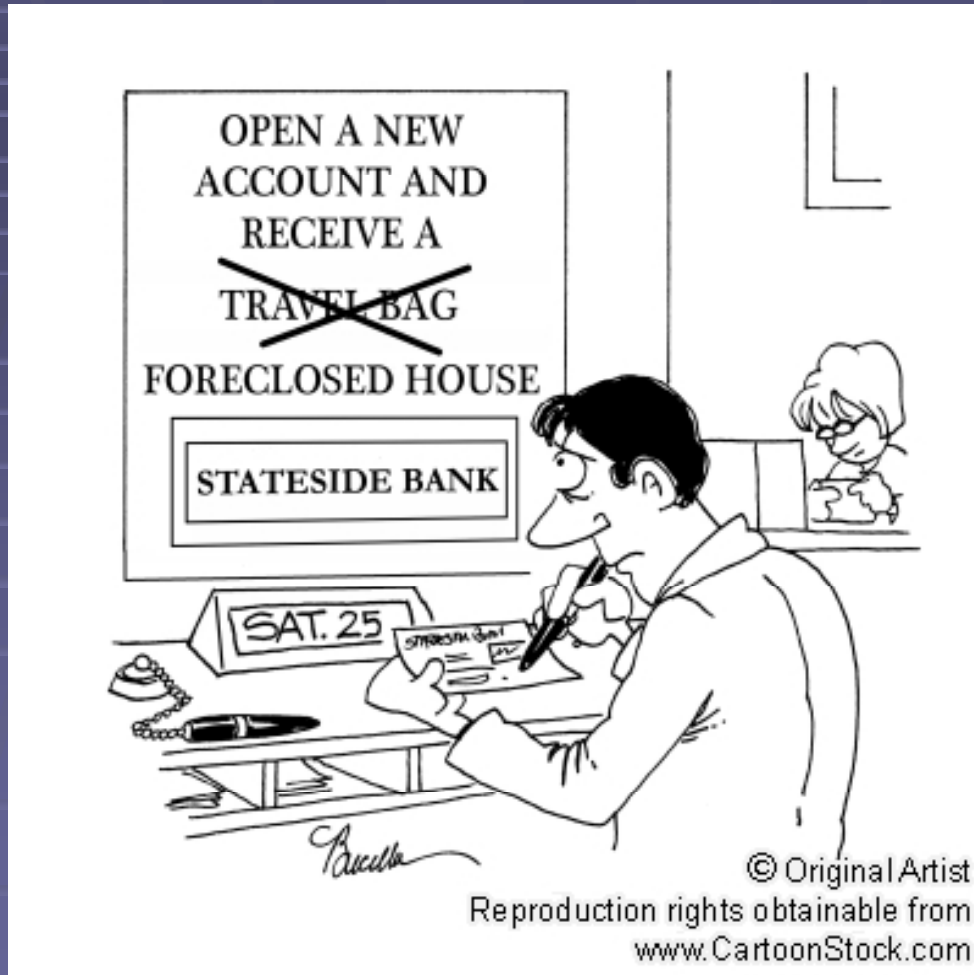


Michigan Foreclosure  
Seminar  
March 5, 2009  
Law School for Legislators

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# Preliminary Questions

- Has Mortgagor breached a covenant?
  - Typically payment. Can be other items, including taxes, insurance, waste, etc.
- Is foreclosure the best solution?
  - Lost money in foreclosures
  - Alternatives

# Preliminary Questions

- Get Title Commitment/Foreclosure Sale Guaranty
- Any sign that property is abandoned?
- Does mortgage contain special notice requirements
  - E.g., certified mail, notice to different address
  - Typically in second home situation

# Foreclosure by Advertisement vs. Judicial Foreclosure

- MCLA §600.3201 *et. seq.*
- “Every mortgage of real estate, which contains a power of sale, upon default being made in any condition of such mortgage, may be foreclosed by advertisement.”
- Faster, less expensive
- One of limited number of states with non-judicial remedy

# Foreclosure by Advertisement

- Must have a power of sale clause. MCLA §600.3201; *Bradway v Miller*, 200 Mich 648 (1918).
- Mortgagor must have breached a covenant of the mortgage. MCLA §600.3204(1)
- No other action pending to recover the debt. MCLA §600.3204(2)

# Foreclosure by Advertisement

- Must be owner of indebtedness, have interest in indebtedness, or be servicing agent at time of first publication.
- Must have record chain of title prior to sale
  - MCLA 600.3204(3)

# The Notice of Foreclosure

- MCLA §600.3212 requires:
  - Name of Mortgagor
  - Name of original mortgagee and/or foreclosing entity
  - Date of Mortgage
  - Date of recording
  - Amount claimed due on date of notice
  - Legal Description (**NOT** address)
    - Must conform substantially to that in the mortgage
  - Length of redemption period

# The Notice of Foreclosure

- Although not required, typically also contains:
  - Interest rate
  - Time and place of sale
- Errors:
  - *Guardian Depositors v Keller*, 286 Mich 403 (1938) (slight/inconsequential mistakes insufficient to void foreclosure sale).

