

# Mortgage Foreclosures

*David A. Trott*  
*Jeffrey D. Weisserman*  
*Trott & Trott, P.C.*

## **FORECLOSURE BY ADVERTISEMENT v. JUDICIAL FORECLOSURE**

If foreclosure is the best solution, the attorney will need to decide which type of foreclosure, judicial or by advertisement, should be utilized. The mortgage must contain a power of sale clause in order to foreclose by advertisement. Each procedure has different advantages. Foreclosure by advertisement is usually less expensive and time consuming than a judicial foreclosure and it may also help avoid problems since the onus is on the mortgagor to start a lawsuit if he or she disputes the foreclosure. A judicial foreclosure may be preferred if the attorney knows at the outset that there are title problems or that a receiver may be required. A judicial foreclosure may be helpful if the mortgagee intends on pursuing a deficiency judgment because the value of the security is less than the mortgage debt.

## **FORECLOSURE BY ADVERTISEMENT**

### A. Initial Considerations

- The mortgage must contain a clause granting the mortgagee the power to sell the property because of a default. MCLA 600.3201; MSA 27A.3201. Bradway v. Miller, 200 Mich. 648, 167 NW 15 (1918).
- The mortgagor must have breached a covenant of the mortgage. MCLA 600.3204 (1); MSA 27A.3204 (1).
- No other action may be pending to recover the debt secured by the mortgage. If a suit has been commenced to collect the debt, the mortgagee will have to establish that execution on the judgment has been returned unsatisfied. MCLA 600.3204 (2); MSA 27A.3204 (2).
- The mortgage, assignments and all modifications must be in recordable form and recorded as of the time of sale. MCLA 600.3204 (3); MSA 27A.3204 (3).
- Does the mortgage contain any special notice requirements? Does the mortgagee have to mail a breach letter 30 days before the commencement of foreclosure?

B. The Notice of Foreclosure

- Section 3212 requires the notice of foreclosure contain the following information: (1) the names of the mortgagor and the mortgagee, and the assignee of the mortgagee, if any; (2) the date of the mortgage, and when recorded; (3) the amount claimed to be due thereon as of the date of the notice; (4) a description of the mortgage premises, conforming substantially with that contained in the mortgage; and (5) the length of the redemption period.
- Pursuant to MCLA 600.3204(1)(d), a party may foreclose if it is the owner of the indebtedness, of an interest in the indebtedness, or if it is the servicing agent. MCLA 600.3204(3) requires an assignment to be on record prior to the sale.
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C. Publication and Posting

- The notice should be published once a week for four (4) successive weeks in a newspaper which is published in the county where the premises being foreclosed are situated. MCLA.600.3208; MSA 27A.3208.
- A true copy of the notice of foreclosure must be posted in a conspicuous place upon any part of the premises within fifteen (15) days of the first publication. MCLA 600.3208; MSA 27A.3208. The individual doing the posting should advise the attorney if the property is vacant and should maintain copious notes in the event the mortgagor challenges the posting.

D. Sheriff's Sale

- Preparing for the Sale. The attorney should contact the client before the sale to determine: (a) the bid amount at sale; (b) the occupancy status of the property; (c) if the property has been damaged by fire; and (d) if there is any reason to adjourn the sale. If the property has become vacant since the first publication, it may be possible to utilize MCLA 600.3241(1), MSA 27A.3241(1), to shorten the redemption period. If the property has been damaged by fire, the sale should be adjourned until the property is repaired or the fire loss settled. If the sale is held, the mortgagee may lose its right to the loss proceeds. *See Smith v. General Mortgage Corporation*, 402 Mich. 125, 261 NW2d 710 (1978).
- The Sale.
  - The sale must be public and held between 9:00 and 4:00 o'clock at the place of holding circuit court for the county in which the premises is located. MCLA 600.3216, MSA 27A.3216. *See Heinmiller v. Hatheway*, 60 Mich. 391, 27 NW 558 (1886). The sale must be conducted so that a prospective purchaser of ordinary intelligence understands which property is being offered. *Hogan v. Hester Investment Co.*, 257 Mich. 627, 241 NW 881 (1932).

- Surplus proceeds from the sale are to be paid to a subsequent mortgagee or lien holder in the event a claim is filed as required by MCLA 600.3252, MSA 27A.3252, otherwise the surplus belongs to the mortgagor.
- The redemption period will run from the date of sale if it is recorded within twenty (20) days of the date of sale. If it is recorded more than twenty (20) days after sale, the redemption period will run from the date the deed is recorded. MCLA 600.3232.
- Adjourning the Sale. The sale may be adjourned on a weekly basis by posting a notice of adjournment, or for a longer period of time by publishing a notice. MCLA 600.3220, MSA 27A.3220
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#### E. Redemption

- The statute governing the length of the redemption period is confusing and unnecessarily complicated. MCLA 600.3240, MSA 27A.3240. The redemption can be as short as 30 days or as long as 12 months. Each foreclosure will fall into one of the following categories:
  - Mortgage dated after January 1, 1965, on commercial, industrial, or multifamily residential property in excess of four (4) units.
    - Not abandoned: six (6) months;
    - Abandoned pursuant to 3241: not possible;
    - Abandoned pursuant to 3241(1): not possible;
  - Mortgage dated after January 1, 1965, on residential property with less than four (4) units, which is less than three (3) acres, and with a mortgage debt as of the date of first publication which is less than 2/3 of original indebtedness.
    - Not abandoned: one (1) year;
    - Abandoned pursuant to 3241: three (3) months;
    - Abandoned pursuant to 3241(1): 30 days.
  - Mortgage dated after January 1, 1965, on residential property with less than four (4) units, which is less than three (3) acres, and with a mortgage debt as of the date of first publication which is more than 2/3 of original indebtedness.
    - Not abandoned: six (6) months;

- Abandoned pursuant to 3241: one (1) month;
- Abandoned pursuant to 3241(1): 30 days.
- Mortgage involving residential property with less than four (4) units and which is more than three (3) acres.
  - Not abandoned: one (1) year;
  - Abandoned pursuant to 3241: 30 days, or 15 days from notice of shortening, whichever is longer.

### **JUDICIAL FORECLOSURE**

- Jurisdiction in Circuit Court. MCLA §600.3101.
- Venue appropriate where property is located. MCLA §600.1605
  - Must name and serve anyone with interest in the property.
  - Big delay
- 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).
- Court may fix upset price. Almost always aimed at Commercial properties. MCLA §600.3165.
- May not shorten redemption period if abandoned.