# The Notice of Foreclosure

- Defective notice makes sale voidable, not void.
  - *Fox v Jacobs*, 289 Mich 619 (1939); *Jackson Investment Corp. v Pittsfield Products, Inc.*, 162 Mich App 750 (1987) (illogical to void sale if no harm suffered).
- No bright line test. Substantial compliance.
  - Look at effect on persons interested

# The Notice of Foreclosure

- Defects making sale voidable:
  - Failure to name wife of mortgagor. *Oades v. Standard Sav. & Loan Ass'n*, 257 Mich. 469 (Mich. 1932)
  - Major Misspelling of Mortgagor's name. *Lee v. Clary*, 38 Mich 228 (1878); *Zlotoeczski v. Smith*, 117 Mich 202 (1898).
  - Inaccurate Description of Property. *Vary v. Chatterton*, 50 Mich. 541 (1883).

# The Notice of Foreclosure

- Defects that substantially comply:
  - Minor misspelling of Mortgagee's name. *Reading v Waterman*, 46 Mich 107 (1881).
  - Minor error in description. *Snyder v Hemmingway*, 47 Mich 549 (1882).
  - Date of amended mortgage. *Calvert Associates v Harris*, 469 F.Supp. 922 (E.D.Mich. 1979).

# The Notice of Foreclosure

- Defects that substantially comply:
  - Lack of book and page number of recording. *McCammom v The Detroit, Lansing & Northern Railroad Co.*, 103 Mich 104 (1894).
  - At which door of courthouse sale is held. *Bass v Federal Land Bank of St. Paul, Minnesota*, 300 Mich 418 (1942).
  - Amount claimed due, if in good faith. *Flax v Mutual Building & Loan Ass'n of Bay County*, 198 Mich 676 (1917).

# The Notice of Foreclosure

- Defects that substantially comply:
  - Gender of Mortgagor. *Worthy v World Wide Financial Services, et al*, E.D. S.D. MI. Civil No. 04-72969 (unpublished).



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# Publication and Posting

- MCLA §600.3208

- Notice shall be given by publishing for 4 successive weeks at least once in each week.
  - Newspaper published in county where property situated; if none, adjacent county.
  - Publication must be for at least 28 days (i.e., 4 FULL weeks). *Jackson Investment Corporation v. Pittsfield Products, Inc.*, 162 Mich App 750 (1987); *Casey v Goetzen*, 240 Mich 41 (1927),
- Copy of notice posted in conspicuous place within 15 days of first publication.
  - Another opportunity to see if abandoned.

# Publication and Posting



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# Publication and Posting

- Actual notice not required; only posting and publication. *Jennings v. Arnold*, 272 Mich 599 (1935).
  - No requirement that junior lienholders get notice.
  - MCLA §559.208 requires notice be given to condo association within 10 days after first publication.
- Lack of understanding of the notice is not a defense. *Schulthies v Barron*, 16 Mich App 246 (1969).
- If affidavit of posting executed, mortgagor has burden of proving property not posted. MCLA §600.3264; *Walsh v Colby*, 153 Mich 602 (1908).

# The Sale



- MCLA §600.3216

- Between 9:00 a.m. and 4:00 p.m.
- Circuit Court
- Must be conducted so that person of ordinary intelligence understands what property is being sold.  
*Hogan v Hester Investment Co.*, 257 Mich 627 (1932).

- Surplus Funds

- Paid to subsequent mortgagee if claim filed. MCLA §600.3252.
- Procedure is county-specific.

# Adjournments

- MCLA §600.3220.
  - May be adjourned on weekly basis by posting.
  - More than weekly at one time requires publishing.
  - Often misunderstood.

# Redemption

- MCLA §600.3240
  - Essentially, 6 months unless greater than 3 acres.
  - If so, than 1 year.
  - Rationale for extended redemption period.



# Redemption Period = 1 Year Huh?



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# Bad crop?



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# Redemption

- Recent change to statute. MCLA 600.3240(2).
  - ROD will not calculate amount
  - Purchaser must include affidavit with deed
    - Precise amount needed to redeem.
      - Plus taxes, condo/homeowner association taxes, amount to redeem senior liens, insurance premiums.
    - Date redemption expires
    - May include designee to aid in redemption
    - Stuck with calculation
    - May charge fee

# Judicial Foreclosures

- Jurisdiction in Circuit Court. MCLA §600.3101.
- Venue where property is located. MCLA §600.1605.
- Must include anyone with interest in the property.
  - Must obtain service on all parties.

# Judicial Foreclosures

- Sale may not take place within 6 months of the filing of the Complaint. MCLA §600.3115.
- Publish for 6 weeks prior to sale. MCLA §600.6052(2).
- Post in 3 public places in township or city. MCLA §600.6052(1).

# Judicial Foreclosures

- Court may fix upset price. MCLA §600.3165.
- May not shorten redemption period if abandoned.

# Mortgagor in the Military

- Servicemembers' Civil Relief Act
  - Intended to protect mortgagors who enter active military service after entering into mortgage.
  - Absent obtaining a court order or agreement, may not foreclose during active service or within 90 days.
    - Extended to 9 months (until 12/31/10).
    - Recent Michigan statute changed to 6 months for Michigan, only. PA 138 (May, 2008).
    - Applies to situations where service member entered into mortgage before active duty or where service member is on overseas duty.
  - Also affects interest rate that may be charged.
  - Can check at:  
<https://www.dmdc.osd.mil/scra/owa/home>

# Mortgagor in the Military

- Order allowing sale possible.
- BUT....think twice about the negative publicity.
  - Do you want to be in the



# Home Retention Programs

- Home retention is a win-win for the customer, the insurer and the investor
- Servicers/investors have a stake in maintaining home ownership
- In the event that home retention is not feasible, helping the customer find a way to exit with dignity is the priority
- Unique issues in Michigan

# Home Retention Programs

- What does the Servicer need in order to consider Home Retention/Loss Mitigation options?
- Need to know reason for default
  - Short term vs. long term



**Job Loss**

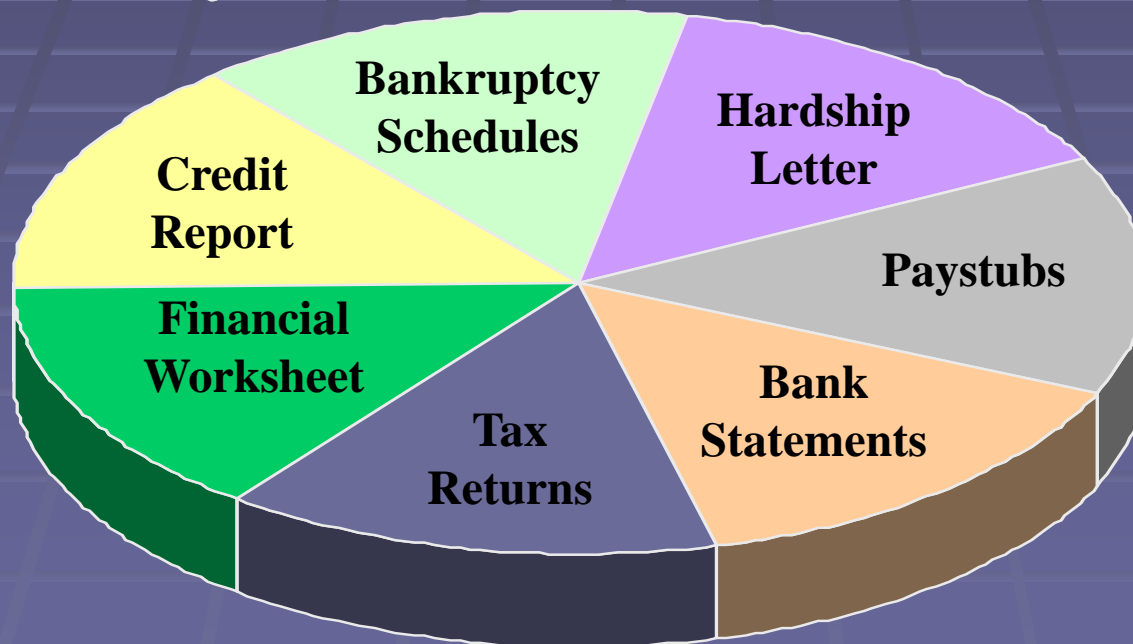
**Divorce**

**Sickness**

**Death**

# Documentation Possibilities

- Servicer may also need documentation to verify hardship and determine options most likely to succeed



# Home Retention Programs

- Typically, needs would include:
  - Current financial information
    - 1 month paystubs
    - 1 month bank statements
    - Most recent full tax return
    - Detailed net income/expenses monthly
- May also require an interior appraisal or Broker Price Opinion

# Traditional Home Retention Options

- Forbearance/Repayment Agreement
  - Monthly payments are made along with additional delinquent payments
  - Traditionally a six month cure with ½ down
  - Many investors currently allowing longer cures with less down
  - May allow temporary waiver or reduction in payments and lump sum cure

# Traditional Home Retention Options

- Loan Modification
  - Allows borrowers to stay in their home
  - Brings account current instantly
  - Interest is calculated on new capitalized amount
  - May change mortgage/note terms such as interest rate, maturity date, and converting adjustable to a fixed rate

# Traditional Home Retention Options

- Pre-Foreclosure Short-Sale
  - Sale to third party for less than total debt.
  - Borrower is able to walk away with minimized credit damage
  - Investor avoids costly foreclosure, preservation, escrow, repair and marketing expenses
  - Could be tax consequences
  - Junior liens can be a problem

# Traditional Home Retention Options

- Deed-in-Lieu
  - Homeowner and mortgage company agree for the property to be deeded to the mortgage company
  - Investors avoids costly foreclosure expenses
  - May be tax consequences
  - Credit report may be less affected than a foreclosure
  - Junior liens may be a problem
  - May include cash for keys

# Traditional Home Retention Options

- ARM reset forbearance
  - Allows temporary relief from ARM adjustment, generally for a period of two years.
- Short payoff (refinance)
  - May waive prepay penalties, fees, costs or other balances
  - Junior liens and tax consequences must again be considered

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